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Michie Company, Charlottesville, Va

A Treatise

ON THE LAW OF

BANKS AND BANKING

By the Editorial Staff of The Michie Company

UNDER THE SUPERVISION OF

THOMAS JOHNSON MICHIE

Volume I

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EXPLANATORY NOTE

This book is arranged on the KEY-NUMBER SYSTEM. This means that topics and section numbers of this book are identical with those in DECENNIAL DIGEST, and in AMERICAN DIGEST, KEY-NUMBER SERIES, title, "Banks and Banking." Moreover, the indexes in the advance sheets and bound volumes of the NATIONAL REPORTER SYSTEM are arranged on the same system, and are current supplements to this work.

Whenever you find a case in point in this work and wish to find other authorities on the same point, turn to the same topic and section number in these other digests and indexes.

ILLUSTRATION: A legal proposition found in this work under

§ 5. "Charter Provisions," will also be found under
Banks and Banking, § 5, in the Decennial Digest;
Banks and Banking, § 5, in the American Digest, Key-Number Series, and
Banks and Banking, § 5, in all other Key-Number Digests and Indexes.

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D. Collections.

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BANKS AND BANKING

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I. CONTROL AND REGULATION IN GENERAL.[1]

§ 1. Right of Banking in General.[2]—As Franchise.—At common law the business of banking was not a franchise, but a common-law right of any individual.[3] But it can be made a franchise by restraining legislation, although the contrary has been held by the supreme courts of South Dakota and Nevada.[4] It seems to be universally conceded that absolute

1. Of loan, trust and investment companies, see post, "Control and Regulation in General," § 310.

Of national banks, see post, "Power to Control and Regulate," § 233.

As of assessment on stock to make good the impairment of capital, see post, "Rights and Liabilities as to Bank," § 43.

2. Rights of foreign banks, see post, "Foreign Banks," § 18.

Stockholder's liability depending on determination of question, see post, "Constitutional and Statutory Provisions," § 44.

Banking, franchises and powers and their exercise in general, see post, §§ 86-101.

3. A common-law right not a franchise.—Attorney General *v.* Utica Ins. Co. (N. Y.), 2 Johns. Ch. 371; S. C., (N. Y.), 15 Johns. 353, 8 Am. Dec. 243; Nance *v.* Hemphill, 1 Ala. 551; State *v.* Granville Alexandrian Soc., 11 O. 1; Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 30 Tenn. (11 Humph.) 1, 53 Am. Dec. 742; Hazen *v.* Union Bank, 33 Tenn. (1 Sneed) 115; State *v.* Lookout Bank, 89 Tenn. (5 Pickle) 278, 14 S. W. 801; Curtis *v.* Leavitt, 15 N. Y. 9; State *v.* Scougal, 3 S. D. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477; Bank *v.* San Francisco, 142 Cal. 276, 75 Pac. 832, 100 Am. St. Rep. 130, 64 L. R. A. 918.

Banking is a lawful business, in which it is the inherent right of every citizen to engage. Ex parte Pittman, 31 Nev. 43, 99 Pac. 700; Marymont *v.* Nevada State, etc., Board, 33 Nev. 333, 111 Pac. 295.

The business of banking "by discounting and negotiating promissory notes, bills of exchange, drafts, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin, and bullion, and by loaning money on personal security," was not a franchise at common law, and has not been made such by the state of national constitutions; the only banking privilege that is made a franchise being the privilege of issuing bank notes intended to circulate as money. State *v.* Scougal, 3 S. Dak. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477.

No special authority necessary for private banking.—But the business of banking, in its most enlarged signification, never required any special authority, except as to the issuing of notes and bills to circulate as money, and as to the right of corporations to do a banking business, and hence all natural persons may engage therein. Exchange Bank *v.* Hines, 3 O. St. 1. See, also, Dearborn *v.* Northwestern Sav. Bank, 42 O. St. 617, 51 Am. Rep. 851; Pickaway County Bank *v.* Prather, 12 O. St. 497; Bonsal *v.* State, 11 O. 72; State *v.* Washington Social Library Co., 11 O. 96; State *v.* Urbana, etc., Ins. Co., 14 O. 6.

4. Subsequently made a franchise by restraining legislation.—Attorney General *v.* Utica Ins. Co. (N. Y.), 2 Johns. Ch. 371; S. C., (N. Y.), 15 Johns. 353, 8 Am. Dec. 243.

Although this was an expression of

prohibition, not merely prohibition except on compliance with certain conditions prescribed as regulations of banking, is not within the constitutional

opinion unnecessary to the decision of Attorney General *v.* Utica Ins. Co. (N. Y.), 2 Johns. Ch. 371, the right of a legislature to make banking a franchise and to confine its exercise to those who can produce a grant, seems to have been assumed in many cases. See Bristol *v.* Barker (N. Y.), 14 Johns. 205; People *v.* Brewster (N. Y.), 4 Wend. 498; People *v.* Bartow (N. Y.), 4 Cow. 290; Pennington *v.* Townsend (N. Y.), 7 Wend. 276; Hallett *v.* Harrower (N. Y.), 33 Barb. 537; Austin *v.* State, 10 Mo. 591; Nance *v.* Hemphill, 1 Ala. 551; State *v.* Williams, 8 Tex. 255; Goodsill *v.* Woodmanse, 1 N. Dak. 246, 46 N. W. 970, 11 L. R. A. 420, direct authority therefor. Indeed the right never seems to have been questioned until the decision of State *v.* Scougal, 3 S. Dak. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477. Here it was held that it is not a constitutional exercise of legislative power to deprive individual citizens of the right to carry on the business of banking, other than the issue of "bills or paper credit designed to circulate as money," which is made a franchise by Const., art. 18, § 3, and confer the exclusive privilege of carrying on such business upon corporations organized as provided by an act of the legislature, on the ground that such business is, or may be made, a franchise by legislative authority. This case was approved and followed in Ex parte Pittman, 31 Nev. 43, 99 Pac. 700, and Marymont *v.* Nevada State, etc., Board, 33 Nev. 333, 111 Pac. 295, and in the latter case it was held, that a similar Nevada act was in conflict with Const., art. 1, § 1, asserting rights to liberty, property, and happiness: with article 1, § 8, guaranteeing due process of law; and with article 1, § 20, under which rights not enumerated are saved to the people.

In Goodsill *v.* Woodmanse, 1 N. Dak. 246, 46 N. W. 970, 11 L. R. A. 420, it is said: "As a matter of precedent and authority, the legislative prerogative, in the exercise of its police power in promoting the public safety, not only to regulate and restrict the business of banking, but also to grant the right to one class, and to prohibit it to others, or even to forbid it altogether, has never been questioned in the courts, and the legislatures of other states have frequently exercised the right of supreme control over the business."

The general expression as to the untrammeled right of a citizen to pursue any lawful business or vocation, found in the Slaughter-House Cases, 83 U. S. 36, 109, 21 L. Ed. 394, and Butchers' Union Slaughter-House, etc., Co. *v.* Crescent City, etc., Co., 111 U. S. 746, 28 L. Ed. 585, 4 S. Ct. 652, must be construed not to apply to banks, because of the danger of injury to the public from free banking. See, also, Lawton *v.* Steele, 152 U. S. 133, 38 L. Ed. 385, 14 S. Ct. 501; Allgeyer *v.* Louisiana, 165 U. S. 578, 41 L. Ed. 832, 17 S. Ct. 427; Chicago *v.* Netcher, 183 Ill. 104, 55 N. E. 707, 75 Am. St. Rep. 93, 48 L. R. A. 261; People *v.* Steele, 231 Ill. 340, 83 N. E. 236, 14 L. R. A., N. S., 361; 121 Am. St. Rep. 321; In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People *v.* Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; Cooley on Torts, page 277.

The first restraining law in Ohio, affecting the power of individuals and associations to engage in the business of banking, was the Act of February 8, 1815, prohibiting the issue of unauthorized bank paper. Bonsal *v.* State, 11 O. 72; State *v.* Granville Alexandrian Soc., 11 O. 1. See post, "In General," § 201.

Ohio constitution, 1851, art. 13, § 7, providing that no act of the general assembly, "authorizing associations with banking powers, shall take effect until it shall have been submitted to the people" for approval, did not deprive unincorporated associations of joint partners of the right to exercise banking functions, including the issuing of notes and bills to circulate as money; the right to exercise the latter function, however, being conditional as indicated in such section. Exchange Bank *v.* Hines, 3 O. St. 1.

Tennessee.—The business of banking was a common-law right, which any person, at his discretion, might lawfully exercise, until it was restrained by the Act of 1827, upon considerations of public policy and convenience. Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 30 Tenn. (11 Humph.) 1, 53 Am. Dec. 742; Hazen *v.* Union Bank, 33 Tenn. (1 Sneed) 115; State *v.* Lookout Bank, 89 Tenn. (5 Pickle) 278, 14 S. W. 801.

powers of a state legislature,[5] and it is also conceded that regulation is not only the right but the duty of the legislative power.[6] And it is for the legislature to determine, primarily, what regulations are proper and needful.[7] The important question, and the one on which the courts differ, is as to whether regulation carried into prohibition of private banking comes within the police power. If it does not, then it would seem that the legislature could not make a franchise of a right which belongs to citizens of the country generally by common right. But the police power is broad enough to cover such legislation, and in view of the modern tendency to broaden that power, the case of State *v.* Scougal must be regarded as sporadic and not likely to be followed by many courts. And the decision by the supreme court of the United States of the bank guaranty fund cases, and what was there said on this point, confirms this conclusion. In this case, and the companion cases cited in the note, state legislation forbidding private banking and making incorporation a necessary prerequisite to engaging in the banking business, is upheld as constitutional under the police power.[8] Requir-

5. Prohibition and regulation compared.—As said in a Wisconsin case: "There are some fundamental propositions so well settled that it is only necessary to state them. Among these are the following: First, banking is a common-law right pertaining equally to every member of the community; second, being a common-law right, it can not be prohibited under a constitution like ours, which recognizes the right, and grants power to the legislature to regulate and supervise it; third, under such a constitution as ours, banking may be regulated so far as may be reasonably necessary to secure the public welfare and safety, but it must be true regulation, not prohibition under the guise of regulation. 1 Morse, Banks and Banking, § 13." Weed *v.* Bergh, 141 Wis. 569, 124 N. W. 664, 25 L. R. A., N. S., 1217. See Marymont *v.* Nevada State, etc., Board, 33 Nev. 333, 111 Pac. 295; State *v.* Scougal, 3 S. Dak. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477.

6. Regulation a right and a duty.—"While the business of banking may not be prohibited, it may be regulated, and it is of the highest importance to the public welfare that it be regulated by wise legislation." Ex parte Pittman, 31 Nev. 43, 99 Pac. 700. See State *v.* Richcreek, 167 Ind. 217, 77 N. E. 1085, 5 L. R. A., N. S., 874, 119 Am. St. Rep. 491, citing Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274; State Stebbins (Ala.), 1 Stew. 299; Nance *v.* Hemphill, 1 Ala. 551; Blaker *v.* Hood, 53 Kan. 499, 36 Pac. 1115, 24 L. R. A. 854; Curtis *v.* Leavitt, 15 N. Y. 9; People *v.* Bartow (N. Y.), 4 Cow. 290; Attorney General *v.* Utica Ins. Co. (N. Y.), 15 Johns. 353, 8 Am. Dec. 243; S. C., (N. Y.), 2 Johns. Ch. 371; Goodsill *v.* Woodmanse, 1 N. Dak. 246, 46 N. W. 970, 11 L. R. A. 420; State *v.* Williams, 8 Tex. 255; 1 Morse, Banks and Banking, 4th Ed., § 13; Zane, Banks & Banking, §§ 9, 10. See, also, Marymont *v.* Nevada State, etc., Board, 33 Nev. 333, 111 Pac. 295; State *v.* Scougal, 3 S. Dak. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477.

7. "The question as to what regulations are proper and needful is primarily for legislative decision; yet, when the police power is used to regulate a business or occupation which in itself is lawful and useful to the community, the courts, if called upon, must determine finally whether such regulations as may have been prescribed are so far just and reasonable as to be in harmony with constitutional guaranties. Republic Iron, etc., Co. *v.* State, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136." State *v.* Richcreek, 167 Ind. 217, 77 N. E. 1085, 5 L. R. A., N. S., 874, 119 Am. St. Rep. 491. See, also, Marymont *v.* Nevada State, etc., Board, 33 Nev. 333, 111 Pac. 295; Noble State Bank *v.* Haskell, 22 Okl. 48, 97 Pac. 590; Goodsill *v.* Woodmanse, 1 N. Dak. 246, 46 N. W. 970, 11 L. R. A. 420.

8. Regulation carried into prohibition.—Noble State Bank *v.* Haskell, 219 U. S. 104, 55 L. Ed. 112, 31 S. Ct. 186. In this case it is said: "The question that we have decided is not

ing incorporation as a condition to doing a banking business is regulation, and not prohibition, and therefore does not unconstitutionally interfere with the right to transact such business.[9]

much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty. We can not say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above-described cooperation are necessary safeguards, this court certainly can not say that it is wrong. Goodsill *v.* Woodmanse, 1 N. Dak. 246, 46 N. W. 970, 11 L. R. A. 420; Brady *v.* Mattern, 125 Iowa 158, 100 N. W. 358, 106 Am. St. Rep. 291; Weed *v.* Bergh, 141 Wis. 569, 124 N. W. 664, 25 L. R. A., N. S., 1217; Commonwealth *v.* Vrooman, 164 Pa. 306, 30 Atl. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250; Myers *v.* Irwin (Pa.), 2 Serg. & R. 368; Myers *v.* Manhattan Bank, 20 O. 283; Attorney General *v.* Utica Ins. Co. (N. Y.), 2 Johns. Ch. 371." Noble State Bank *v.* Haskell, 219 U. S. 104, 55 L. Ed. 112, 31 S. Ct. 186.

See Shallenberger *v.* First Nat. Bank, 219 U. S. 114, 55 L. Ed. 117, 31 S. Ct. 189, following, and on the authority of, Noble State Bank *v.* Haskell, 219 U. S. 104, 55 L. Ed. 112, 31 S. Ct. 186, sustaining the Bank Depositors' Guaranty Fund Acts of Oklahoma, which held that a similar act of Nebraska, providing for a guaranty fund and prohibiting banking except by corporations formed under the act, is not unconstitutional. First State Bank *v.* Shallenberger, 172 Fed. 999.

9. Weed *v.* Bergh, 141 Wis. 569, 124 N. W. 664, 25 L. R. A., N. S., 1217; Shallenberger *v.* First Nat. Bank, 219 U. S. 114, 55 L. Ed. 117, 31 S. Ct. 189; Noble State Bank *v.* Haskell, 219 U. S. 104, 55 L. Ed. 112, 31 S. Ct. 186; Goodsill *v.* Woodmanse, 1 N. Dak. 246, 46 N. W. 970, 11 L. R. A. 420. See contra, Ex parte Pittman, 31 Nev. 43, 99 Pac. 700; Marymont *v.* Nevada State, etc., Board, 33 Nev. 333, 111 Pac. 295; State *v.* Scougal, 3 S. Dak. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477.

As said in Weed *v.* Bergh, 141 Wis. 569, 124 N. W. 664, 25 L. R. A., N. S., 1217: "If, as matter of fact, the requirement of incorporation is a form of regulation reasonably calculated to meet and remedy these difficulties, though not in the wisest way, it must be sustained as an exercise of the police power. We have been referred to but one case which holds the contrary doctrine, viz, State *v.* Scougal, 3 S. Dak. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477; which indeed holds that an act requiring incorporation as a condition of doing banking is unconstitutional. The discussion of the question there is long and learned, but not convincing to us. It is to be noted, further, that the constitution of South Dakota contains an unusual provision which figures largely in the result. This provision is to the effect that no law shall grant to any citizen, class of citizens, or corporations, privileges or immunities which on the same terms shall not equally belong to all citizens or corporations. The weight of decision as well as text-book authority is the other way, however. 1 Morse, Banks & Banking, § 13; 5 Cyc. Law & Proc., p. 433; Boone, Banks & Banking, § 10; Goodsill *v.* Woodmanse, 1 N. Dak. 246, 46 N. W. 970, 11 L. R. A. 420; Myers *v.* Manhattan Bank, 20 O. 283."

Such a statute was upheld by the supreme court of North Dakota, not contravening either § 1 of art. 1 of the state constitution or § 1 of the fourteenth amendment to the federal constitution, in Goodsill *v.* Woodmanse, 1 N. Dak. 246, 46 N. W. 970, 11 L. R. A. 420.

The Pennsylvania statute of 1810, prohibiting all existing unincorporated banking companies from doing banking business, was constitutional and valid. White *v.* Commonwealth (Pa.), 4 Bin. 418; Myers *v.* Irwin (Pa.), 2 Serg. & R. 368.

Statute discriminating against in-

The prohibition of private banking necessarily results from the inauguration of a banking system for the state in which the business is made an exclusive corporate franchise.[10]

Banking Through Agency of Corporation a Franchise.—But the right to carry on the business of banking through a corporation is a franchise.[11]

Authority of Corporations for Particular Purposes.—It has been held that insurance companies have no authority to engage in banking,[12] nor have incorporated religious societies.[13]

Authority of Corporation Organized under General Laws.—No corporation organized under the general incorporation act is permitted to engage in the banking business.[14]

§ 2. What Are Banks.[15]—Bank or Banker and Banking Defined. —A bank is a quasi public institution,[16] for the custody and loan of money,

dividual bankers held unconstitutional. —"In Alabama a statute which made it a misdemeanor for an individual banker to discount negotiable paper at a higher rate of interest than 8 per cent was declared to be unconstitutional because this restriction could not be placed upon the individual banker when it did not apply to incorporated banks. Carter *v.* Coleman, 84 Ala. 256, 4 So. 151; Youngblood *v.* Birmingham Trust, etc., Co., 95 Ala. 521, 12 So. 579, 36 Am. St. Rep. 245, 20 L. R. A. 58, 10 Am. & Eng. Ann. Cas. 904, note." Marymont *v.* Nevada State, etc., Board, 33 Nev. 333, 111 Pac. 295.

10. Prohibition of private banking. —Goodsill *v.* Woodmanse, 1 N. Dak. 246, 46 N. W. 970, 11 L. R. A. 420. See post, "Unauthorized Banking," § 7, et seq. As to regulation generally, see post, "Power to Control and Regulate," § 3.

11. Banking through agency of corporation.—While the right to do a banking business is not a franchise, and belongs to all citizens generally, yet the right to carry on such business through the agency of a corporation is a franchise, dependent on a grant of corporate powers by the state. Bank *v.* San Francisco, 142 Cal. 276, 75 Pac. 832, 100 Am. St. Rep. 130, 64 L. R. A. 918.

12. Insurance companies.—A corporation created for insuring property has no authority to engage in banking. Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129.

13. Incorporated religious societies.—A religious society incorporated under the Act of March 5, 1836, is not empowered to engage in the business of banking, and to receive on deposit, keep, and circulate the money or bank paper of others. Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371.

14. Corporation organized under general laws.—Workingmen's Accommodation Bank *v.* Converse, 29 La. Ann. 369.

15. See post, "Foreign Banks," § 18, as to foreign banks.

What is a bank, within statute requiring a license, see post, "Authority or License to Do Business," § 6.

Construction of charter provisions as conferring banking powers, or no, see "Construction of Charters and Banking Laws," § 87.

Savings banks.—See post, "Savings Banks," §§ 289-309.

National banks.—See post, "National Banks," §§ 252-288.

Bank money and banknotes.—See post, "Circulating Notes," § 196.

Bank stock.—See post, "Amount of Capital and Shares," § 36.

Capital stock.—See post, "Amount of Capital and Shares," § 36.

16. Bank or banker defined.—Knickerbocker Life Ins. Co. *v.* Pendleton, 115 U. S. 339, 29 L. Ed. 432, 6 S. Ct. 74; Guthrie *v.* Harkness, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4; Patterson *v.* Marine Nat. Bank, 130 Pa. 419, 18 Atl. 632, 17 Am. St. Rep. 778; American Nat. Bank *v.* Morey, 113 Ky. 857, 69 S. W. 759.

Although the mere business of banking is a private business. Osborn *v.* Bank, 9 Wheat. 738, 6 L. Ed. 204.

And a bank, when the stock is owned by individuals, is a private cor-

the exchange and transmission of the same by means of bills and drafts, and the issuance of its own promissory notes, payable to bearer, as currency, or for the exercise of one or more of these functions,[17] not always necessarily chartered,[18] but sometimes so,[19] created to subserve public ends,[20] or a financial institution regulated by law.[21]

And state banks are public corporations and state institutions for certain purposes,[22] but the bank and the state are different entities,[23] and in assuming to carry on the business and to exercise the functions

poration. State Bank *v.* Knoop (U. S.), 16 How. 369, 14 L. Ed. 977.

A bank is an institution organized for private business, and with a view to individual profit, although it may serve a public purpose and such public purpose justify its creation. Talbott *v.* Silver Bow, 139 U. S. 438, 35 L. Ed. 210, 11 S. Ct. 594.

"Mr. Justice Story, in his learned and able remarks in Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. Ed. 629, says: 'A bank created by the government for its own uses, where the stock is exclusively owned by the government is, in the strictest sense, a public corporation.' 'But a bank whose stock is owned by private persons is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature.'" State Bank *v.* Knoop (U. S.), 16 How. 369, 14 L. Ed. 977.

Free banks under Tennessee Act of 1851-52.—Neiffer *v.* Bank, 38 Tenn. (1 Head) 162.

17. Kiggins *v.* Munday, 19 Wash. 233, 52 Pac. 855.

18. Not necessarily chartered.—The term "bank" does not necessarily refer to a chartered banking institution, though it includes all such; and is used in the Indiana constitution simply in reference to that class of banks. Davis *v.* McAlpine, 10 Ind. 137; Norton *v.* Jewett, 12 Ind. 426.

19. Sometimes so.—*Massachusetts.*—The word "bank" has long had a well-defined signification in this commonwealth, and has been applied to institutions incorporated for banking purposes, but not to offices kept by individuals or copartnerships for the purpose of doing such banking business as such persons have been authorized to do. Way *v.* Butterworth, 106 Mass. 75; S. C., 108 Mass. 509, 513.

Georgia.—A concern, not chartered, advertising as bankers, lending money, discounting notes, bills, etc., but not receiving deposits, there being no other evidence of the concern performing any other functions of a bank than that indicated above, is not a bank within the meaning of Civil Code, § 3688, doing away with the necessity for protest in certain cases in order to bind indorsers. Davis *v.* West & Co., 127 Ga. 470, 56 S. E. 403.

As meaning incorporated institutions with banking powers under Ohio constitution.—Exchange Bank *v.* Hines, 3 O. St. 1.

20. Purpose of creation.—A bank is created upon public considerations, to subserve public ends, and not for private purposes only. Williams *v.* Union Bank, 21 Tenn. (2 Humph.) 339.

21. Cannon *v.* Apperson, 82 Tenn. (14 Lea) 553.

22. State banks.—The Bank of Tennessee is in its nature and character a public corporation, chartered for the benefit of the state; the faith and credit of the state are pledged for its support. Nashville *v.* Bank, 31 Tenn. (1 Swan) 269; Bank *v.* Woodson, 45 Tenn. (5 Coldw.) 176, citing Furman, etc., Co. *v.* Nichol, 43 Tenn. (3 Coldw.) 432. See, also, Vanzant *v.* Waddel, 10 Tenn. (2 Yerg.) 260; Bonner *v.* Burke, 41 Tenn. (1 Coldw.) 623; State Bank *v.* Knoop, 16 How. 369, 14 L. Ed. 977.

But not so within the meaning of a statute giving the state priority over certain other claims. Fields *v.* Creditors, 33 Tenn. (1 Sneed) 350.

"The Bank of Tennessee is a state institution, chartered by a public law." Shaw *v.* State, 35 Tenn. (3 Sneed) 86.

23. "The bank and the state are entirely different entities. While the state owned all the stock in the bank, appointed its officers, received the benefit of the profits it made, and dictated its management; yet it was merely a private corporation, and it is to be held and treated accordingly. This was expressly determined by this court in the case of Watson *v.* Bank." Keith *v.* Clarke, 72 Tenn. (4 Lea) 718. See, also, Bank *v.* Dibrell, 35 Tenn. (3 Sneed) 379; State *v.* Bank, 64 Tenn. (5 Baxt.) 1.

of banking, the government, thus far, divests itself of its sovereign character, and takes that of a private citizen, or corporation.[24] Banking associations are moneyed corporations.[25]

Banks, in the commercial sense, are of three kinds, to wit: 1, of deposit; 2, of discount; 3, of circulation. All or any two of these functions may, and frequently are, exercised by the same association; but there are still banks of deposit, without authority to make discounts or issue a circulating medium.[26] Although, under the legislation and decisions of

24. Fields *v.* Creditors, 33 Tenn. (1 Sneed) 350, citing Bank *v.* Planters' Bank (U. S.), 9 Wheat. 904, 6 L. Ed. 244; Bank *v.* Wister (U. S.), 2 Pet. 318, 7 L. Ed. 437; Turnpike Co. *v.* Wallace (Pa.), 8 Watts 316.

25. General laws.—Banking associations organized under Laws, 1838, c. 260, are "moneyed corporations," and are therefore embraced by the "Banking Act." Hirschfeld *v.* Bopp, 27 App. Div. 180, 50 N. Y. S. 676, reversed on another point in Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 46 L. R. A. 839, 51 N. E. 997. See, also, Robinson *v.* Bank, 21 N. Y. 406.

26. Bank defined.—Bank *v.* Collector, 3 Wall. 495, 512, 18 L. Ed. 207; Oulton *v.* Savings Institution (U. S.), 17 Wall. 109, 21 L. Ed. 618.

Strictly speaking the term bank implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, such as bullion, plate, and the like, for safekeeping until the depositor should see fit to draw it out for use, but the business, in the progress of events, was extended, and bankers assumed to discount bills and notes and to loan money upon mortgage, pawn, or other security, and at a still later period to issue notes of their own intended as a circulating currency and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even all three of those functions, but it is still true that an institution prohibited from exercising any more than one of those functions is a bank in the strictest commercial sense. Oulton *v.* Savings Institution (U. S.), 17 Wall. 109, 21 L. Ed. 618; Bank *v.* Collector, 3 Wall. 495, 512, 18 L. Ed. 207.

"**Associations engaged in moneyed transactions,** whether incorporated or not, having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order; or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes; or where stock, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, are regarded as banks." Oulton *v.* Savings Institution (U. S.), 17 Wall. 109, 21 L. Ed. 618; Richmond *v.* Blake, 132 U. S. 592, 33 L. Ed. 481, 10 S. Ct. 204; Selden *v.* Equitable Trust Co., 94 U. S. 419, 24 L. Ed. 249; Western Invest. Banking Co. *v.* Murray, 6 Ariz. 215, 56 Pac. 728.

"'A bank,' says Morse (§ 2, Banks and Banking), 'is an institution usually incorporated with power to issue its promissory notes intended to circulate as money (known as bank notes); or to receive the money of others on general deposit to form a joint fund that shall be used by the institution for its own benefit, for one or more of the purposes of making temporary loans and discounts; of dealing in notes, foreign and domestic bills of exchange, coin, bullion, credits and the remission of money; or with both these powers, and with the privileges in addition to these basic powers, of receiving special deposits and making collections for the holders of negotiable paper, if the institution sees fit to engage in such business.'" Auten *v.* United States Nat. Bank, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628.

"**McCulloch,** in his Commercial Dictionary (vol. 1, p. 63), under the word 'Banking,' says: 'Banks are establishments intended to serve for the safe custody of money; to facilitate its payment by one individual to another; and sometimes for the accommodation of the public with loans.'" Niagara County Bank *v.* Baker, 15 O. St. 68.

Reception of money of others and doing banking business thereon—Ohio Act of 1845.—Pickaway County Bank *v.* Prather, 12 O. St. 497; Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371; Medill *v.* Collier, 16 O.

Ohio and California, and those of other states, banking purposes necessarily include issue of notes.[27] And receiving deposits in small sums to be sent to another state or foreign countries is banking,[28] and so as to receipt

St. 599; United Protestant, etc., Congregation *v.* Stegner, 21 O. St. 488.

Intention to do banking business sometimes essential.—Bonsal *v.* State, 11 O. 72.

Receiving deposits under Ohio Act of 1851.—Medill *v.* Collier, 16 O. St. 599.

A corporation engaged in loaning its own money upon note and mortgage is not a banking corporation. Oregon, etc., Invest. Co. *v.* Rathburn, Fed. Cas. No. 10,555, 5 Sawy. 32. See, also, Davis *v.* West & Co., 127 Ga. 407, 56 S. E. 403, where it is intimated that the receipt of deposits was necessary to constitute a bank.

Foreign corporation.—A foreign corporation organized under a statute entitled "An act to provide for the formation of corporations for certain purposes," and providing that corporations for manufacturing, mining, or chemical purposes or for the purpose of engaging in any species of trade or commerce may be formed, and that no corporation organized under the act shall possess the power of issuing bills, notes, or other evidences of debt for circulation as money, possesses no power to carry on the business of banking, though the certificate of incorporation discloses that it is created for the purpose of carrying on the business of banking to such an extent as may be legally done under the constitution and laws of the state of its organization. Bank *v.* Collins (N. Y.), 7 Hun 336.

27. Although, under Ohio legislation, "banking institutions" or "banks" appear to be confined to corporations authorized to issue bills or notes for circulation as currency. Ohio Life Ins., etc., Co. *v.* Debolt (U. S.), 16 How. 416, 14 L. Ed. 997; Exchange Bank *v.* Hines, 3 O. St. 1; State *v.* Granville Alexandrian Soc., 11 O. 1; Lougee *v.* State, 11 O. 68; Bonsal *v.* State, 11 O. 72; State *v.* Urbana, etc., Ins. Co., 14 O. 6, 12; Porter *v.* Kepler, 14 O. 127; Porter *v.* Porter, 14 O. 220; Watson *v.* Brown, 14 O. 473; Johnson *v.* Bentley, 16 O. 97; Lawler *v.* Walker, 18 O. 151; Myers *v.* Manhattan Bank, 20 O. 283; Dearborn *v.* Northwestern Sav. Bank, 42 O. St. 617, 51 Am. Rep. 851; 2 Bates' Stat., § 3821-1.

The term "banking," as used in the Act of March 12, 1845 (2 Bates' Anno. Stat., § 3821-6), entitled "An act to prohibit unauthorized banking," and providing "That no body politic or corporate shall establish a bank, or engage in the business of banking, to receive on deposit, keep and circulate the money or bank paper of others, without express authority of a law of this state," does not refer to unauthorized banking as such, but only a particular function or department of banking, to wit, the reception on deposit of the money or bank paper of others and the doing of a banking business thereon. Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371; United Protestant, etc., Congregation *v.* Stegner, 21 O. St. 488; Medill *v.* Collier, 16 O. St. 599; Pickaway County Bank *v.* Prather, 12 O. St. 497.

It is no violation of a charter which contains a clause prohibiting the exercise of banking powers to receive money on deposit. State *v.* Urbana, etc., Ins. Co., 14 O. 6.

Individuals issuing notes to pass as money not included in Ohio statute of 1816.—Steedman *v.* State, 11 O. 82. But see Act of February 16, 1838.

Banking purposes as necessarily including issue of notes under California constitution.—The word "banking" as used in Const., art. 4, § 34, prohibiting the legislature from passing any act granting any charter "for banking purposes," and Id., § 35, commanding the legislature to prohibit any person, association, or corporation from "exercising the privilege of banking or creating paper to circulate as money," refers merely to the issuance of bank bills or paper to circulate as money. Bank *v.* Hemme, etc., Land Co., 105 Cal. 376, 38 Pac. 963; Bank *v.* Fairbanks, 52 Cal. 196.

Iowa.—State *v.* Union Stock Yards, etc., Bank, 103 Iowa 549, 70 N. W. 752, 72 N. W. 1076. See post, "Incorporation," § 23.

Pennsylvania.—Merchants' Bank *v.* Shouse, 102 Pa. 488; Dreisbach *v.* Price, 133 Pa. 560, 19 Atl. 569; In re Lebanon Trust, etc., Estate, 3 Pa. Dist. R. 286. See post, "Constitutional and Statutory Provisions," § 4.

28. Receiving deposits to be sent to another state.—Of national banks,

of deposits by department store.[29]

But trust companies are not banks in the commercial sense of the word.[30]

A banker is one who has a place of business where deposits are received and paid out on checks, and where money is loaned upon security.[31]

see post, "Power to Control and Regulate," § 233.

The business of receiving deposits of money in small sums from time to time until they reach an amount sufficient to be sent to other states or foreign countries is banking, and as such is a proper subject for regulation in the exercise of the police power of the state. Engel *v.* O'Malley, 219 U. S. 128, 55 L. Ed. 128, 31 S. Ct. 191, affirming decree (C. C.), 182 Fed. 365.

29. Receipt of deposits by department store.—Under Laws 1909, c. 285, § 2024—78l, declaring the receiving of money on deposit as a regular business by a person or corporation to be a banking business, whether the deposit is made subject to check or is evidenced by a certificate of deposit, passbook, note, receipt, or other writing, a department store which received deposits up to a certain amount, issued passbooks, paid interest on the amounts deposited, and paid the principal, with interest thereon, on demand, in money or goods at the election of the depositor, was engaged in the banking business, and subject to the laws regulating it. McLaren *v.* State, 141 Wis. 577, 124 N. W. 667.

30. Trust companies not banks.—Mercantile Bank *v.* New York, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826.

Since the decision in Mercantile Bank *v.* New York, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826, there has been no change in the legislation of New York in respect to the powers of trust companies which calls for any limitation of that decision. Jenkins *v.* Neff, 186 U. S. 230, 46 L. Ed. 1140.

31. Banker defined.—The substance of the business of a banker, as defined by the acts of congress approved June 30, 1864 (13 Stat. 252), and March 3, 1865 (13 Stat. 472), is having a place of business where deposits are received and paid out on checks, and where money is loaned upon security. Warren *v.* Shook, 91 U. S. 704, 23 L. Ed. 421.

When a corporation or natural person receives from another person, for discount, bills of exchange or promissory notes belonging to that other, he is acting as a banker. Selden *v.* Equitable Trust Co., 94 U. S. 419, 422, 24 L. Ed. 249; Richmond *v.* Blake, 132 U. S. 592, 33 L. Ed. 481, 10 S. Ct. 204.

"A banker, Macleod says, is a trader who buys money, or money and debts, by creating other debts, which he does with his credit—exchanging for a debt payable in the future one payable on demand. This, he says, is the essential definition of banking. 'The first business of a banker is not to lend money to others but to collect money from others.' (Macleod on Banking, vol. 1, 2d Ed., pp. 109, 110.) And Gilbart defines a banker to be 'a dealer in capital, or more properly a dealer in money. He is an intermediate party between the borrower and the lender. He borrows of one party and lends to another.' (Gilbart on Banking, vol. 1, p. 2.)" Auten *v.* United States Nat. Bank, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628.

"A banker is one who keeps a place for the traffic in money; who there receives it from others, and keeps it with his own, using the whole fund as his own, or remits it at request to other places; who repays it at the will and call of his customer; who furnishes money to others on the discount of their obligations, or on securities brought by them; and who buys and sells bills of exchange. To these is sometimes added the issuing of his notes to pass as money, when allowed by law to do so." People *v.* Doty, 80 N. Y. (35 Sickles) 225.

Attorneys at law, partners in a business held forth to the public, by their notes, checks, letter heads, etc., as the "Perry County Bank," and who receive deposits, etc., are bankers. Commonwealth *v.* Sponsler, 1 Lack. Leg. N. 61.

Private Banker.—The business of "private banker" is one which may be carried on in the banker's individual capacity. Exchange Bank *v.* Hines, 3 O. St. 1.

This term has been commonly used in Ohio to distinguish money brokers, or dealers in money, who did not issue bills or notes to circulate as money, from "associations with banking powers," or banks of issue and circulation. Dearborn *v.* Northwestern

The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations.[32] Or the exercise of any banking function.[33]

Sav. Bank, 42 O. St. 617, 51 Am. Rep. 825.

"The proper phrase for a banker who exercises in his business no more than the rights and privileges common to all men, as distinguished from a bank or association or person who has taken advantage of the provisions of statutes, and by a compliance with the conditions of them has privileges not natural and common, is not individual banker, it is private banker. He is private in his business, inasmuch as he may conduct it as he pleases within law, is not subject to visitation or scrutiny by the state; while those who have started a banking business under an enabling statute are public inasmuch as the public have given them the right and have the power to demand securities and have reports, and to make inquiry into the business and how it is conducted. The individual banker of the statutes is a public banker, but he is different from persons associated for the purpose of becoming public bankers." People *v.* Doty, 80 N. Y. (35 Sickels) 225.

Banker under Ohio tax laws.—The term "banker," as used in the constitutional provision relating to the taxation of "banks and bankers," denotes unincorporated "associations with banking powers," as distinguished from incorporated institutions having the same powers. Exchange Bank *v.* Hines, 3 O. St. 1.

Statutory term "individual banker" held not to include private banker.—In Laws 1875, c. 371, § 49, forbidding "any bank, banking association, or individual banker to advertise or put forth a sign as a savings bank," the term "individual banker" does not apply to a private banker, who exercises in his business no more than the privileges common to all as an individual banker is one who has availed himself of the banking statutes and become empowered to do banking business thereunder. People *v.* Doty, 80 N. Y. (35 Sickles) 225.

Under statutes requiring reports.—See post, "Reports and Statements," § 16.

32. Banking defined.—Mercantile Bank *v.* New York, 121 U. S. 138, 30 L. Ed. 895, 7 S. Ct. 826; Auten *v.* United States Nat. Bank, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628; Exchange Bank *v.* Hines, 3 O. St. 1; Holladay *v.* Faurot, 9 W. L. Bull. 92, 8 O. Dec. Reprint 633; Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 30 Tenn. (11 Humph.) 1, 53 Am. Dec. 742. See to the same effect State *v.* Lookout Bank, 89 Tenn. (5 Pickle) 278, 14 S. W. 801.

By § 3407 of the Revised Statutes of the United States, relating to revenue, it is provided that "every incorporated or other bank, and every person, firm or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange or promissory notes or where stocks, bonds, bullion, bills of exchange or promissory notes are received for discount or for sale, shall be regarded as a bank or a banker." 13 Stat. 251, c. 173, § 79; 14 Stat. 115, c. 184, § 9. Richmond *v.* Blake, 132 U. S. 592, 33 L. Ed. 481, 10 S. Ct. 204; Selden *v.* Equitable Trust Co., 94 U. S. 419, 24 L. Ed. 249.

A corporation whose business is confined to the investment of its capital in bonds secured by mortgage on

33. Exercise of any banking function.—Any person engaged in the business carried on by banks of deposit or of discount or of circulation is doing a banking business, although but one of these functions is exercised. MacLaren *v.* State, 141 Wis. 577, 124 N. W. 667; People *v.* Bartow (N. Y.), 6 Cow. 290.

Making loans on collateral.—The "banking business," as defined by laws and customs, consists, among other things, in making loans of money on

The business of a stock broker is ordinarily distinct from the business of a banker, or according to the common understanding a stock broker is

real estate, and to the negotiation, sale, and guaranty of them, is not a bank or a banker within the meaning of § 3407 of the Revised Statutes. Selden *v.* Equitable Trust Co., 94 U. S. 419, 24 L. Ed. 249; Kiggins *v.* Munday, 19 Wash. 233, 52 Pac. 855; Oregon, etc., Invest. Co. *v.* Rathburn, Fed. Cas. No. 10,555, 5 Sawy. 32.

It is the business of advancing or lending in the mode usual with bankers—that is, on collaterals or on the pledge of personal property—that, by the statute, is defined to be banking, within the intention of congress, and lending upon mortgages of real estate is not intended. Selden *v.* Equitable Trust Co., 94 U. S. 419, 24 L. Ed. 249.

A firm which keeps a deposit account with a bank in a foreign city, and draws checks thereon when necessary, but is not in any way held out to the public as a banking institution, and does not loan money except on landed security, discount commercial paper, or buy or sell drafts in the course of business, is not engaged in the banking business. Clark *v.* Wallick, 56 Ill. App. 30.

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collateral security. Earle *v.* American Sugar Refin. Co., 74 N. J. Eq. (4 Buch.) 751, 71 Atl. 391.

Dealing in money, securities and stocks.—A bank is an institution whose object is to make gain by dealing in money. It trades in notes, bonds, bills and other securities for money, and unless restrained by charter it deals in stocks of other companies of whatever description. Goddin *v.* Crump, 35 Va. (8 Leigh) 120.

Dealing in bills of exchange for profit.—Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 30 Tenn. (11 Humph.) 1, 53 Am. Dec. 742.

The issue of paper designed to circulate in the form and similitude of bank notes is an act of banking. People *v.* River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64.

Issue of bonds transferable by delivery not banking.—Bonds of a railroad corporation, payable at a certain day after date, are not in violation of the act to restrain unauthorized banking, although they be transferable by delivery. They can not be considered to circulate as money, since obligations so circulating are payable on demand. Hubbard *v.* New York, etc., R. Co., 14 Abb. Prac. 275, 36 Barb. 286.

A merchants' exchange company, in order to make loans for the completion of their building, issued several hundred bonds, some for £200 sterling, and the residue for $1,000 each, under the seal of the corporation, and payable to the obligee or his assigns in ten years after date, with interest half-yearly, coupons for which, payable to bearer, were annexed to each bond; and mortgages on the real estate were given to a trustee to secure the payment of the bonds, which were described in the mortgages. Held, that these bonds were not within the prohibition of the statute relative to "unauthorized banking." Barry *v.* Merchants' Exch. Co. (N. Y.), 1 Sandf. Ch. 280.

"In the case of the Attorney General *v.* Life, etc., Ins. Co. (N. Y.), 9 Paige 470, the notes adjudged to fall within the restraining laws were promissory notes, payable to a clerk of the corporation and by him endorsed in blank, and were engraved with vignettes and other devices of bank notes. And see on this subject, Safford *v.* Wyckoff (N. Y.), 4 Hill 442. The bonds in question clearly are not within the provisions of the statute against unauthorized banking." Barry *v.* Merchants' Exch. Co. (N. Y.), 1 Sandf. Ch. 280.

Discounting.—The charter of a corporation established for the purpose of loaning money provided that "nothing therein contained should be construed to authorize the company to discount notes, or exercise any banking privileges whatever." Held, that the taking of a note for the sum loaned, and the receiving the interest on that sum in advance, for the period of the loan, was thereby prohibited, and that there could be no recovery on a note thus discounted. Philadelphia Loan Co. *v.* Towner, 13 Conn. 249.

A statute giving an insurance company power to loan its money and improve its profits in the purchase of mortgages and stocks is not in violation of the provisions of the constitution relating to discounting privileges. Lycoming Fire Ins. Co. *v.* Newcomb, 1 Leg. Chron. 9, 4 Leg. Gaz. 409.

Literary, scientific and charitable corporations.—The provisions of the act relating to illegal banking (Rev. Code 1855, p. 286) do not apply to

not a banker. A stock broker may do some of the kinds of business that are usually done by bankers, and many banks and bankers do business which, as a general rule, is only done by stock brokers.[34]

And a bank is a person under the usury laws.[35]

Insurance Company.—An insurance corporation differs radically from a banking corporation, and the powers given to one can not be exercised by the other without some authority granted by the state through its legislature. The power to receive in trust for any person moneys or other valuable thing, and of giving its acknowledgment therefor, and to loan its surplus funds as provided in its original charter, in no sense authorizes an insurance company to conduct a general banking business.[36]

Express Company.—It has been held that an express company is not a banking corporation, although authorized to draw and deal in bills of exchange.[37]

State and National Bank Distinguished.—In every respect, except the issuing of bills to circulate as money, state banks carry on a similar business, and operations and investments of a like character as national banks.[38]

§ 3. Power to Control and Regulate.—In General.—The police power of a state extends to the regulation of the banking business, and even

literary, scientific, and charitable corporations. The evil the act designed to prevent was the introduction into this state, by moneyed corporations, or corporations engaged in business of profit, of the circulation of foreign and worthless bank notes, to the injury of the people of the state. Christian University *v.* Jordan, 33 Mo. 528.

Statute against keeping office of deposit does not preclude individual loans.—Act April 21, 1818, imposing a penalty of $1,000 upon any person or association carrying on a banking business unless specially authorized, does not preclude individuals and corporations from lending their money on promissory notes by way of discount or otherwise. People *v.* Brewster (N. Y.), 4 Wend. 498.

Banking partnerships and joint-stock companies.—See post, "Partnerships and Joint-Stock Companies," § 24.

34. Distinguished from stock broking.—Richmond *v.* Blake, 132 U. S. 592, 33 L. Ed. 481, 10 S. Ct. 204.

35. A person.—The word "person," as used in the statute against usury, embraces banks. Stribbling *v.* Bank, 26 Va. (5 Rand.) 132, followed and approved in Bank *v.* Merchants' Bank, 40 Va. (1 Rob.) 573, 590; Crafford *v.* Warwick, 87 Va. 110, 12 S. E. 147, 10 L. R. A. 129; Crump *v.* Nicholas, 32 Va. (5 Leigh) 251. See post, "Interest or Rate of Discount, and Usury," § 181.

36. Insurance company distinguished.—Memphis City Bank *v.* Tennessee, 161 U. S. 186, 40 L. Ed. 664, 16 S. Ct. 468; Memphis *v.* Memphis City Bank, 91 Tenn. 574, 19 S. W. 1045. See, also, Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 30 Tenn. (11 Humph.) 1, 53 Am. Dec. 742.

The investment of the profits of insurance companies in loans secured by mortgage can not be considered as banking business. Life Ass'n *v.* Levy, 33 La. Ann. 1203.

37. Express company.—A corporation, created under a special act of Colorado, whereby it is authorized to engage in the express business, and to draw drafts and bills of exchange, or sell and buy the same, in the course of such business, is not prohibited (Rev. St. U. S., §§ 1889, 1924) from carrying on such business in Washington Territory, on the ground that it is a banking corporation, or that it was not organized under a general incorporation law. Wells, etc., Co. *v.* Northern Pac. R. Co., 23 Fed. 469, 10 Sawy. 441.

38. Cleveland Trust Co. *v.* Lander, 62 O. St. 266, 56 N. E. 1036, affirming 19 O. C. C. 271, 10 O. C. D. 452. As to national banks, see post, "Nature and Status," § 232.

to its prohibition except on such conditions as the state may prescribe;[39] and is sometimes substantially reserved in constitution or charter.[40] From this a bank can not claim exemption under its charter.[41] Although the authorities agree that banking may not be absolutely prohibited, were such legislation conceivable.[42] As to whether a legislature may constitutionally make the right of banking a franchise, and limit it to certain classes only, such as corporations, there is a conflict of authority, but by the weight of authority it may be done. The supreme court of the United States has so declared.[43]

39. Power to control and regulate.—Noble State Bank *v.* Haskell, 219 U. S. 104, 55 L. Ed. 112, 31 S. Ct. 186, affirming decree in 22 Okl. 48, 97 Pac. 590; Shallenberger *v.* First Nat. Bank, 219 U. S. 114, 55 L. Ed. 117, 31 S. Ct. 189, reversing decree in First State Bank *v.* Shallenberger, 172 Fed. 999; State *v.* Richcreek, 167 Ind. 217, 77 N. E. 1085, 119 Am. St. Rep. 491, 5 L. R. A., N. S., 874; Marymont *v.* Nevada State, etc., Board, 33 Nev. 333, 111 Pac. 295; Lee *v.* O'Malley, 126 N. Y. S. 775, 69 Misc. Rep. 215, order reversed in 140 App. Div. 595, 125 N. Y. S. 772; Goodsill *v.* Woodmanse, 1 N. Dak. 246, 46 N. W. 970, 11 L. R. A. 420.

The business of banking is, by reason of the nature of the business and the relation which it bears to the fiscal affairs of the people and the revenues of the state, within the police power of the state, and subject to legislative control. State *v.* Richcreek, 167 Ind. 217, 77 N. E. 1085, 5 L. R. A., N. S., 874, 119 Am. St. Rep. 491.

As to right of banking in general, see ante, "Right of Banking in General," § 1.

Banking business conducted by department store.—The legislature may define as banking a business conducted by a department store in which it received deposits, issued passbooks, and paid the principal, with interest on demand, in money or goods, these things clearly constituting a performance of some of the functions of a bank, and subject it to regulations provided for the banking business proper. MacLaren *v.* State, 141 Wis. 577, 124 N. W. 667.

Penalizing conduct of business by an insolvent bank.—The legislature as an exercise of police power can impose a penalty for the conduct of business by an insolvent bank. Ex parte Pittman, 31 Nev. 43, 99 Pac. 700.

Enforcement of regulation against panics.—"A periodical madness seems to pervade every section of the country in the business of banking, leading, necessarily, to over issues and consequent depreciation. It is the duty of the government to guard against this mischief; and the regulations provided by law for this purpose, instead of being relaxed, should be rigidly enforced by the courts." Hightower *v.* Thornton, 8 Ga. 486, 52 Am. Dec. 412.

Constitutional provision as to banks of circulation not exclusive.—Const., art. 13, authorizing the organization and control of banks of circulation, does not prevent the enactment of laws (Laws 1891, c. 43), imposing reasonable regulations on banks of deposit and discount. Blaker *v.* Hood, 53 Kan. 499, 36 Pac. 1115, 24 L. R. A. 854.

40. Substantial reservation.—State *v.* Hastings, 12 Wis. 47.

New York Savings Bank.—Under the laws applicable to the Bank for Savings in the City of New York, and its charter, granted in 1819, it was held, in 1865, that the bank commissioners had the power to visit and inspect the bank under existing laws whenever they deemed it necessary, or whenever thereto required by the comptroller of the state, and they were required to report the general condition of the bank to the legislature once at least in every three years. Bank *v.* Collector, 3 Wall. 495, 510, 18 L. Ed. 207.

41. Not exempted by charter.—Cummings *v.* Spaunhorst, 5 Mo. App. 21.

42. Regulation, not prohibition, allowed.—The banking business can be regulated, but not prohibited, and it is not only the legislature's power, but its duty, to regulate the business so as to reduce failures to a minimum. Ex parte Pittman, 31 Nev. 43, 99 Pac. 700. See ante, "Right of Banking in General," § 1, for full treatment.

43. Right of legislature to prohibit any but certain classes from engaging

Requiring Reserve.—Legislation in effect requiring the maintenance of a reserve is valid.[44]

Requirement of Residency.—A requirement that an individual or a member of a banking firm must be a resident of the state is valid.[45]

Restriction on Investment in Real Estate and Fixtures.—A restriction of the amount that can be legally invested in real estate, bank furniture and fixtures, to a certain proportion of the capital, is constitutional, and does not take property without just compensation.[46]

§ 4. Constitutional and Statutory Provisions.[47]—It has been found convenient to treat of the specific constitutional and statutory provisions where the branches of the subject to which they severally relate are treated of. Only some general considerations will be found here.

Submission of General Banking Law to People—Amendment.—Where a banking law has been adopted in accordance with the constitutional provision taking from the legislature the power to create banks, but permitting it to submit the question to the people, and, if they shall vote for banks, to submit to them a general banking law for their adoption or rejection, such law can not be materially amended by a statute not submitted to the people.[48]

in banking.—See ante, "Right of Banking in General," § 1, where this question is treated fully.

44. Acts 1905, p. 183, c. 109, § 3, subd. 5, requiring a banker to make oath that the net worth of individual members of the firm, partnership, or individual, engaged in the banking business is equal to an amount at least double the amount of capital paid into the bank, is valid, it not prohibiting a banker from using all of his capital in his business, but merely forbidding him from treating his entire holdings as capital and in effect requiring him to maintain a reserve. State *v.* Richcreek, 167 Ind. 217, 77 N. E. 1085, 119 Am. St. Rep. 491, 5 L. R. A., N. S., 874. See post, "Reserves," § 14.

45. Requirement of residency.—State *v.* Richcreek, 167 Ind. 217, 77 N. E. 1085, 119 Am. St. Rep. 491, 5 L. R. A., N. S., 874.

46. Restriction on investment in real estate and fixtures.—State *v.* Richcreek, 167 Ind. 217, 77 N. E. 1085, 5 L. R. A., N. S., 874, 119 Am. St. Rep. 491, cited approvingly in Noble State Bank *v.* Haskell, 22 Okl. 48, 97 Pac. 590, that case affirmed in 219 N. S. 104, 55 L. Ed. 112, 31 S. Ct. 186.

47. As to unauthorized banking.—See post, "In General," § 8.

Usury laws.—See post, "Interest and Rate of Discount, and Usury," § 181.

Statutes regulating right of banking.—See ante, "Right of Banking in General," § 1; "Power to Control and Regulate," § 3.

Constitutional restrictions on power of legislature to incorporate.—See post, "Incorporation," § 23.

Tax and license laws.—See post, "License Fees and Taxes," § 12.

Provisions for stockholders' individual liability.—See post, "In General," § 47 (1).

Bank depositors' guaranty act.—See post, "Safety Funds and Deposits of Securities," § 15.

48. Porter *v.* State, 46 Wis. 375, 1 N. W. 78. See, also, Rusk *v.* Van Norstrand, 21 Wis. 159, where this principle was applied to a law which provides that a bank comptroller may, in his discretion, permit the original stockholders' bond to be withdrawn, and a new bond substituted in its stead, which was held invalid, because it affected materially the principle of the banking law, and might thus work an injury to the bill holders.

General banking laws.—Minnesota Laws 1895, c. 145 (an act entitled "An act to revise the laws relating to banks of discount and deposit"), is not invalid as not complying with const., art. 9, § 13, as to the issuance or regulation of circulating notes, or as impairing the obligation of the contract between banks theretofore ex-

Scope of Statutes.—Legislation applicable in terms to banks has been held to apply only to banks of issue,[49] and a requirement of payment of a certain proportion of the capital stock has been held inapplicable to existing banks.[50] An act to restrain unincorporated banking associations has been held inapplicable to individuals.[51] And "institution" has been held to include a private banker in law relating to bank inspection.[52]

§ 5. Charter Provisions.—Charter provisions, and their construction and operation, will be treated under the sections where the subject matter of such provisions is considered.[53]

isting and the state, or upon the ground, if it be applicable to such banks, that it impairs the contract obligations between its stockholders and creditors whose claims arose prior to the day such law took effect, or upon the ground that due process of law was not provided for in insolvency proceedings against banking corporations, or upon the ground that the act itself is in violation of art. 4, § 33, of the constitution. Anderson *v.* Seymour, 70 Minn. 358, 73 N. W. 171.

As to general banking laws and their repeal, see the following cases: Wilson *v.* Tesson, 12 Ind. 285; Cascade Bank *v.* Yoder, 39 Mont. 202, 103 Pac. 499; Smock *v.* Farmers' Union State Bank, 22 Okl. 825, 98 Pac. 945.

But Wisconsin Laws 1891, c. 263, § 6, as amended by Laws 1895, c. 160, authorizing the formation of corporations to engage in the usual business of trustees, and providing that nothing therein shall be construed to give the right to issue bills to circulate as money, or deal in bank exchange, or to do a banking business, confers no banking powers, and is not void because not submitted to vote of the people as required by Const., art. 11, § 5. Roane Iron Co. *v.* Wisconsin Trust Co., 99 Wis. 273, 74 N. W. 818.

And Rev. St., Wis., § 3245, directing a preference to the United States, the state, and any county, city, town, or village therein, out of the assets of an insolvent corporation in process of being closed up under the statutes, is applicable to banking corporations, and is not in contravention of this constitutional provision. Northwestern Nat. Bank *v.* Superior, 103 Wis. 43, 79 N. W. 54.

Submission of incorporating statute to popular vote, see post, "Incorporation," § 23.

49. Act April 16, 1850, entitled an "Act regulating banks," does not apply to savings and deposit banks, but only to banks of issue. Merchants' Bank *v.* Shouse, 102 Pa. 488; Dreisbach *v.* Price, 133 Pa. 560, 19 Atl. 569; In re Lebanon Trust, etc., Estate, 3 Pa. Dist. R. 286. See, also, ante, "What Are Banks," § 2.

50. Laws 1891, c. 43, providing for the organization and regulation of all banks thereafter to be created, and for the regulation of all banks which continue to do business for a longer time than six months thereafter, and declaring that a bank thereafter created shall have 50 per cent of its capital stock paid in before it shall be entitled to do business, does not prohibit a banking corporation in existence at its passage from continuing in business with only 20 per cent of its capital stock paid in. Putnam *v.* Hutchison, 4 Kan. App. 273, 45 Pac. 931.

51. Bristol *v.* Barker (N. Y.), 14 Johns. 205. See, also, post, "Increase of Capital Stock," § 37; "Subscription to and Issue of Stock," § 39.

52. Laws 1903, p. 81, c. 79, § 2, relating to bank inspection, provides that where reference is made to banks, bankers, or banking in the act, the same shall be construed as applying to any corporation, association, firm, or individual engaged in such business; and § 26 (page 88) declares that every officer, agent, or clerk of any banking institution within the title, who subscribes or makes any false statement, or enters or subscribes or exhibits any false paper, etc., shall be subject to imprisonment, etc. Held, that the term "institution" as so used, included a private banker, and hence the section was not unconstitutional, as conferring a special privilege on private bankers. State *v.* Struble, 19 S. Dak. 646, 104 N. W. 465.

As to bank examiners, see post, § 17 (1) to 17 (5).

53. Charter provisions.—As to construction of charters as granting bank-

§ 6. Authority or License to Do Business.[54]—Prescriptive Right.—It has been held that a corporation might obtain the right to exercise banking franchises by prescription.[55]

Necessity for License or Grant from State.—The occupation of banking can be, and usually is, forbidden except upon license issued.[56]

Before Issuance of Certificate.—A bank which has not received a certificate from the bank commissioner authorizing it to transact business may negotiate notes, so as to bind itself, and pass a valid title thereto.[57]

§ 7. Unauthorized Banking—§ 8. —— In General.—Where an association or corporation, not endowed with the power to receive deposits and contract to pay interest thereon, does so, its acts are ultra vires.[58] Where a corporation which is prohibited by its charter from engaging in the business of banking, dealt in bills of exchange for profit as a business or pursuit, it engaged in the business of banking and its acts were ultra vires.[59]

Power of Legislature to Restrain from Banking.—Under a clause, in an act of incorporation, providing that the action of the corporation shall be "subject to such rules and regulations as the legislature, from time to time, may think proper to make," the general assembly may restrict such

ing powers or not, see post, "Construction of Charters and Banking Laws," § 87.

As to suspension of specie payments, "Constitutional and Statutory Provisions," § 63.

54. Authority or license to do business.—See the following sections treating of unauthorized banking.

License fees and taxes, see post, "License Fees and Taxes," § 12.

55. Prescriptive right.—It seems that a corporation may obtain the right to exercise banking franchises by prescription, the term of prescription being twenty years. See State *v.* Miami Exporting Co., 11 O. 126; Miami Exporting Co. *v.* Clark, 13 O. 1; Morris *v.* Way, 16 O. 469.

56. Banking charter—Domestic—Necessity for.—The occupation of banking is forbidden, except upon license issued. National Bank *v.* Chattanooga, 55 Tenn. (8 Heisk.) 814.

Under the Act of 1827, no person has the right, unless, indeed, he have a grant from the state, to establish any banking institution, or to issue any notes, bills, or other paper for such purpose. Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 30 Tenn. (11 Humph.) 1, 53 Am. Dec. 742.

But it has never been considered that the laws containing these exclusive privileges of banking, are repugnant to the constitution as not being "laws of the land," of general application. Hazen *v.* Union Bank, 33 Tenn. (1 Sneed) 115. See ante, "Right of Banking in General," § 1.

Common-law right of banking restored by Tenn. Act of 1859-60, Ch. 129, in form of a licensed privilege.—State *v.* Lookout Bank, 89 Tenn. (5 Pickle) 278, 14 S. W. 801; Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 30 Tenn. (11 Humph.) 1, 53 Am. Dec. 742; Hazen *v.* Union Bank, 33 Tenn. (1 Sneed) 115.

57. Before issuance of certificate.—Kellogg *v.* Douglas County Bank, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596.

As to constitutional and statutory provisions, see ante, "Constitutional and Statutory Provisions," § 4.

As to incorporation and necessity therefor, see post, "Incorporation," § 23, and its subdivisions.

58. Unauthorized banking.—Stefan *v.* Brennan, 92 Ill. App. 291; Chapman *v.* Lynch, 156 N. Y. 551, 51 N. E. 275.

59. Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 30 Tenn. (11 Humph.) 1, 53 Am. Dec. 742.

As to constitutional and statutory provisions generally, see ante, "Constitutional and Statutory Provisions," § 4.

company from exercising the franchise of banking.[60]

Statutory Provisions and the Repeal Thereof.—The prohibition of a particular kind of banking, such as the receipt on deposit of the money or bank paper of others, does not prohibit unauthorized banking as such.[61] Statutes against unauthorized banking are not impliedly repealed by other statutes in pari materia where not necessarily inconsistent.[62]

Acts must be done in banking business to fall under prohibitive statute.[63]

Transaction of Business by Incomplete Organization.—The transaction of business by an incompletely organized banking association is an evasion of the statute against unauthorized banking.[64]

Foreign Corporations—Effect of Restraining Acts.—Incorporation under the laws of another state will not relieve a bank from the operation of the laws of a state where it operates relating to unauthorized banking.[65]

Necessity for Ouster.—But to prevent a bank from continuing illegally

60. **Restraining power of legislature.**—State *v.* Granville Alexandrian Soc., 11 O. 1.

61. **The Ohio act to prohibit unauthorized banking by corporations,** passed March 12, 1845, and providing, "That no body politic or corporate shall establish a bank, or engage in the business of banking, to receive on deposit, keep and circulate the money or bank paper of others, without express authority of a law of this state," does not prohibit unauthorized banking as such, but merely a particular kind of banking, to wit, the receipt on deposit of the money or bank paper of others and the doing of a banking business thereon. Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371. See also, Pickaway County Bank *v.* Prather, 12 O. St. 497. See, also, Medill *v.* Collier, 16 O. St. 599; United Protestant, etc., Congregation *v.* Stegner, 21 O. St. 488, construing this act. and State *v.* Urbana, etc., Ins. Co., 14 O. 6.

62. **Repeal by implication.**—Wilson *v.* Spencer, 22 Va. (1 Rand.) 76, 10 Am. Dec. 491; Bank *v.* Stegall, 41 Miss. 142; Mills *v.* State, 23 Tex. 295.

63. **The prohibition in the Tennessee Act of 1827** goes to the business and occupation of banking, and not to any one or more of the acts in detail, which are banking functions, and therefore, any person may, without becoming a banker, borrow or loan money, and be a depository of money, buy or sell exchange, and be the drawer or holder of any kind of commercial paper, as notes, bills, and drafts, provided, that it be not in the business and pursuit of banking. The same may be said of a corporation. Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 30 Tenn. (11 Humph.) 1, 53 Am. Dec. 742.

64. **Incomplete organization.**—Where "seven (or more) citizens of this state" associated to establish an office of discount, deposit, and circulation, under the act to authorize the business of banking, approved February 27, 1850, and executed, acknowledged, and recorded, in the offices of the secretary of state and the clerk of the county where said office was proposed to be located, the certificate required by the sixteenth section of the act, which certificate also stated that the associates had elected one of their number to be president of the association, and the association went into operation without further organization, except the election of a cashier, the transaction of banking business by said association, or by the president alone whom they had selected, was an evasion of the statute. Kinsela *v.* Cataract City Bank, 18 N. J. Eq. 158.

65. **Foreign corporation—Effect of restraining acts.**—Myers *v.* Manhattan Bank, 20 O. 283.

But these acts were not intended to exclude foreign capital or to prevent the exercise of all banking functions by foreign banks in Ohio, but only such functions as the legislature deemed advisable to confine to banks incorporated under the laws of Ohio. Pickaway County Bank *v.* Prather, 12 O. St. 497. See also, State *v.* Urbana, etc., Ins. Co., 14 O. 6. See, also, post, "Foreign Banks," § 18.

to exercise its franchise after repeal of its charter, there must be a judgment of ouster upon an information in quo warranto.[66]

§ 9. —— Validity of Transactions and Liabilities Incurred.[67]—In General—Effect on Securities.—All securities given to an unauthorized banking company are void.[68] But a note given as collateral security for a loan of small checks, intended to circulate as banknotes, is not affected with invalidity.[69] Mortgages to a bank organized under an unconstitutional statute are unenforcible.[70]

Construction of Statutes.—A statute to suppress private banking has been held to prohibit all transactions and contracts connected with establishing such a bank and its illegal operations.[71] Such penal provisions can

66. **Necessity for ouster.**—Upon information in the nature of a quo warranto, calling upon the president, directors, and company of the Miners' Bank of Dubuque to show by what warrant they claimed the right to use the franchise; plea, referring to an act of incorporation; replication, that the act of incorporation had been repealed; rejoinder, that the repealing law was passed without notice to the parties, and without any evidence of misuse of the franchise; demurrer to the rejoinder, and joinder in demurrer, sustaining the demurrer, without any further judgment of the court, did not prevent the parties from continuing to exercise the franchise. Miners' Bank *v.* United States (U. S.), 5 How. 213, 12 L. Ed. 121.

67. **Validity of transactions and liabilities incurred.**—See post, "Effect of Ultra Vires Acts," § 261, et seq.

Fraudulent organization as barring recovery on note against stockholder.—See post, "Liability of Stockholders or Officers," § 211.

Of foreign banks doing business in state without authority, see post, "Foreign Banks," § 18.

Effect of failure to deposit securities, see post, "Safety Funds and Deposits of Securities," § 15.

68. **Securities generally.**—Myers *v.* Manhattan Bank, 20 O. 283.

69. **Note as collateral for checks used as bank notes.**—2 Rev. Laws, p. 234, invalidates all securities given to any company which, without authority of law, shall issue notes or transact any other business which incorporated banks may transact by virtue of their corporate powers. Plaintiff loaned defendant money, collaterally secured by the deposit of a promissory note indorsed by defendant. The sum advanced consisted of small checks drawn by plaintiff on a bank where he had no funds; the checks having the general appearance of bank notes, and being intended to circulate as such. The checks were redeemed at plaintiff's own office. Held, that the giving of the checks was not a banking transaction, and hence plaintiff could recover on the note. Utica Ins. Co. *v.* Pardow, 2 N. Y. Super. Ct. 552.

70. **Mortgage to unauthorized bank.**—The general banking law of Michigan (Sess. Laws 1837, p. 76) being unconstitutional and void in so far as it purports to confer corporate powers, no foreclosure could be maintained upon a mortgage executed to a bank organized under its provisions. Hurlbut *v.* Britain (Mich.), 2 Doug. 191.

71. **Illegal private banking.**—A statute declared by its title to be "an act to suppress private banking," and making it penal to "erect, establish, institute, or put in operations or to issue any bills or notes for the purpose of erecting, establishing, or putting in operation any banking institution, association, or concern," covers with its prohibition not only the primary steps in establishing and putting into operation the bank, but also the whole range of its transactions, by which illegitimate currency is imposed on a community; and contracts made in furtherance of such transactions are as void as those made to give it original operation. Davidson *v.* Lanier (U. S.), 4 Wall. 447, 18 L. Ed. 377.

It applies to contracts for the purpose of carrying on such business, made after it has been put in operation, such as the acceptance and payment of the bills of such banking company with the intention of promoting their circulation; and money so advanced can not be recovered. David-

not be extended beyond their terms, and a prohibition of the purchase of bills of exchange does not extend to notes.[72]

Transactions and instruments growing out of but not tainted with the illegality are legal and valid and can be enforced.[73]

Distinction between Dealings of Authorized and Unauthorized Banks.—There is a distinction between the unauthorized dealings of an authorized bank and the dealings of an unauthorized bank, in that the unauthorized dealings of an authorized bank may be valid as against every one except the state, as where a bank which is authorized to purchase and hold only so much land as may be necessary for its immediate use and occupation purchases more than is necessary for such purpose, the title to the property in such case vests in the bank and a purchaser from the bank can not set up the fact of the bank's violation of the charter prohibition.[74]

Relation Created by Deposit in Unauthorized Bank.—Money deposited with a concern which has not banking powers, under contract

son *v.* Lanier (U. S.), 4 Wall. 447, 18 L. Ed. 377.

In Brown *v.* Tarkington (U. S.), 3 Wall. 377, 18 L. Ed. 255, it was held that notes given for a balance found due on a settlement of accounts with an illegal banking company, and for advances to redeem its circulation, could not be enforced in favor of a payee who had been participant in the illegal business. Davidson *v.* Lanier (U. S.), 4 Wall. 447, 18 L. Ed. 377.

But at common law, individuals needed no legislative authority to exercise the right of banking. Bank *v.* Earle (U. S.), 13 Pet. 519, 10 L. Ed. 274.

72. Prohibition of purchase of bills not extended to notes.—By the Restraining Act (1 Rev. St. p. 712), corporations other than banking institutions are prohibited from "making discounts of bills and notes," and by another section from "buying and selling bills of exchange." Held, that this, being a penal statute, can not be extended to the purchase of notes, even if such prohibition would fall within the same reason as that against bills of exchange. American Life Ins. Co. *v.* Dobbin (N. Y.), Lalor's Supp. (Hill & Denio) 252.

73. Transactions and instruments not tainted with illegality.—A banking institution organized under the general banking law, which was held unconstitutional, drew certain drafts on A. to the amount of $12,000, which A. accepted for the accommodation of the bank, on its depositing with him $15,000 of its own bills to secure and indemnify him. The drafts were dishonored at maturity. B., C., and D., who, with others, were by the terms of the banking law liable for the debts of the bank, in consideration of the delivery to them by A. of the $15,000, in bills, made and delivered to E. a promissory note for $1,000, and also assigned to him certain other securities, upon the trust that he should collect the moneys due and to become due thereon, and apply the same to the payment of the drafts drawn upon A., and in indemnifying A. against his acceptances thereof. Held, that although the general banking law was unconstitutional, and the bills of the bank and the drafts were illegal and void, yet the notes and assignment in trust were not tainted with the illegality, but were legal and valid, and that E. could recover upon the note, without showing that A. had been damnified by reason of his acceptances of the drafts. Smith *v.* Barstow (Mich.), 2 Doug. 155.

74. Dealings of authorized and unauthorized banks distinguished.—Banks *v.* Poitiaux, 24 Va. (3 Rand.) 136, 15 Am. Dec. 706, distinguishing Wilson *v.* Spencer, 22 Va. (1 Rand.) 76, 10 Am. Dec. 491, in which case it was held that an unincorporated bank which issued notes contrary to law could not enforce payment of a bond given in exchange for such note.

A person taking the notes of an unchartered bank doing business contrary to a penal statute is not necessarily in pari delicto with the bank in the sense that he can be granted no equitable relief from his contract with the bank. Wilson *v.* Spencer, 22 Va. (1 Rand.) 76, 10 Am. Dec. 491.

whereby such concern promises to pay the amount so deposited with interest, at a certain place and time, is not a technical deposit, but a loan upon interest.[75]

Paper Discounted by Unauthorized Bank.—While a note given to and discounted by a bank engaged in the business of banking in violation of law is void,[76] yet a note of the treasurer of such corporation, given to secure the same loan, is not illegal.[77]

Rights of Third Persons.—A bill discounted by a bank within the prohibition of a law, will be valid in the hands of a bona fide holder.[78] And

75. **Deposit in unauthorized bank.**—State *v.* Buttles, 3 O. St. 309.

76. **Notes taken and discounted.**—Huber *v.* United Protestant, etc., Congregation, 16 O. St. 371; United Protestant, etc., Congregation *v.* Stegner, 21 O. St. 488; In re Jaycox, Fed. Cas. No. 7,237, 12 Blatchf. 209.

An insurance company not being authorized by law to become proprietors of any bank or fund, for the purpose of issuing notes, receiving deposits, making discounts, or transacting any other business which incorporated banks may lawfully do, any note discounted by them, or security taken for money lent, etc., is void, within the meaning of that statute. Utica Ins. Co. *v.* Scott (N. Y.), 19 Johns. 1; Utica Ins. Co. *v.* Hunt (N Y.), 1 Wend. 56; Utica Ins. Co. *v.* Caldwell (N. Y.), 3 Wend. 296.

But the principal case was reversed in Utica Ins. Co. *v.* Scott (N. Y.), 8 Cow. 709, on the ground that the pleading raised the issue of the legality of a loan, not a discount, and that the insurance company did have authority to loan its surplus funds on bond, note or mortgage.

Validity of paper issued and discounted without authority.—To an action of debt on a note alleged to have been made and discounted by the plaintiffs in Virginia, but made payable at a bank out of the state, a plea that the plaintiffs are an unchartered banking company, issuing and circulating their own paper notes or bills as currency, contrary to law and public policy; and that they as a banking company discounted the said note, contrary to law and public policy, sets up a good defense to the action. So in such a case, a plea that the consideration of the note declared on was the bank paper of the plaintiffs unlawfully issued by them as currency, they being an unchartered banking company, presents a good defense to the action. Hamtramck *v.* Selden, etc., Co., 53 Va. (12 Gratt.) 28.

77. **Note to secure same loan.**—While a promissory note given to and discounted by a corporation for a loan of money, in the course of an unauthorized banking business, contrary to the Act of March 12, 1845, could not be enforced, yet where the treasurer of such corporation took and appropriated to his private use moneys deposited with it contrary to such act, and being unable, when called on, to refund the same, secured it by his promissory note, such note would not be held to have been given in the course and furtherance of an illegitimate business, and an action will lie thereon. United Protestant, etc., Congregation *v.* Stegner, 21 O. St. 488.

78. **Rights of third persons.**—The bank of K., a banking institution of the state of Virginia, and authorized by its charter to buy, sell and negotiate bills of exchange, etc., acting by its cashier at C., in Ohio, loaned money on the discount of such bills, and, among others, discounted a bill drawn by P., and others, upon L., in the city of New York, which bill was assigned by said bank, before its maturity, to a third party, without notice, actual or constructive, of the manner in which the bill was acquired by the bank. After protest for nonpayment, the indorsee brought suit thereon against the drawers. It was held that such indorsee might maintain an action upon said bill against the drawers, and that his right to do so was not affected by § 1 of the Act of March 12, 1845 (1 S. & C. Stat. 152), "to prohibit unauthorized banking," etc. Pickaway County Bank *v.* Prather, 12 O. St. 497. This decision was based upon the assumption that the discount of the bill was within the prohibition of the statute, and that therefore the bill would have been invalid in the hands of the bank.

so of a note put in circulation without authority.[79] The fraudulent organization of a bank can not be set up as a defense against the payment of an acceptance.[80]

Rights of Action—May Compel Accounting from Cashier.—A private unchartered company, associated for the purpose of carrying on business as a bank, though such associations are contrary to law, will be entertained in a court of chancery, in a suit against its cashier, for an account of his agency.[81] Where the restraining act avoids merely the security, not the contract of loan, an action for money lent will lie.[82]

Curative Legislation.—Notwithstanding a bank may have been organized contrary to law, still, it is competent for the legislature to pass a statute of pardon, waiving the wrong; and in such case, the omission or abuse of authority can not be set up as a defense by the defaulting corporation; nor relied upon as absolving it from the performance of its obligations.[83]

Liability of Officers.—This is treated elsewhere in this work.[84]

§ 10. —— Penalties and Actions Therefor[85]—§ 10 (1) Statutory Provisions and Construction.—One statute against illegal banking will not be held to have been repealed by another which applies to a different type of the mischief at which both were aimed.[86]

79. Circulating noteholders.—Conceding that a bank was organized and bills issued, without the actual payment of the $250,000 in specie, required by the charter, and that by reason thereof, the state might, at any time, have recalled its corporate franchises, or a stockholder have resisted the payment of stock, or a debtor his liability to the bank, provided the rights of third persons were not prejudiced, it was, nevertheless, a valid corporation, so as to make it liable to creditors for its own acts; and its stockholders liable to bill-holders, under the charter, for the ultimate redemption of the bills put in circulation by the bank. McDougald *v.* Bellamy, 18 Ga. 411.

80. Liability on acceptance.—Southern Bank *v.* Williams, 25 Ga. 534.

81. Rights of action.—Berkshire *v.* Evans, 31 Va. (4 Leigh) 223.

82. Action on loan independent of security.—The charter of the Utica Insurance Company authorizes the loan of the company's surplus funds not required in the business of insurance. In an action on a note discounted by it, the defendant pleaded that the company had engaged in banking business contrary to the law restraining unauthorized banking, and, while so engaged, had discounted the note sued on. The second count of the declaration was for money lent. It was held that, conceding that taking the note was an illegal exercise of the right to loan, and that it is prohibited by the restraining act, still the contract of lending affords a good cause of action. Utica Ins. Co. *v.* Kip (N. Y.), 8 Cow. 20; Utica Ins. Co. *v.* Scott (N. Y.), 19 Johns. 1, case reversed on another point in (N. Y.), 8 Cow. 709; Utica Ins. Co. *v.* Cadwell (N. Y.), 3 Wend. 296. See, however, Curtis *v.* Leavitt, 15 N. Y. 9; In re Jaycox, Fed. Cas. No. 7,237, 12 Blatch. 209; New York, etc., Trust Co. *v.* Helmer, 77 N. Y. 64, where this principle of the Utica Ins. Co. cases is questioned.

Although an association may not have power to do a general banking business, if a person borrows money from such association such money may be recovered in an action for money had and received, although an action could not be maintained upon the discount technically. Central Trust Co. *v.* Cook County Nat. Bank, 15 Fed. 885.

83. Curative legislation.—McDougald *v.* Bellamy, 18 Ga. 411.

84. Liability of officers.—See post, "Liability for Debts and Acts of Bank," § 56.

85. Penalties and actions therefor.—Penalties for violation of regulations, see post, "Penalties for Violations of Regulations," § 19.

86. See ante, "In General," § 8.

Liability of Directors and Stockholders.—Where a state law subjects to a penalty any one who became interested in any banking association unauthorized by law, and banks are formed under an unconstitutional law, the obligations of such bank are not enforceable against the directors and stockholders, the transactions being illegal, and the parties particeps criminis.[87]

§ 10 (2) Enforcement—§ 10 (2a) Petition—Sufficiency.—Where a statute imposed a penalty on the exercise of "banking or discounting privileges," a petition which charges that the defendants "exercised banking privileges," is insufficient in law to authorize a judgment against the defendants.[88]

§ 10 (2b) Replication to Plea.—When the plea to an action against the endorser of a note is that it was illegally discounted by an unauthorized association, the replication that it was an authorized loan of surplus funds, as was lawful, need not deny the illegal banking.[89]

87. Nessmith *v.* Shelden, Fed. Cas. No. 10,125, 4 McLean 375. See post, "Liability for Debts and Acts of Bank," § 46; "Nature and Extent," § 57.

88. **Sufficiency of petition.**—State *v.* Williams, 8 Tex. 255.

Where the statute imposes a penalty on the use and exercise of banking or discounting privileges, and also on the issue of each bill, check, promissory note, or other paper to circulate as money, and prescribing that each month that any one should use or exercise banking or discounting privileges should be a distinct offense, and each bill also a distinct offense, and prescribing one penalty for the use or exercise of banking or discounting privileges, and a different penalty for the issue of bills, a petition in an action for using or exercising banking or discounting privileges must specify the particular facts intended to be proved as constituting the offense, and it is not sufficient to allege that defendant, "without authority of law, did use and exercise banking privileges in this state on and from the first day of April, A. D. 1852, for and during the term of one month, fully completed and ended." State *v.* Williams, 8 Tex. 255.

Where a subsequent section of the same statute declared that each and every month during which the same should be exercised should be a separate offense, a petition is defective which fails to allege with great particularity, the specific fact or facts constituting the offense charged, the person or persons who had obtained the discount or discounts, and thus to raise the foundation for proof that it had been so continued for the space of one month. State *v.* Williams, 8 Tex. 255.

89. **Replication to plea.**—In an action by an insurance company incorporated by statute (Sess. Laws 1816, c. 52), against the indorser of a promissory note, defendant pleaded that plaintiff, contrary to Sess. Laws 1812, c. 71, § 2 (forbidding such institutions from joining an association, etc., for the purpose of exercising banking powers), became a member of such an association, and became proprietor of a bank for the purpose of transacting business which incorporated banks may transact; that for this purpose they established a banking house, and issued notes, received deposits, and made discounts as incorporated banks may do; and that the note in question was made for the purpose of being, and was, discounted at their office, they knowing for what purpose it was made. Plaintiffs replied, setting up the act constituting them a corporation, which authorized them to loan their surplus funds, and alleged that they lent a part of their surplus funds on the security of the note, showing the particulars, and that the plaintiffs had subscribed and became members of an association for the purposes in the plea set forth. Defendant demurred specially, assigning for cause that plaintiffs had not in their replica-

§ 10 (2c) Quo Warranto.—When It Lies.—An information, in the nature of a quo warranto, lies against an incorporated company, for carrying on banking operations without authority from the legislature.[90]

Sufficiency of Rejoinder.—A rejoinder admitting the facts alleged as to insolvency and cessation of business, but which avers recommencement of business, is sufficient.[91]

Plea of Not Guilty and Disclaimer of Right—Effect.—In a proceeding in quo warranto charging defendants with illegally exercising a banking franchise, defendant can plead not guilty, and a disclaimer of any right to do the acts complained of.[92] And in such case the state is not entitled to judgment without proof of the charges denied by the plea of not guilty.[93]

Burden of Proof.—An information in the nature of a quo warranto against a corporation for illegally carrying on a banking business need not show title in the people to a franchise. It is the duty of the defendant to show authority for exercising the right.[94]

§ 10 (2d) Jurisdiction and Venue.—This depends upon the terms of the local statutes and is treated entirely in the notes.[95]

tion denied that they illegally established an office or banking house, and issued notes, received deposits, and made discounts, as stated in the plea. Held, that plaintiffs were entitled to judgment on the demurrer. Utica Ins. Co. *v.* Scott (N. Y.), 8 Cow. 709.

90. When quo warranto lies.—People *v.* Utica Ins. Co. (N. Y.), 15 Johns. 353, 8 Am. Dec. 243.

91. Sufficiency of rejoinder.—On an information in the nature of a quo warranto against an incorporated bank for exercising banking privileges without warrant, the respondent pleaded setting forth its act of incorporation and organization under it. To this it was replied that the bank had become insolvent by the fraud, negligence, and mismanagement of some of its officers, had stopped payment, and discontinued and closed their banking operations, for several years. It was held, that a rejoinder admitting the facts alleged, but averring that the bank, on a certain date, had resumed payment, and continued it ever since, was sufficient. People *v.* Niagara Bank (N. Y.), 6 Cow. 196.

92. Plea of not guilty and disclaimer of right.—State *v.* Brown, 34 Miss. 688.

93. State *v.* Brown, 34 Miss. 688.

94. Burden of proof.—People *v.* Utica Ins. Co. (N. Y.), 15 Johns. 353, 8 Am. Dec. 243.

In a proceeding, in the nature of a writ of quo warranto, against individuals, alleging that they had exercised and enjoyed, without legal authority, the franchise of being a banking corporation, it is not sufficient for the defendants merely to show that by an act of the legislature a banking corporation was established, of which they are members, and by virtue of which they exercise the said franchise; but they must also show that the corporation was in such a state of organization that it could use the privileges of a bank, and that they are authorized to bind the corporation by their acts according to the terms of the charter. State *v.* Brown, 33 Miss. 500.

Proceedings to forfeit bank charter, see post, "Proceedings to Enforce Dissolution," § 70.

95. Jurisdiction.—The district court of the county where an "association of individuals" for illegal banking, etc. (Hart. Tex. Dig., art. 88), keep their office, has jurisdiction to try and determine a suit, in behalf of the state, to recover the penalty prescribed, for a violation of the Texas Act of 1848. Williams *v.* State, 23 Tex. 264.

Nature of prohibition.—In Commonwealth *v.* Scott, 250 Va. (4 Rand.) 143, it was held that the act of 1816, 2 Rev. Va. Code, 111, providing that it shall not be lawful for an unorganized company to engage in banking, and that members of such company shall be guilty of a misdemeanor, was penal, and that there-

§ 10 (2e) Service of Process and Execution.—The Texas statute provides for service of citation on the officers of the concern,[96] and for execution against the officers in default of estate of the concern on which to levy.[97]

§ 11. —— Criminal Prosecutions—§ 11 (1) Offense a Statutory One.—The unauthorized exercise of banking or discounting privileges is a statutory offense, unknown to the common law.[98] All the stockholders need not be proceeded against under a statute to suppress illegal banking; to proceed against the officers is enough.[99] And a proceeding to recover

fore the court of appeals had no jurisdiction in the case of an information against the members. See, also, construing this act, Commonwealth *v.* Horner, 37 Va. (10 Leigh) 700; Wilson *v.* Spencer, 22 Va. (1 Rand.) 76, 10 Am. Dec. 491.

Venue.—The Texas statute of 1848 to suppress illegal banking, provided that suit may be brought in the county where the company, corporation or association keep their office. Mills *v.* State, 23 Tex. 295.

96. Service of process.—The statute of 1848 intended to suppress illegal banking provides, that service of citation upon the officers shall be deemed sufficient service upon the corporation, company or association. Mills *v.* State, 23 Tex. 295.

97. Execution.—The statute of 1848, to suppress illegal banking, provides that where the state recovers judgment in any suit, for a violation of the statute, execution may be levied on the estate of the corporation, company or association against whom judgment may be rendered, and in default of such estate, then execution may be levied on the estate of the officers of such corporations, company or association. Mills *v.* State, 23 Tex. 295.

98. Offense a statutory one.—State *v.* Williams, 8 Tex. 255; S. C., 14 Tex. 98; Williams *v.* State, 23 Tex. 264.

Under Texas statutes.—The Texas Act of March 20, 1848, entitled "An act to suppress illegal banking," is intended to apply only to such companies, corporations, and associations as act through officers. Mills *v.* State, 23 Tex. 295.

A proceeding against a banking association, under the Act of 1848 (Hart. Dig. art. 87), to suppress illegal banking, does not call in question the power of the bank to exercise corporate powers, except on the subject of issuing notes. Williams *v.* State, 23 Tex. 264.

Institution of prosecution.—The statute of 1848, intended to suppress illegal banking, did not authorize indictments by the grand juries against those who violate its provisions, although the offense is called, in the statute, a misdemeanor. It required suit to be instituted by the attorney general of the state. Mills *v.* State, 23 Tex. 295; Williams *v.* State, 23 Tex. 264.

Under Hart. Dig., art. 87, Act of 1848, "to suppress illegal banking," the state had power to test the right of a corporation to issue notes as a circulating medium by the proceedings therein provided, and it was not necessary to bring a direct proceeding by quo warranto. Williams *v.* State, 23 Tex. 264.

Under Virginia statutes.—Under the Act of 1816, 2 Rev. Va. Code, § 3, it was unlawful for any unincorporated company to engage in banking. Commonwealth *v.* Horner, 37 Va. (10 Leigh) 700; Commonwealth *v.* Scott, 25 Va. (4 Rand.) 143; Wilson *v.* Spencer, 22 Va. (1 Rand.) 76, 10 Am. Dec. 491; Moses *v.* Trice, 62 Va. (21 Gratt.) 556, citing Farmers' Bank *v.* Reynolds, 25 Va. (4 Rand.) 186; Exchange Bank *v.* Morrall, 16 W. Va. 546.

Under New Jersey statute.—Persons are not guilty of carrying on the business of private banking without authority, in violation of Gen. St., pp. 135-137, §§ 70-77, because as president and treasurer of a New Jersey building association they participate in its lawful business. State *v.* Newberry, 71 N. J. L. (42 Vr.) 18, 58 Atl. 163.

99. Proceedings against officers enough without stockholders.—In an action under Hart. Dig., art. 87, to suppress illegal banking, it is not necessary to prosecute all the stockholders composing such an association, and it is sufficient to proceed against the president, cashier, and di-

the capital stock of an offending banking company for the benefit of the state has been held to be a criminal proceeding.[1]

§ 11 (2) Indictment.[2]—It is sufficient to charge the offense in the words of the statute.[3]

Joint Indictments.—Several persons may be jointly indicted for violation of the statute to prevent illegal banking.[4]

§ 11 (3) Information.—See note.[5]

§ 12. License Fees and Taxes[6]**—§ 12 (1) Power to Impose.—In General.**—The power to impose a license tax on a bank must be exerted by legislation, in order that payment may be required, and it must be imposed in clear and unambiguous terms,[7] but the police power of the state justifies such an imposition,[8] and the fact that national banks are exempt

rectors. Williams *v.* State, 23 Tex. 264.

Effect of nonjoinder.—The liability of defendants (the officers of an illegal banking association) is not affected by the nonjoinder, as defendants of other members and stockholders, besides themselves, of what is, by them, claimed to be a corporation, of which they are officers; because it is a criminal action. Williams *v.* State, 23 Tex. 264.

1. **Proceeding to recover capital stock a criminal one.**—Act of 1816, § 1, provides that it shall not be lawful for any unauthorized company to engage in banking, and that every member, officer, or agent of such company that may engage in banking shall be held to be guilty of a misdemeanor, and shall be liable to be fined. Section 2 declares that all the capital stock of such company shall be held in trust for the benefit of the commonwealth, and that it shall be the duty of the attorney general to institute suit to recover the capital stock aforesaid; that any or all the members of such company may be made defendants, and they shall be severally liable to the commonwealth for their respective proportions of the capital stock. It was held, that proceedings under said sections are criminal, and therefore the court of appeals has no jurisdiction thereof. Commonwealth *v.* Scott, 25 Va. (4 Rand.) 143.

2. For acting as officer of unauthorized bank, see post, "Prosecution and Punishment," § 62.

3. **Charge in words of statute sufficient.**—In an indictment, under the fourth section of the statute, "to prevent illegal banking," it is sufficient to charge the offense in the words of the act; and an acquittal on an indictment so charging the offense will bar a subsequent indictment for an offense against the act within the time covered by the former indictment. State *v.* Presbury, 13 Mo. 342.

4. **Joint indictments.**—State *v.* Presbury, 13 Mo. 342.

5. Against officers of illegal banking associations, see post, "Prosecution and Punishment," § 62.

In the nature of a quo warranto, see post, "Quo Warranto," § 10 (2c).

6. See post, "Taxation," § 324, et seq.

Authority or license to do business.—See ante, "Authority or License to Do Business," § 6.

Application of statute to foreign corporation, see post, "Foreign Banks," § 18.

Savings bank defined.—See post, "Nature and Status," § 289.

Business of banker and banking defined.—The business of a banker, as defined by the acts of congress (13 Stat. 252, 472) providing for a license to carry on the business of banking, is having a place of business where money is received on deposit, paid out on checks, and loaned upon security. Warren *v.* Shook, 91 U. S. 704, 23 L. Ed. 421. See ante, "What Are Banks," § 2.

7. **Power to impose generally.**—State *v.* Bank, 48 La. Ann. 1029, 20 So. 201.

8. **Justified under police power.**—The police power of the state justifies the requirements of Laws N. Y. 1910, c. 348, that a license from the comptroller be obtained by individuals or partnerships desiring to engage in the business of receiving deposits of

therefrom does not offend against the requirement of equality and uniformity.[9] And there is no right to a reduction after the tax is levied, although the law has been changed so as to prohibit so large a levy.[10] A bank authorized to deal in securities is not liable to a broker's tax for buying and selling stocks and bonds.[11] Where a license tax is required of the president, such tax may be collected of him for each bank of which he is president.[12] A change in the settled construction of a statute should not be made retroactive, so as to impose a tax for past years.[13]

Municipal License Tax.—Under a charter power to tax all persons exercising within the city any profession, trade, or calling, or business, a city may tax chartered banks in said city on their business therein to the extent that private bankers are taxed therein.[14] The good faith and rea-

money for safekeeping, or for the purpose of transmission to another, or for any other purpose. Engel *v.* O'Malley, 219 U. S. 128, 55 L. Ed. 128, 31 S. Ct. 191, affirming decree (C. C.), 182 Fed. 365.

9. Equality and uniformity.—Pol. Code, § 4061, imposing a license on banks, is not in conflict with Const., art. 15, § 11, providing that "no company or corporation formed under the laws of any other country, state or territory, shall have * * * any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state," though the national banks organized under the United States laws are not subject to the payment of such license. State *v.* Thomas Cruse Sav. Bank, 21 Mont. 50, 52 Pac. 733, 45 L. R. A. 760.

10. No reduction after levy.—2 Sayles' Civ. St. of Texas, art. 5049, subd. 1, requires occupation taxes to be paid in advance. An occupation tax was levied on defendant, a banker, a few days prior to the passage of Gen. Laws (Called Sess.) 25th Leg., p. 50, which amended the act under which such tax was levied by prohibiting so large a levy as that made on defendant. Held, that the defendant was not entitled to a reduction of the tax already levied. Brooks *v.* Texas (Civ. App.), 58 S. W. 1032.

11. Not liable to broker's tax.—State *v.* Nashville Sav. Bank, 84 Tenn. (16 Lea) 111.

12. Tax on president for each bank over which he presides.—Act Dec. 16, 1902 (Act 1902, p. 20), § 2, par. 2, provides that the specific tax of $10 for each of the fiscal years of 1903 and 1904 shall be levied on the presidents of certain corporations doing business in the state, including banks. Held that, under the act, where the same person is president of two or more banks, a tax of $10 may be collected from him for each bank for which he was president, and, where plaintiff was the president of several banks, he is liable to be taxed for each bank. Witham *v.* Stewart, 129 Ga. 48, 58 S. E. 463.

13. Construction—Change not retrospective.—The words, "That for each business of carrying on a bank, banking company, association, corporation or agency," as used in the Louisiana license law (Act No. 150 of 1890), having for a number of years been construed by those charged with its execution as not entitled the state to exact a license for "the business of carrying on a bank," etc., from an agency in New Orleans of a foreign bank, where such agency received no deposits, and discounted no commercial paper, but confined its business to making advances on cotton and grain en route to Europe, and to the dealing in exchange incidental and necessary to that business; and the general assembly having, in 1898, imposed a license on the specific business done by such agency—the construction of the Act of 1890 will not be changed so as to require the agency to pay back licenses, with heavy penalties, for "the business of carrying on a bank," etc., during the years when the previous construction obtained. State *v.* Comptoir Nat., etc., De Paris, 51 La. Ann. 1272, 26 So. 91.

14. Municipal license tax.—Under a grant in its charter to tax brokers and "all other persons exercising within the city any profession, trade, or calling, or business of any nature whatever," the city of Macon may tax chartered banks in said city on their business therein to the extent that

sonableness of a charge against banks imposed by a city ordinance under a law authorizing the licensing of banks being conceded, it will be presumed to be a license as it purports to be, and not a tax for revenue.[15]

Amount.—A license tax of $200 imposed by a municipal corporation on banks is not unreasonable.[16]

§ 12 (2) Exemptions.—Some free banking acts have been held to exempt banks from any license.[17] But an exemption of bank stock from taxation did not exempt it from payment of a license tax.[18] A bank is not exempt from the provisions of a municipal ordinance, taxing every one engaged in any form of business or trade, because it is incorporated under act of the legislature,[19] or because it has paid a state license tax.[20]

§ 12 (3) Interest.—The rule is that interest is not recoverable unless the statute authorizes it.[21]

§ 12 (4) Effect of Payment.—The payment of a privilege tax may be made in lieu of all other taxes.[22]

private bankers are taxed therein. Macon *v.* Macon Sav. Bank, 60 Ga. 133.

Under a charter authorizing it to license and tax money changers, a municipal corporation may require bankers to take out a license. Hinckley *v.* Belleville, 43 Ill. 183.

15. Presumed to be license and not a tax.—Oil City *v.* Oil City Trust Co., 151 Pa. 454, 25 Atl. 124, 31 Am. St. Rep. 770.

16. Amount.—State *v.* Columbia, 6 S. C. 1.

17. Exemptions—Louisiana.—Banks organized under the free banking law of Louisiana are exempt by that act from paying to the state or any of its municipal corporations a license for carrying on the business of banking. State *v.* Southern Bank, 23 La. Ann. 271.

Banking institutions, incorporated under the banking laws of the state, with a capital less than the minimum expressed in paragraph 13 of the revenue license law, can not be required to pay license. State *v.* Bank, 48 La. Ann. 1029, 20 So. 201.

But no act or charter can exempt any bank from license taxation, under the constitution of 1868. New Orleans *v.* New Orleans, etc., Banking Co., 32 La. Ann. 104.

The "New Orleans Savings Institution" was at least a bank of deposit, and, as such, liable to the payment of the annual license tax imposed by the city of New Orleans, under its ordinances, on "banks, banking houses, banking companies, or banking agencies." New Orleans *v.* New Orleans Sav. Inst., 32 La. Ann. 527.

And a banking corporation which organized in the year 1873 under the free banking law, which had been reenacted in 1870, is liable for the same license tax as that imposed on other banking institutions. State *v.* Southern Bank, 31 La. Ann. 519.

18. Exemptions from taxation.—New Orleans *v.* New Orleans, etc., Banking Co., 32 La. Ann. 104; New Orleans *v.* State Nat. Bank, 34 La. Ann. 892.

19. Incorporation does not exempt from municipal license tax.—State *v.* Columbia, 6 S. C. 1.

20. In payment of state license.—A bank is not relieved from paying local license taxes, which have been imposed by a municipal corporation, because it has also paid the license tax imposed by the state government. State *v.* Columbia, 6 S. C. 1.

21. Interest.—In Brooks *v.* Texas (Civ. App.), 58 S. W. 1032, an action to collect a delinquent occupation tax, levied under 2 Sayles' Civ. St. of Texas, art. 5049, subd. 5, authorizing such tax on banks, it was held error to allow interest thereon, as not authorized by statute.

22. Privilege tax in lieu of all other taxes.—Miss. Code 1880, §§ 557, 585, as amended by Laws 1888, which provide for a privilege tax to be paid by banks, and vary the amount with

§ 13. Limitation of Indebtedness.[23]**—Scope of Constitutional Provision.**—A constitutional provision that banks shall not increase their indebtedness can not be applied to a bank incorporated before adoption of the constitution, and which has not accepted any legislation under it.[24] And for bank directors to give a mortgage to a depositor to secure repayment of his deposits does not violate a prohibition that the directors shall not increase the indebtedness of the bank without consent of the stockholders.[25]

§ 14. Reserves.—As to validity of legislation therefor, see ante, "Power to Control and Regulate," § 3.

Construction of Statute.[26]—A statutory requirement of the retention of a certain per cent of net profits as a reserve fund, with a provision allowing the bank to dispose of any excess thereof over $100,000, does not prevent the creation of a larger reserve than that.[27] And the discretion of the directors as to the maximum will not be controlled by the courts, unless unfairly or wantonly exercised.[28]

reference to the capital stock or assets, and declare that such tax "shall be in lieu of all other taxes, state, county, and municipal, upon the shares and assets of said banks," are not unconstitutional, under Const., art. 12, § 13, which declares that "the property of all corporations for pecuniary profits shall be subject to taxation, the same as that of individuals," as the legislature has the power to exempt property from taxation whether the owners be corporations or natural persons; nor do they violate section 16, which declares that "no county shall be denied the right to raise, by special tax, money sufficient to pay for * * * conveniences for the people of the county, * * * provided the tax thus levied shall be a certain per cent on all tax levied by the state," as by this section the right of the counties under it is limited to the levy of "a certain per cent on all tax levied by the state," and the subjects of taxation are to be determined by the legislature. Vicksburg Bank *v.* Worrell, 67 Miss. 47, 7 So. 219.

Under Act March 8, 1888, § 4, providing that, if a proper privilege tax had been paid before its passage, it should protect the privilege to the expiration of the license, where a bank paid its privilege tax for the years 1888 and 1889 it was protected so far as the privilege was concerned. Vicksburg Bank *v.* Adams, 74 Miss. 179, 21 So. 401.

Real estate owned by a bank constitutes part of its assets, within the meaning of Code, §§ 557, 585, as amended by Laws 1888, providing that banks shall pay a privilege tax, whose amount varies with their "capital stock or assets," in lieu of all other taxes. Vicksburg Bank *v.* Worrell, 67 Miss. 47, 7 So. 219.

23. Borrowing money.—See post, "Borrowing Money," § 97.

As to liability of directors for wrongful increase of indebtedness, see post, "Nature and Extent," § 57.

24. Scope of constitutional provision.—Ahl *v.* Rhoads, 84 Pa. 319.

25. Mortgage to depositor to secure deposits.—Ahl *v.* Rhoads, 84 Pa. 319.

26. As to safety funds and deposits, see post, "Safety Funds and Deposits of Securities," § 15.

27. Construction of statute.—St. 1862, p. 200, c. 187, § 11, providing that banking corporations having no capital stock shall retain on each dividend day at least 5 per cent of the net profits of the corporation, to constitute a reserve fund, to be used in paying any of the losses which the corporation may sustain, and that the corporation may provide by its by-laws for the disposal of any excess in the reserve fund over $100,000, and the final disposal upon the dissolution of the corporation of the reserve fund or remainder thereof after payment of losses, does not prevent a corporation from creating a reserve fund in excess of $100,000. Mulcahy *v.* Hibernia Sav., etc., Soc., 144 Cal. 219, 77 Pac. 910.

28. Discretion of directors.—Mulcahy *v.* Hibernia Sav., etc., Soc., 144 Cal. 219, 77 Pac. 910.

In a suit to compel a banking cor-

Proceeding to Enforce Distribution of Reserve.—In a suit to compel a banking corporation to distribute part of its reserve fund, the maximum amount of which is lodged in the discretion of its directors, an averment in the complaint that the directors acted in bad faith in endeavoring to exclude the plaintiff as a member of the corporation has no bearing on any question as to the reserve fund.[29] And an averment in the complaint that it was unnecessary for the corporation to keep in the reserve fund an amount specified as that kept by the corporation, because it was not indebted to any one except its depositors, and had no unpaid losses in its business, and because no banking corporation in the state carried a reserve of the size carried by defendant, is a mere conclusion of the pleader, in the absence of a statement of the amount of the indebtedness of the corporation to its depositors.[30]

§ 15. Safety Funds and Deposits of Securities[31]—§ 15 (1) Necessity and Constitutionality.—No deposit of money or stock need be made unless expressly required by the terms of some statute.[32]

Bank Guaranty Funds.—Legislation subjecting state banks to assessments for a depositors' guaranty fund has been held to be a valid exercise of the police power,[33] although contribution thereto is not made obliga-

poration to distribute part of its reserve fund, the maximum amount of which is in the discretion of its directors, the court can not interfere with the discretion of directors, and compel a distribution, in the absence of a showing that, in violation of plaintiff's rights, the directors had refused to declare dividends to which he was entitled, without just reason, and notwithstanding they had in their hands ample funds which should be devoted to that purpose. Mulcahy *v.* Hibernia Sav., etc., Soc., 144 Cal. 219, 77 Pac. 910.

Where, under a statute creating a banking corporation, the minimum amount of reserve fund to be accumulated by it is $100,000, and the maximum is lodged in the discretion of the board of directors, the accumulation of a reserve of $2,500,000 does not of itself render the accumulation fraudulent. Mulcahy *v.* Hibernia Sav., etc., Soc., 144 Cal. 219, 77 Pac. 910.

29. Proceeding to enforce distribution of reserve.—Mulcahy *v.* Hibernia Sav., etc., Soc., 144 Cal. 219, 77 Pac. 910.

30. Averment of legal conclusion.—Mulcahy *v.* Hibernia Sav., etc., Soc., 144 Cal. 219, 77 Pac. 910.

31. Reserves.—See ante, "Reserves," § 14.

32. Necessity.—Marion Sav. Bank *v.* Dunkin, 54 Ala. 471.

Under the Alabama free-banking law of 1868 (Rev. Code, pt. 2, tit. 1, c. 1, § 1644, et seq.); an association, not claiming the right to issue or circulate its own notes, need not deposit money or transfer stock to the auditor, to authorize it to carry on other banking business. Marion Sav. Bank *v.* Dunkin, 54 Ala. 471.

33. Bank guaranty funds.—The Acts of December 17, 1907, and March 11, 1909, of Oklahoma, subjecting state banks to assessments for a depositors' guaranty fund are within the police power of the state and do not deprive banks assessed of their property without due process of law or deny to them the equal protection of the law, nor do they impair the obligation of the charter contracts. Noble State Bank *v.* Haskell, 219 U. S. 104, 55 L. Ed. 112, 31 S. Ct. 186, affirming 22 Okl. 48, 97 Pac. 590.

Such legislation is not in violation of the constitutional provision that "all persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry;" or that which provides that: "No private property shall be taken or damaged for private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining or

tory.[34] And the permission to national banks to avail themselves of such a state law does not invalidate it, even if ineffectual,[35] and it is no objec-

sanitary purposes, in such manner as may be prescribed by law;" or which provides that "private property shall not be taken or damaged for public use without just compensation." Noble State Bank *v.* Haskell, 22 Okl. 48, 97 Pac. 590.

The police power extends to all the great public needs, Camfield *v.* United States, 167 U. S. 518, 42 L. Ed. 260, and includes the enforcement of commercial conditions such as the protection of bank deposits and checks drawn against them by compelling co-operation so as to prevent failure and panic. Noble State Bank *v.* Haskell, 219 U. S. 104, 55 L. Ed. 112, 31 S. Ct. 186, affirming 22 Okl. 48, 97 Pac. 590.

The dividing line between what is, and what is not, constitutional under the police power of the state is pricked out by gradual approach and contact of decisions on opposing sides; and while the use of public credit to aid individuals on a large scale is unconstitutional, a statute compelling banks to contribute to a guarantee fund to protect deposits, such as that of Oklahoma, under consideration in this case, is constitutional. Noble State Bank *v.* Haskell, 219 U. S. 104, 55 L. Ed. 112, 31 S. Ct. 186, affirming 22 Okl. 48, 97 Pac. 590.

"The power to compel, beforehand, co-operation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. Gundling *v.* Chicago, 177 U. S. 183, 44 L. Ed. 725. So far is that from being the case that the device is a familiar one. It was adopted by some states the better part of a century ago, and seems never to have been questioned until now. Danby Bank *v.* State Treasurer, 39 Vt. 92; People *v.* Walker, 17 N. Y. 502. Recent cases going not less far are Lemieux *v.* Young, 211 U. S. 489, 496, 53 L. Ed. 295, 29 S. Ct. 174; Kidd, etc., Co. *v.* Musselman Grocer Co., 217 U. S. 461, 54 L. Ed. 839, 30 S. Ct. 606." Noble State Bank *v.* Haskell, 219 U. S. 104, 55 L. Ed. 112, 31 S. Ct. 186, affirming 22 Okl. 48, 97 Pac. 590. See, also, Attorney General *v.* North American Life Ins. Co., 82 N. Y. 172; Elwood *v.* Treasurer, 23 Vt. 701, in which similar statutes of New York and Vermont were sustained. See, also, People *v.* Walker, 17 N. Y. 502; In re Reciprocity Bank, 29 Barb. 369, 17 How. Prac. 323, reversing 22 N. Y. 9, where the appellate courts in New York construed the provisions of said act without the question of their constitutionality ever being raised. And see Dolley *v.* Abiline Nat. Bank, 102 C. C. A. 607, 179 Fed. 461, 32 L. R. A., N. S., 1065, and Assaria State Bank *v.* Dolley, 219 U. S. 121, 55 L. Ed. 123, 31 S. Ct. 189, affirming Larabee *v.* Dolley, 175 Fed. 365, sustaining a similar Kansas statute.

34. Contribution need not be obligatory.—A state statute creating a bank depositors' guaranty fund for the purpose of securing the full repayment of deposits in case of the insolvency of any bank contributing to the fund is no less a valid exercise of the police power because contribution to such fund is not absolutely required. Assaria State Bank *v.* Dolley, 219 U. S. 121, 55 L. Ed. 123, 31 S. Ct. 189, affirming Larabee *v.* Dolley, 175 Fed. 365.

35. Effect of permitting national banks to avail of law.—The section permitting national banks to avail themselves of the privileges of the protection of this depositors' guaranty fund law does not permit an injustice against the state banks, as the national banks which might avail themselves of the benefit of the law could, if they desire, repudiate the contract as ultra vires, and refuse to continue to pay their assessments, thereby endangering the assessment fund paid pro rata by the state banks, in the event of the failure of national banks which have availed themselves of the privileges of said law. Concede that such a contract is ultra vires as to national banks, that does not render the law invalid as to state banks. If the contract of the banking board is not binding upon the national banks, the converse of the proposition is also true, that it is not binding upon the state banking board. Neither party could claim any independent benefit under a void law or statute. At most, all the national bank could recover, in such event, would be the money paid under the same in good faith, when not against public policy. Noble State Bank *v.* Haskell, 22 Okl. 48, 97 Pac. 590.

tion to such legislation that it may incidentally increase competition with national banks.[36]

§ 15 (2) Obligation Therefor and Payment.—The charter of a bank expired on December 31, 1849. Held, that it was not bound to pay its proportion for that year of the state safety fund due "on or before" January 1, 1850.[37] The state, under an early New York statute (1829), was held to become a trustee of the whole fund, for the benefit of all who might have claims on it, and the people were the proper party plaintiff in an action to compel a bank to contribute.[38]

§ 15 (3) Lien of State—Substitution of Other Securities.—Where a bank purchased state bonds, giving a bond for 30 per cent of the purchase price, and agreed to deposit bonds as security for circulation, and these bonds were afterwards withdrawn and other securities substituted, in the absence of any agreement for any lien or claim on other securities than the bond given for unpaid installments, the state had no lien on the securities substituted, for unpaid installments due it from the bank.[39]

§ 15 (4) Effect of Failure to Deposit.—When a banking company

36. As affecting national banks.—The Bank Depositors' Guaranty Act of Kansas (Laws 1909, c. 61), which authorized banks incorporated under the laws of the state and possessing prescribed qualifications to join in contributing to and maintaining a fund for certain classes of their depositors against loss in case of the insolvency of any of their number, is not unconstitutional on the ground that its effect may be to attract depositors from the national to the guaranteed banks, and thus increase competition with the national banks, and impair their efficiency as instrumentalities of the national government; such effect, if any, being merely indirect and incidental. Dolley *v.* Abiline Nat. Bank, 102 C. C. A. 697, 179 Fed. 461, 32 L. R. A., N. S., 1065, reversing order, Larabee *v.* Dolley, 175 Fed. 365.

37. Obligation therefor and payment.—People *v.* Walker, 17 N. Y. 502.

38. State as trustee—Party plaintiff.—People *v.* Walker, 21 Barb. 630, reversed in 17 N. Y. 502, but on another point.

The state comptroller notified a bank liable to contribute to the safety fund that the fund was reduced below the amount required by law, and that the bank was required to pay to the treasurer of the state, on or before the 1st of January then next, half of 1 per cent on its capital stock. Held, that that sum continued to be payable each year, without any subsequent notice from the comptroller, till the fund was reimbursed. People *v.* Walker, 21 Barb. 630, reversed in 17 N. Y. 502, but on another point.

39. Lien of state—Substitution of other securities.—State *v.* Rusk, 21 Wis. 212.

A bank purchased state bonds, paying 70 cents on a dollar, and giving its bond conditioned for the payment of 30 per cent more, in semiannual installments, with an agreement that the bonds so purchased should be deposited with the bank comptroller as security for the circulation of the bank, and that the state treasurer, in case of default in payment of any of these installments, might retain for the use of the state, in payment of such unpaid installments, the amount thereof out of the interest falling due on the state bonds so deposited, if in the opinion of the comptroller the circulation of the bank should be fully secured. These bonds being afterwards withdrawn by the bank, and other securities substituted, according to provisions of law, it was held that, in the absence of any agreement for any lien or claim on other securities than the bond, the state had no lien on the securities substituted for unpaid installments due it from the bank. State *v.* Rusk, 21 Wis. 212.

has commenced business without depositing the securities required by the statute, those stockholders who engage in or authorize and sanction such business assume its liabilities,[40] and the contracts of the corporation will be void.[41]

§ 15 (5) Loss.—The state is not liable for loss of bonds deposited with the state treasurer in compliance with statute, in absence of an express guarantee or contract, or for any deficiency in their amount.[42]

§ 15 (6) Custody, Title and Control.—In General.—Such transfers are not absolute, but merely pledges for the purpose of guaranty.[43]

Sinking Funds.—Where by the charter of a bank, a sinking fund was provided for, to pay the holders of the bonds of the state, issued to purchase stock, such bondholders have no control over the appointment of the trustees of such fund, nor over the trustees in their management of it. If they can object to its management at all, they can do so only in a court of equity; and there, it seems, only for an improper exercise of authority.[44] Where the charge of the fund had been given to a "state commissioner," the state held the fund in trust and should appoint a trustee to fill any vacancy,[45] and the commissioners of such a sinking fund may loan the same at interest.[46]

Withdrawal.—A statute providing that, on giving a certain bond, a bank

40. Effect of failure to deposit.—Medill *v.* Collier, 16 O. St. 599.

41. Contracts void.—A banking corporation organized under the Act of March 21, 1851, can not lawfully transact its business until it has complied with that clause of the banking act requiring the deposit of securities with the auditor of the state, before commencing business; and a failure to comply with the law will render the contracts of the corporation void. Medill *v.* Collier, 16 O. St. 599. See, also, post, "Conditional Incorporation—Conditions Precedent and Beginning of Corporate Existence," § 23 (2).

42. Liabilities of state for loss.—Clark *v.* State, 47 Tenn. (7 Coldw.) 306.

A bank comptroller holds the securities deposited with him under the banking laws as trustee for the banks and bill holders, and there is no liability on the part of the state to the banks for such deposits. State *v.* Rusk, 21 Wis. 212.

43. Transfers not absolute but in pledge.—Citizens' Bank *v.* Gay, 47 La. Ann. 551, 17 So. 148.

Foreclosure of mortgage.—Mortgages assigned to the treasurer of the state as security under the statute to authorize banking (Nix. Dig. 48) may be foreclosed by the treasurer, and the debt collected by a sale of the premises. Townsend *v.* Smith, 12 N. J. Eq. (1 Beasl.) 350, 72 Am. Dec. 403.

44. Sinking funds.—Young *v.* Hughes (Miss.), 12 Smedes & M. 93.

And where the charge of the fund was by a subsequent legislative enactment given to a "state commissioner," who was authorized to coerce payment of debts by suit or otherwise, the state commissioner was a proper party to sue to recover a debt belonging to the fund. Young *v.* Hughes (Miss.), 12 Smedes & M. 93.

45. Fund held by state commissioner.—In an action in the name of the commissioner, to recover a debt belonging to the fund, it was held, on demurrer to the declaration, that the state held the fund in trust, and that it was her duty to appoint a trustee in case any vacancy occurred. Young *v.* Hughes (Miss.), 12 Smedes & M. 93.

46. Power to loan.—The commissioners of the sinking fund of the Planters' Bank have the right to loan the same at interest, and to sue for and collect it. Montgomery *v.* Commissioners (Miss.), 7 How. 13; Commissioners *v.* Walker (Miss.), 6 How. 143, 38 Am. Dec. 433.

shall thereafter be exempt from all payments required to be made to the bank fund, and from all the provisions for the establishment, preservation, and regulation of said fund, gives a bank no right, by reason of giving such bond, to withdraw from the bank fund what it has previously paid into said fund, pursuant to chapter 84.[47] But the inference is drawn from this case that each contributor has a reversionary interest entitling it to a return of what remained if the purpose were given up.[48]

§ 15 (7) Payment of Debts Therefrom.—When a bank ceases to do business in consequence of its insolvency, the balance of the indebtedness of the bank in excess of its property and effects must be paid by the bank fund,[49] without regard to who contributed the fund,[50] including the notes of the bank,[51] and the duty may be enforced by mandamus against the state treasurer.[52]

Action by Single Creditor.—A single creditor may sue upon the bond for prompt repayment of deposit, where it does not appear that there are others entitled to the security.[53]

47. **Withdrawal.**—Danby Bank *v.* State Treasurer, 39 Vt. 92.

A bank, organized under St. 1851, has no title to maintain an action on a security assigned to the state treasurer till after a reassignment. South Royalton Bank *v.* Downer, 28 Vt. 635.

48. **Reversionary interest.**—Noble State Bank *v.* Haskell, 219 U. S. 104, 110, 55 L. Ed. 112, 31 S. Ct. 186, affirming 22 Okl. 48, 97 Pac. 590.

49. **Payment of debts therefrom.**—Danby Bank *v.* State Treasurer, 39 Vt. 92; Elwood *v.* Treasurer, 23 Vt. 701.

50. Where, under the general banking law the entire safety fund was made liable for the payment of all the debts of any insolvent bank, exclusive of capital stock; and this without reference to the time when the debts accrued, or when the insolvency accrued, or at what time any particular bank began to contribute, hence, that part of the fund contributed by any particular bank could not be withheld from being appropriated for the payment of the debts of an insolvent bank, upon the ground that the bank for the payment of whose debts it was required became insolvent previous to the time when the bank contributing such part of the fund came into existence under its charter. Elwood *v.* Treasurer, 23 Vt. 701.

51. **Notes of a bank,** received as collateral security after such bank has suspended specie payments, but afterwards gone on for a time under a specific arrangement, are embraced by a bond given to secure the notes of the bank, if the creditors on notes issued before the suspension omitted to issue process of execution under the bond, when forfeited, and gave no notice to receivers of notes afterwards issued. In re Dyott (Pa.), 2 Watts & S. 463.

A person establishing a bank gave to certain trustees a bond to secure promissory notes that might be issued. Held, that it embraced all notes whatever in the nature of bank notes, whether payable on demand, or post notes payable at a future day. In re Dyott (Pa.), 2 Watts & S. 463.

52. **Mandamus.**—A receiver of an insolvent bank is entitled to a mandamus to compel the state treasurer to pay to him from the bank fund a sum sufficient to discharge the excess of the bank's indebtedness beyond its effects, provided such fund is large enough. But the writ should not require payment of any money of the state, as distinguished from the bank fund; nor should it require the treasurer to pay money of his own, on the score of his having subjected himself to liability for the deficit of the fund by reason of his having wrongfully made payments from the fund to banks not entitled to such payments. Danby Bank *v.* State Treasurer, 39 Vt. 92.

53. **Action by single creditor.**—Where a banker executed a bond as required by Laws 1907, c. 185, as amended by Laws 1908, c. 479, providing for a bond conditioned for prompt repayment of deposits, and

§ 15 (8) School Funds.—(Okl.) Comp. Laws 1909, § 7943, provides a specific system for the protection of any part of the permanent school fund temporarily deposited in banks or trust companies, and the protection extended to general depositors by section 323, providing for the depositors' guaranty fund, does not apply to deposits of the permanent school fund.[53a]

§ 16 Reports and Statements[54]**—§ 16 (1) Duty to Make and Effect of Failure.**[55]—Only reports and statements expressly required of the banks by law can be demanded of them.[56]

Statutory Provisions and Repeal.—Where a statute requires reports to be filed in a certain office and published in newspapers, it is not repealed by a subsequent statute creating a board of bank commissioners not inconsistent with it.[57]

that a suit may be brought thereon by any party aggrieved, a depositor may sue alone at law on the bond in the absence of any proof of the existence of other creditors, or that the money of any other person has been embezzled. Alessandro *v.* People's Surety Co., 143 App. Div. 145, 127 N. Y. S. 572. See, also, Guffanti *v.* National Surety Co., 133 App. Div. 610, 118 N. Y. S. 207, affirmed in 196 N. Y. 452, 90 N. E. 174, 134 Am. St. Rep. 848.

53a. School funds.—Columbia Bank and Trust Co. *v.* United States Fidelity, etc., Co. (Okl.), 176 Pac. 556.

54. Falsification of by bank officers, see post, "Offenses," § 61; "Prosecution and Punishment," § 62.

By trust companies, see post, "Control and Regulation in General," § 310.

55. As ground of forfeiture of charter, see post, "Grounds for Forfeiture of Franchise or Dissolution," § 68.

Effect on right to sue, see post, "Capacity to Sue and Be Sued," § 213.

Liability of officers for failure to make reports, see post, "Nature and Extent," § 57.

56. Express authority of law essential to requirement of reports.—State *v.* Union Bank (La.), 4 Rob. 199, construing Louisiana statute of Feb. 5, 1842.

Banking partnership not within statute.—Sections 108, 109, of Act 99 O. L. 269, the former requiring "every banking company, saving bank, * * * and every person or copartnership doing a banking business," to make certain reports, and the latter requiring the president, vice president, cashier, secretary or treasurer to verify such reports, neither expressly nor by necessary implication require a banking partnership to make reports as required by §§ 3817, 3818, Rev. Stat., which required certain reports to be made to the auditor of the state. Guilbert *v.* Kilgour, 8 N. P., N. S., 617, 19 O. D. N. P. 670 (see 8 N. P., N. S., 81, 19 O. D. N. P. 837). See ante, "Right of Banking in General," § 1.

A banking partnership is not an "institution" within the meaning of §§ 3817, 3818, Rev. Stat., requiring "every banking institution, or corporation engaged in the business of banking," to file certain reports, verified by its officers. Guilbert *v.* Kilgour, 8 N. P., N. S., 617, 19 O. D. N. P. 670 (see 8 N. P., N. S., 81, 19 O. D. N. P. 837).

57. Statutory provisions and repeal.—By Act April 1, 1876, each banking company was required to file, with the recorder of the county wherein its principal office was, certain sworn statements, showing the amount of capital employed by it, and the condition of its assets and liabilities, which statements should be published semiannually in a local newspaper. Any bank failing to comply with these provisions was debarred from suing in any court of the state. Acts 1877-78, p. 740, created a board of bank commissioners, whose office was to be at San Francisco, and whose duty it was to investigate and report upon violations of the banking law. All banks were required to report to them semiannually on the state of their business, and these statements were to be preserved and kept for inspection. No mention was made of filing statements in the recorder's office, or of publishing them in newspapers. All incon-

Denial of Access to State Courts.—Where the statute merely denies access to the state courts to banks failing to comply therewith, they may still transact banking business in the state.[58]

Liability to Be Proceeded against as Insolvent.—Sometimes failure to comply makes the banking association liable to be proceeded against as insolvent.[59]

Untrue Returns to Governor.—Charges in a bill that a small sum was paid in money for bank stock, and the balance paid in notes for stock notes, and that the purchasers became president and directors and reported to the governor that one-fourth of the capital stock was paid in, when the report was known to be untrue, require an answer and explanation. The charges uncontradicted warrant the strongest conclusions against the parties.[60]

§ 16 (2) Time to Make.—While a quarterly statement must be made at the time required by law, or it need not be received,[61] yet, where an act (Cal. St. 1876, p. 729), provides that banking corporations shall publish in January and July of every year statements of their financial condition, yet, in view of the fact that the only penalty provided for failure to so publish is that no corporation can maintain an action "until" such statement has been published, a publication of a statement before the time named in the statute for the publication of the next statement is sufficient,[62] where intended in good faith as a compliance with its requirements.[63]

§ 16 (3) Form and Contents.—Substantial Compliance with Statute.—Substantial compliance with the requirements of the statute requiring the report or statement is necessary.[64] But substantial compliance

sistent acts were repealed. Held, that there was no inconsistency in the acts, and that the former was not repealed by the latter. Bank *v.* Cahn, 79 Cal. 463, 21 Pac. 863.

58. Denial of access to state courts.—Barling *v.* Bank, 50 Fed. 260, 1 C. C. A. 510, construing Cal. Act April 1, 1876 (St. 1876, p. 729).

59. Liability to be proceeded against as insolvent.—Boisgerard *v.* New York Banking Co. (N. Y.), 2 Sandf. Ch. 23, affirmed in 4 Ch. Suit, 20, construing statute of 1841.

60. Untrue returns to governor.—Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

61. Quarterly statement.—People *v.* Campbell, 14 Ill. 400.

62. Publication before time named for publication of next statement.—Bank *v.* Madison, 99 Cal. 125, 33 Pac. 762.

63. Intention to comply in good faith.—The statute requires that the statements be published each year in January and July. It appeared that plaintiff could not get its statements from London before about the middle of February and August, and did not publish them until the following July or January, respectively. Held that, though it would have been a more substantial compliance with the statute to have published the statements as soon as received, yet withholding them until the recurrence of the next July or January would not of itself have been considered a fatal defect, since it would have been presumed that the delay was caused by the supposition that the publication could be legally made only in the months named in the statute, and was therefore intended in good faith as a compliance with its requirements. Bank *v.* Alaska Imp. Co., 97 Cal. xvii, 31 Pac. 729; S. C., 97 Cal. 28, 31 Pac. 726.

64. Substantial compliance with statute.—Bank *v.* Alaska Imp. Co., 97 Cal. 28, 31 Pac. 726; S. C., 97 Cal. xvii, 31 Pac. 729.

St. 1875-6, p. 729, provides that bank-

is sufficient, as, where the statute provides for the publication of two statements, the publication of the two statements in one document is sufficient;[65] and under a provision of the statute that the published statement shall contain "the actual condition and value of the assets" of the corporation, a statement showing the amount of cash on hand and at bankers, the amount of cash at call and short notice, the amount of investments, the amount of bills receivable and other securities, and the value of the corporation's premises, is sufficient.[66] Under a statute requiring returns to be made by the officers of banks, the return of the cashier must be founded on the books of the bank, and must contain a true statement of the condition of the bank at the time of making the return.[67] Under a statute requiring a quarterly report of the condition of the bank in various particulars, including loans and discounts due from the directors, the bank may be required to state in a general way, the largest amount due any one individual, firm, or corporation, and also the aggregate of loans upon paper made, accepted or indorsed by the directors as individuals or as members of firms.[68]

§ 16 (4) Verification.—The primary meaning of "verify" is to affirm under oath, and a statute requiring a firm doing a banking business to

ing corporations shall publish and record statements each year in January and July; that one of such statements shall show the amount of capital stock actually paid in, and the other shall show the actual condition and value of its assets and liabilities, and where the assets are situated. Plaintiff filed a statement which, omitting the figures, was, under the head of "Liabilities:" "Capital," $——; "Circulation," $——; "Deposits," $——; "Bills payable and other liabilities," $——; "Undivided net profits," $——; "Total," $——; and under the head of "Assets:" "Specie on hand and cash at banker's," $——; "Bills receivable and other securities," $——; "Investments," $——; "Bank premises," $——; "Total," $——,—a sum equaling the liabilities. Held, that the statement was not a substantial compliance with the statute. Bank *v.* Alaska Imp. Co., 97 Cal. 28, 31 Pac. 726, S. C., 97 Cal. xvii, 31 Pac. 729.

65. Publication of two statements in one document.—Bank *v.* Madison, 99 Cal. 125, 33 Pac. 762.

Though the statute provides for the publication of two statements—one of the capital stock, and the other of the assets and liabilities, of the corporation—the publication of the two statements as one document is sufficient, where the amount of the capital stock, and the actual condition and value of the assets and liabilities, are set out in the document. Bank *v.* Madison, 99 Cal. 125, 33 Pac. 762.

66. Statement of condition and value of assets.—Bank *v.* Madison, 99 Cal. 125, 33 Pac. 762.

Under a provision that the published statement shall contain "the actual condition and value of the liabilities" of the corporation, a statement showing the amount of capital, the amount of reserve fund, the amount due depositors, the amount of circulation, the amount of bills payable and other liabilities, the amount of rebate, and the amount of undivided net profits, is sufficient. Bank *v.* Madison, 99 Cal. 125, 33 Pac. 762.

Under a provision that the published statement shall set forth "where" the assets are situated, a statement reciting that part of the assets are in London, England, part in San Francisco, part in New York City, and part in Canada, without giving the amount of assets at the places named, is sufficient. Bank *v.* Madison, 99 Cal. 125, 33 Pac. 762.

67. Return must be founded on books of the bank.—Commonwealth *v.* Dunham, Thacher Cr. Cas. 519, construing an old Massachusetts statute.

68. Report as to loans and discounts due from directors of bank.—People *v.* Vail (N. Y.), 6 Abb. N. C. 206, 57 How. Prac. 81, construing New York statute of 1847.

make reports to the auditor of state, verified by some member of the firm, calls for reports under oath.[69] A verification to the best of affiant's knowledge and belief is sufficient when that is the language of the statute,[70] or where the specified officer or agent could not have actual knowledge of its correctness, e. g. of the condition of a foreign corporation.[71] But where the statute requires a sworn statement, verified by some officer of the bank, the affidavit must show that the officer at least swears that he believes it to be true, not merely that it is a copy of another statement.[72]

§ 16 (5) Returns as Notice of Bank's Condition.—The returns required by law to be made to the governor and published are a source of information and opened to every person having dealings with the bank, and though they may not amount to technical notice, they are a method by which a diligent person may ascertain the true condition of the bank; but whether true or untrue such returns are conclusive as to the liability of the bank and stockholders.[73]

§ 17. Public Examiners[74]—§ 17 (1) Appointment.—Authority to Appoint.—It has been held, and no doubt, correctly, that inspections may be required and the cost thrown on the bank.[75]

Provisional Appointment.—The appointment, during vacation of the state senate, of a bank commissioner, under a statute providing for his appointment with the consent of the senate, was only provisional, and the of-

69. **Verification—Primary meaning.**—State *v.* Trook, 172 Ind. 558, 88 N. E. 930, construing Ind. Acts, 1905, p. 182, c. 109, § 5.

70. **Verification to best of affiant's knowledge and belief enough.**—Davenport *v.* Prentice, 126 App. Div. 451, 110 N. Y. S. 1056, construing banking laws of New York.

71. **As to foreign corporation.**—Under a provision of the statute that the statement of a foreign corporation shall be verified by the agent or manager of such corporation residing in the state, a verification of the statement of a foreign corporation by its resident agent, that it was true to the best of his knowledge and belief, is not open to the objection that it was not made upon actual knowledge. Bank *v.* Madison, 99 Cal. 125, 33 Pac. 762.

72. **Affidavit that statement is copy of another statement insufficient.**—The statute further requires that the statements filed shall be sworn statements, verified, in the case of foreign corporations, by the agent or manager of the business resident in the state. Plaintiff's statement was followed by an affidavit of the managing agent at San Francisco, which stated that the bank has its principal place of business in London; that the accounts of the San Francisco agency are made up twice each year, and forwarded to the London office, where a general statement is prepared, and sent to the San Francisco office; that the foregoing is a correct copy of the last statement received. There was nothing in the affidavit to show that the statement was sworn to by any officer or employee of the bank, or that the affiant believed the statement to be true, only that it was a true copy of the last statement received. Held, that this was not a sworn statement, within the meaning of the statute. Bank *v.* Alaska Imp. Co., 97 Cal. 28, 31 Pac. 726; S. C., 97 Cal. xvii, 31 Pac. 729.

73. **Returns as notice of bank's condition.**—Hill *v.* Silvey, 81 Ga. 500, 8 S. E. 808, 3 L. R. A. 150; Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

74. Of national banks, see post, § 287, et seq.

75. **Inspection and payment therefor.**—Charlotte, etc., R. Co. *v.* Gibbes, 142 U. S. 386, 35 L. Ed. 1051; Noble State Bank *v.* Haskell, 219 U. S. 104, 112, 55 L. Ed. 112, 31 S. Ct. 186.

ficial term began to run only on the appointment of such commissioner at the next session of the senate.[76]

§ 17 (2) Compensation.—Where the statute creating bank examiners prescribes their compensation, it must prevail.[77] An act of the legislature appropriating a certain sum to pay officers appointed at that session to wind up a certain bank includes an officer appointed to visit such bank and another one, the amount appropriated being sufficient to pay his salary as well as the salaries of the other officers appointed for the purpose stated.[78]

§ 17 (3) Removal.—Bank examiners can not be prosecuted under the statute providing for the removal of public officers from office, for malfeasance or neglect of duty, where, by other sections, prosecutions for removal can only be maintained against district, county, municipal or township officers.[79]

Power of Governor.—Under the common law and under Const. art. 12, § 8, and article 4, § 22, and Civ. Code, 1902, §§ 340, 393, of South Carolina the Governor has no authority to remove from office the State Bank Examiner whose term of office if fixed at four years by Act Feb. 23, 1906 (25 St. at Large, p. 103), as amended by Act Feb. 20, 1911 (27 St. at Large, p. 4).[79a]

§ 17 (4) Powers.—In General.—The powers of bank examiners depend on the terms of the statutes creating them.[80] The legislature, in the exercise of its police power, is authorized to regulate the business of

76. **Provisional appointment.**—State *v.* Breidenthal, 55 Kan. 308, 40 Pac. 651, construing Kansas Laws, 1891, c. 43. See, also, ante, "Constitutional and Statutory Provisions," § 4.

77. **Compensation — Amount.**—Act March 29, 1889, which provides for reports of the business of all banking institutions to be made to the board of state officers constituted by the act, and for yearly examinations of the affairs of such banks, in § 8 gives the compensation of the bank examiners at $10 a day, but in no case to exceed $20, to be paid by the bank whose affairs are being examined. Held, that the board created by the act has no authority to prescribe a different rate of compensation. Post *v.* Benton, 31 Neb. 44, 47 N. W. 477.

78. **Appropriation.**—Byrd *v.* Conway, 5 Ark. 436.

79. **Removal—Construction of statutes.**—Kilburn *v.* Law, 111 Cal. 237, 43 Pac. 615, construing Cal. Pen. Code, §§ 772, 888, 889.

79a. **Power of Government.**—Lyon *v.* Rhame (S. C.), 75 S. E. 881.

80. **Particular statutes construed.**—*Arkansas.*—An act relating to the liquidation of a bank, whose property had gone into the possession of trustees named in a deed of the directors, provided for the appointment of other trustees, and also of a bank visitor for such bank and another. The act required him to schedule the property in the hands of "said trustees," it being doubtful which ones were meant. It also provided that in case he was prevented from acting as visitor of either of the banks, but acted for the other, he was to have only half the salary prescribed. Held, that the officer's right to visit the bank in liquidation existed while the property was in the hands of the trustee named in the deed. Byrd *v.* Conway, 5 Ark. 436.

California.—Incorporated commercial banks are subject to examination by the bank commissioners, under the Act of 1878, creating the board. Wells *v.* Coleman, 53 Cal. 416.

banking, and for that purpose may authorize an administrative officer to adopt a reasonable system of inspection and reports.[81]

Examination of Vaults, Books and Papers.—Authority for this is usually conferred.[82]

Judicial Powers—Enjoining Prosecution of Business.—A statute authorizing bank commissioners to apply for an injunction to restrain the bank from proceeding further with its business is not unconstitutional as usurping judicial power,[83] or as compelling the officers and agents of the bank to furnish evidence to criminate themselves,[84] or as impairing the obligation of a contract.[85]

Requiring Change of Directors.—Visitorial powers over bankers justify the requirement of a change in the personnel of directors.[86]

Power to Bind Bank by Representations.—When a defaulting officer of an insolvent bank in charge of a bank examiner, for the purpose of replenishing the assets of the bank to enable it to resume business, is allowed to furnish collateral securities for his indorsements on paper previously sold by him to the bank, representations made by such examiner as to the liabilities of such officer to the bank and the value and condition of the securities already furnished by him are not binding on the bank; and one who furnishes securities to such defaulting officer to be so used by him can not

81. Adoption of system of inspection and reports.—State *v.* Struble, 19 S. D. 646, 104 N. W. 465.

82. Examination of vaults, books and papers.—Under Act Feb. 5, 1842, § 2, No. 22, the board of currency are entitled to free access to the vaults and books of the banks in New Orleans; may call upon their officers at any time; take such memoranda and lists as they think proper; and require any officer of such banks to submit their books and papers to their inspection and examination. State *v.* Union Bank (La.), 4 Rob. 499.

83. Statute authorizing injunction against bank. — Commonwealth *v.* Farmers', etc., Bank (Mass.), 21 Pick. 542, 32 Am. Dec. 290, construing old Massachusetts statute of 1838.

84. As compelling self-incrimination.—Neither is it unconstitutional on the ground of its compelling the officers and agents of a bank to furnish evidence to criminate themselves; for (among other reasons) it imposes a penalty only upon those who "without justifiable cause" refuse to testify. Commonwealth *v.* Farmers', etc., Bank (Mass.), 21 Pick. 542, 32 Am. Dec. 290.

85. As impairing contract obligation.—Nor is it unconstitutional on the ground that a suspension of the proceedings of a bank by the injunction, diminishes the period for which the bank is by its charter empowered to act as a corporation and thereby impairs the obligation of a contract; for as the bank may violate its charter or the law, there must be some mode prescribed for a judicial inquiry into the fact and for giving redress to parties who may have suffered, and the injunction is not an arbitrary suspension of the corporate powers of the bank, but a species of compulsory process entirely consonant to the course of the administration of justice in like cases. Commonwealth *v.* Farmers', etc., Bank (Mass.), 21 Pick. 542, 32 Am. Dec. 290.

86. Requiring change of directors.—Where the promoter of a bank advertised that its affairs would be placed in the hands of directors, who were strong, wealthy men and most experienced bankers, but in fact he caused directors to be elected who were men inexperienced in financial affairs, of no independent judgment nor fortune, but who were wholly subservient to his will, the secretary of state, on ascertaining such conditions, was justified by Rev. St. 1899, § 1305, conferring on him visitorial powers over bankers, to require a change in the personnel of the board of directors. Harley *v.* People's, etc., Bank, 197 Mo. 574, 94 S. W. 953.

rely on such representations of the examiner as a defense in an action by the bank to foreclose its lien on such securities.[87]

To Examine Records of Bank Commissioner.—The state bank examiner and inspector is authorized by the Oklahoma statute to examine the records of the bank commissioner, including the records of a failed or insolvent bank in his custody as such officer in administering the affairs of such bank under the powers conferred upon him by said act.[88]

§ 17 (5) Effect on Title to Property and Rights of Action.—The legal title to the assets is unchanged, and it may still sue in regard thereto.[89]

§ 18. Foreign Banks.[90]—A penal statute in regard to failure to pay prescribed fees for doing business in the state is not applicable to foreign banking companies where they are not mentioned,[91] nor a statute punish-

87. **Power to bind bank by representations.**—Tecumseh Nat. Bank *v.* Chamberlain Banking House, 63 Neb. 163, 88 N. W. 186, 57 L. R. A. 811.

88. **Examination of records of bank commissioner.**—Taylor *v.* Cockrell, 27 Okl. 630, 112 Pac. 1000, construing the Oklahoma statute.

89. **Effect on title to property and rights of action.**—Laws 1892, c. 689, § 18, as amended by Laws 1908, c. 143, § 3, authorizes the state superintendent of banks to take possession of the property and business of any corporation and individual banker, when it appears that such bank is doing business in an unsafe or unauthorized manner, and retain possession till the bank resumes business, collect money due the bank, collect all debts due and claims belonging to it, and upon an order of the supreme court sell or compound doubtful debts or sell its realty, pay all debts of the corporation, and do other acts necessary to conserve its assets, and further provides that the corporation may resume business upon conditions approved by the superintendent. Held, that the statute did not directly deprive a bank, in the hands of the superintendent, of title to its assets, or vest it in the superintendent, so that a bank in the hands of the superintendent was the real party in interest, and the proper party plaintiff in an action on a promissory note owned by it. Lafayette Trust Co. *v.* Higginbotham, 136 App. Div. 747, 121 N. Y. S. 489.

90. **Banking powers generally.**—See post, "Place of Exercise," § 86 (3).

Location and place of business, see post, "Location and Place of Business," § 32.

National banks as foreign corporations, see post, "Nature and Status," § 232.

What are banks, see ante, "What Are Banks," § 2.

Power to acquire and hold property.—See post, "In General," § 94; "Real Property," § 95.

Power to make loans.—See post, "Power to Make Loans in General," § 176.

Power of discount.—See post, "Power of Discount," § 177.

As to circulating notes.—See post, "Power to Issue or Circulate," § 197.

Subjection to laws of state where it operates.—See ante, "In General," § 8.

91. **Amenability to penal statute.**—Pol. Code, pt. 3, tit. 1, c. 3, art. 11, § 497, as amended by Act March 4, 1897 (Laws 1897, p. 107), and Laws 1903, p. 184, c. 100, requiring each bank or investment and loan company incorporated under the laws of this state to pay certain fees into the state examiner's fund, and requiring each building and loan association, whether foreign or domestic, to pay a certain proportion of its assets into the fund, and § 498, providing penalties for failure of any bank, building and loan association, or investment and loan company incorporated under the laws of this state, "or doing business under any law of this state concerning corporations," to pay the fees prescribed in the preceding section, do not apply to foreign banking companies doing business in the state, since the statute being penal, and to be strictly construed, the phrase quoted can not be read into § 497. State *v.* Ætna Banking, etc., Co., 34 Mont. 379, 87 Pac. 268. See, also, ante, "Power to Impose," § 12 (1).

ing embezzlement by officers or employees of banks "in the state."[92]

§ 19. Penalties for Violations of Regulations.—It has been held that a failure in several respects to comply with a statute requiring reports and returns, makes the delinquent bank liable for each neglect to the penalty named.[93]

§ 20. Offenses by Banks or Bankers.[94]**—Sufficiency of Information.**—In the information against a bank, it is only necessary that the time and other circumstances, in the description of one of the charges showing a violation of the charter, be certain to a common intent.[95]

§ 21. Offenses by Persons Dealing with Banks.—Drawing Check without Funds.—A statute making it a crime to draw or pay a check without funds to draw against has been held to embrace all classes of persons, not merely bank officers.[97] The essential elements of the crime are the drawing of the check, knowledge of insufficiency of drawer's funds to meet it, and an intent to defraud.[98]

Passing of Fictitious Check with Intent to Defraud.—The essentials of the offense denounced by a statute punishing the passing with intent to defraud any fictitious check, are the uttering and publishing of a fictitious check with knowledge of its character and an intent to defraud, and the

92. **Under embezzlement statute.**—The Freedman's Savings and Trust Company, incorporated by act of congress, and located in the city of Washington, is not a bank or corporate body in Georgia, within the meaning of § 4421 of the Code. Cory *v.* State, 55 Ga. 236.

93. Commonwealth *v.* Cooke, 50 Pa. 201, construing Act of May 16, 1861.

Unauthorized banking, see ante, "Penalties and Actions Therefor," § 10.

94. **Offenses by banks or bankers.**—Civil liability therefor, see post, "Civil Liability on Insolvency," § 82, and subdivisions thereunder.

Constitutional and statutory provisions, see ante, "Constitutional and Statutory Provisions," § 4.

Criminal responsibility of bank officers and agents, see post, "Officers," § 61; "Prosecution and Punishment," § 62; "Officers," § 84; "Prosecution of Punishment," § 85.

Unauthorized banking, see ante, "Criminal Prosecutions," § 11.

Criminal responsibility of bank officers and agents, see post, "Criminal Responsibility," § 60; "Officers," § 61; "Prosecution of Punishment," § 62.

95. **Sufficiency of information.**—Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234.

97. **Drawing check without funds.**—Burkett *v.* Lanata, 15 La. Ann. 337, construing Act of March 15, 1855.

98. **Essential elements.**—State *v.* Pilling, 53 Wash. 464, 102 Pac. 230.

The essential elements of the crime defined by the Washington Act March 2, 1905 (Laws 1905, p. 78, c. 49) § 1, are the drawing of a check on a bank for the payment of money, knowledge that the drawer has not sufficient funds to meet the check, and an intent to defraud; and the technical ownership of the money paid out by a bank on a check drawn on another bank is not material. State *v.* Pilling, 53 Wash. 464, 102 Pac. 230.

An information alleging that accused with intent to defraud prosecutor drew and delivered to a third person a check on a bank, knowing at the time he had no funds in or credit with the bank to meet the check, states the offense denounced by Pen. Code, § 476a, prohibiting the drawing of checks with intent to defraud. People *v.* Mohr, 157 Cal. 732, 109 Pac. 476.

Postdated check.—A prosecution held warranted under Pen. Code, § 476a, for the utterance of a postdated check, where there were no funds to meet it. People *v.* Bercovitz (Cal.), 126 P. 479.

state need not prove that accused drew or attempted to draw on an account which he had established in a bank based on the fictitious check, or that the bank was in fact defrauded by the transaction.[99]

Intent a Question for Jury.—The intent is a question for the jury.[1]

Repeal of Statute.—A statute making the forgery of a check on a bank a felony was not repealed by a general revision of the penal laws.[2]

Admissibility of Evidence.—On a trial for passing a fictitious check purporting to have been signed and indorsed by a third person on a designated bank, evidence of the nonpayment of the check and of the fact that the third person did not have an account with such bank was admissible.[3] And the testimony of the receiving teller of the bank that, referring to the bank book showing the names of the depositors, the name of the third person did not appear as a depositor was admissible as prima facie evidence that the check was fictitious.[4]

Sufficiency of Evidence.—In a prosecution under laws 1905, c. 5468, for drawing a draft on a bank in consideration of property received without having sufficient money in the bank to pay it, evidence held sufficient to sustain a conviction.[5]

99. **Passing fictitious check with intent to defraud.**—People v. Walker, 15 Cal. Cr. App. 400, 114 Pac. 1009, construing Cal. Pen. Code, § 476.

1. **Intent a question for jury.**—The intent with which a depositor of a bank who had opened a deposit account in a fictitious name deposited a fictitious check in violation of Pen. Code, § 476, and thereby received credit on his account therefor, is for the jury, who need not accept his statement of his intent in making the deposit, but the establishment of the account and the subsequent deposit of the check creating an opportunity to defraud the bank justify a finding of an intent to defraud. People v. Walker, 15 Cal. Cr. App. 400, 114 Pac. 1009.

2. **Repeal of statute.**—Drew v. Commonwealth (Pa.), 1 Whart. 279, construing a statute of Penn.

3. **Admissibility of evidence.**—People v. Walker, 15 Cal. Cr. App. 400, 114 Pac. 1009.

4. People v. Walker, 15 Cal. Cr. App. 400, 114 Pac. 1009.

5. **Sufficiency of evidence.**—Ryan v. State, 60 Fla. 25, 53 So. 448.

In a prosecution under Laws 1905, c. 5468, making it a felony for one to issue a draft upon a bank in payment of anything of value, the title or possession of which shall have been transferred upon the faith of the payment of such draft, where he does not, at the time of making the draft, have sufficient money on deposit with such bank to pay the draft, or has reason to believe, from an existing contract or from previous dealings with the bank, that the draft will be paid, and does not within 24 hours after notice of nonpayment of such draft, make full restitution by returning the consideration, evidence clearly establishing that the draft was presented for payment at the place named therein, that the drawee could not be found there, that the draft was not paid, that notice of its nonpayment was given to accused personally, and that it has never been paid, is sufficient, as to presentment and notice of nonpayment, to sustain a conviction. Ryan v. State, 60 Fla. 25, 53 So. 448.

CHAPTER II.

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II. BANKING CORPORATIONS AND ASSOCIATIONS.[1]

A. INCORPORATION, ORGANIZATION AND INCIDENTS OF EXISTENCE.

§ 22. Nature and Formation in General.—An individual carrying on the banking business is not a corporation,[2] or a quasi corporation.[3]

Classes of Banks.—There are two classes of banks in the states, viz, state banks and national banking associations.[4]

Purpose of Creation.—Banks are created primarily for the public interest.[5]

Duties and Liabilities of Promoters.—Both in England and in the United States, promoters of corporations or other enterprises have been held to occupy a fiduciary relation towards one another, and towards the company or corporation whose organization they seek to promote. The principle of law necessarily resulting from the doctrine is that the promoters must act in good faith with one another, and with the corporation, and such special advantages or profits as they reserve to themselves must not be secret. In other words, they will not be permitted to assert, either expressly or by necessary implication, that they are forming a corporation upon terms which give them no special profit or advantage, while, in fact they are intending to reap benefit of which their fellow promoters or subsequent subscribers have no notice.[6]

1. Loan, trust and investment companies, see post, "Loan, Trust and Investment Companies," §§ 310-317; National banks, see post, "National Banks," §§ 232-288. Savings banks, see post, "Savings Banks," §§ 289-309.

2. **The business of banking by an individual** is his personal and individual affair, and suits in relation thereto are rightly prosecuted in his individual name. Cuyler *v.* Sandford (N. Y.), 8 Barb. 225; Codd *v.* Rathbone, 19 N. Y. 37; Hallett *v.* Harrower (N. Y.), 33 Barb. 537.

An unincorporated bank, exclusively owned by a private individual, is not a legal entity, even though its business be conducted by a president and cashier. Longfellow *v.* Barnard, 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255, affirmed on rehearing in 59 Neb. 455, 81 N. W. 307.

3. **Not a quasi corporation.**—A private bank carried on by an individual is not a quasi corporation under the banking law. In re Purl's Estate, 147 Mo. App. 105, 125 S. W. 849.

4. **Classes of banks—State and national.**—"Judicial cognizance will be taken of the fact that there are two classes of banks which are located, operated, and doing business in the state, which have presidents; to wit, banks organized under the laws of this state, and banking associations created under the laws of the United States, which are private associations authorized by congress for the joint purposes of convenience and profit to the holders of United States bonds, and of furnishing the public with a convenient and uniform circulating medium." Linton *v.* Childs, 105 Ga. 567, 32 S. E. 617.

As to definitions, see ante, "Right of Banking in General," § 1.

5. **Purpose of creation of banks.**—"However repugnant it may be to the notions or to the practices of some bankers, banks are created primarily for the public interest. Their bills are the medium of circulation; their drafts the medium of exchange; their vaults are places of deposit; and every man who has occasion to use either—and who has not?—as well as the state, the proper guardian of the public interests, is legitimately concerned in the maintenance, in their integrity and strictness, of all the restraints which the wisdom of the legislature has devised for individual and public security." State *v.* Seneca County Bank, 5 O. St. 171.

6. **Duties and liabilities of promoters.**—Shawnee, etc., Sav. Bank Co. *v.*

§ 23. Incorporation[7]—§ 23 (1) Power to Incorporate.—Congress has power to incorporate a bank,[8] as a necessary and proper instrument for carrying on the fiscal operations of government.[9] A state may, of course, charter banks, and the attempt to make the notes of a bank so chartered a tender, while ineffectual, does not affect the validity of the incorporation,[10] unless forbidden by a provision of the constitution, as in Texas,[11] and in Oregon as to banks of issue.[12] Sometimes it is forbidden

Miller, 24 O. C. C. 198, 14-24 O. C. D. 198.

7. Of national banks.—See post, "Organization and Corporate Existence," § 236.

8. Power of congress.—McCulloch *v.* Maryland, 4 Wheat. 316, 4 L. Ed. 579; Osborn *v.* Bank, 9 Wheat. 738, 6 L. Ed. 204; Bank *v.* Bank, 10 Wheat. 333, 347, 6 L. Ed. 334; Minor *v.* Mechanics' Bank, 1 Pet. 44, 7 L. Ed. 47; Casey *v.* Galli, 94 U. S. 673, 24 L. Ed. 168; Huntington *v.* Savings Bank, 96 U. S. 388, 24 L. Ed. 777; Legal Tender Cases, 110 U. S. 421, 445, 28 L. Ed. 204, 4 S. Ct. 122; Easton *v.* Iowa, 188 U. S. 220, 47 L. Ed. 452.

Bank of the United States.—The act of the 10th of April, 1816, c. 44, to "incorporate the subscribers to the Bank of the United States," is a law made in pursuance of the constitution. McCulloch *v.* Maryland, 4 Wheat. 316, 4 L. Ed. 579.

9. Osborn *v.* Bank, 9 Wheat. 738, 6 L. Ed. 204.

10. Power of state.—Briscoe *v.* Bank, 11 Pet. 257, 9 L. Ed. 709; Nathan *v.* Louisiana, 8 How. 73, 81, 12 L. Ed. 992; Woodruff *v.* Trapnall (U. S.), 10 How. 190, 13 L. Ed. 383. See Ohio Life Ins., etc., Co. *v.* Debolt (U. S.), 16 How. 416, 14 L. Ed. 997; Veazie Bank *v.* Fenno (U. S.), 8 Wall. 533, 19 L. Ed. 482, per Nelson, J., dissenting; Lampton *v.* Commercial Bank (Ky.), 2 Litt. 300; Briscoe *v.* Bank (Ky.), 7 J. J. Marsh, 349; Bank *v.* Swindler (Ky.), 2 Dona 393; Craighead *v.* State Bank, 19 Tenn. (1 Meigs) 199; Bell *v.* Bank, 7 Tenn. (1 Peck) 269.

A state, in granting privileges to a bank, with a view of affording a sound currency, or of advancing any policy connected with the public interest, exercises its sovereignty, for a public purpose, of which it is the exclusive judge. State Bank *v.* Knoop (U. S.), 16 How. 369, 14 L. Ed. 977.

Employment of trust funds in state bank.—It is difficult to see how the employment of trust funds by a state in a state bank made the bank any less a state institution, for it was created expressly for the benefit of the state, which had the exclusive management of it, and agreed to support it. Furman *v.* Nichol (U. S.), 8 Wall. 44, 19 L. Ed. 370.

Ohio.—Prior to the declaration of war in 1812, there were in operation in the state of Ohio only six banks incorporated as such. Bonsal *v.* State, 11 O. 72.

From that time to the adoption of the constitution of 1851, banks were incorporated by and under laws especially applicable to such institutions. See Act February 23, 1816, incorporating many banks by name; Act February 24, 1845, incorporating the State Bank of Ohio; Act March 21, 1851, authorizing free banking. The constitution of 1851, however, placed the incorporation of banks upon the same ground with the incorporation of other corporations, with the exception of banks of issue and circulation. Const. 1851, art. 13. See, as discussing these various statutory and constitutional provisions, State *v.* Chase, 5 O. St. 528; Citizens' Bank *v.* Wright, 6 O. St. 318. See, also, Ridenour *v.* Mayo, 29 O. St. 138; Franklin Bank *v.* Commercial Bank, 36 O. St. 350.

Tennessee.—Bell *v.* Bank, 7 Tenn. (1 Peck) 269.

11. Constitutional prohibition.—*Texas.*—Section 16, art. 16, of the constitution of Texas, 1876 (Art. VII, § 30 of Const. of 1866), provides that "no corporate body shall hereafter be created, renewed or extended with banking or discounting privileges." Anderson *v.* Cleburne Bldg., etc., Assn., 4 App. Civ. Cases, § 174, 16 S. W. 298; Mills *v.* State, 23 Tex. 295.

But this section was not intended to prohibit foreign banking corporations from enforcing their legal rights in the courts of this state. Freeman *v.* Bank, 3 App. Civ. Cases, § 338.

12. *Oregon.*—Const., art. 2, § 1; "The legislative assembly shall not have the power to establish or incorporate any bank or banking company or moneyed institution whatever; nor shall any bank," etc., with the privi-

unless authorized by a vote of the people, but "banking powers" under such prohibitions has usually been held to mean only the power to issue notes to circulate as money.[13] If it meant more, a mere remedial amendment would not come within its scope.[14] And if there is any other requirement of the fundamental law, it must be complied with.[15] But the power is a legislative one,[16] and may be exhausted by exercise.[17]

lege of circulating any paper as money —held not to constitute two independent propositions. Not the incorporation of banks, but the issuance of paper to circulate as money, is prohibited. State *v.* Hibernian Sav., etc., Ass'n, 8 Or. 396.

13. Necessity for authorization by popular vote.—In Const. 1848, art. 10, § 5, the words "with banking powers" mean power to issue notes to circulate as money. It was not intended to prohibit the conferring of some of the other banking powers upon corporations without a vote of the people. People *v.* Loewenthal, 93 Ill. 191.

Const., art. 8, § 5, requiring all acts and amendments thereto, authorizing and creating corporations with banking powers, to be first submitted to a vote of the people, relates only to banks of issue, and not to those organized under the general incorporation act (Code, c. 1, tit. 9), of which Acts 18th Gen. Assem., c. 208, fixing the liability of stockholders, is an amendment. State *v.* Union Stock Yards, etc., Bank, 103 Iowa 549, 72 N. W. 1076, 70 N. W. 752.

Kansas.—Pape *v.* Capitol Bank, 20 Kan. 440, 27 Am. Rep. 183.

Ohio.—Dearborn *v.* Northwestern Sav. Bank, 42 O. St. 617, 51 Am. Rep. 851; Bates *v.* People's Sav., etc., Ass'n, 42 O. St. 655.

14. Mere remedial amendment.—Smith *v.* Bryan, 34 Ill. 364, construing an Ill. statute facilitating the remedy of a creditor of a bank against its stockholders; Reapers' Bank *v.* Willard, 24 Ill. 433, 76 Am. Dec. 755, construing Ill. statute, amending banking law so as not to require separate presentation of every note or bill.

15. Other requirements.—*Alabama.*—"An incorporated bank, in Alabama, is not only the mere creature of the law creating it, as banks are in other states; but it is the creature of a peculiar fundamental law; and if its charter is not in conformity to the provisions of the fundamental law, it is void." Bank *v.* Earle (U. S.), 13 Pet. 519, 10 L. Ed. 274.

Michigan.—The legislature of Michigan passed an act on the 15th of March, 1837, entitled "An act to organize and regulate banking associations," and on the 30th of December, 1837, an act to amend the former act. By the first, any persons were allowed to form associations for the purposes of banking upon the terms specified in the law; and by the second, the stockholders were made liable, in their individual character, under certain circumstances, for the debts of the association. The associations formed under these acts are corporations within the meaning of the constitution of Michigan, and the acts are unconstitutional and void, for § 2, art. 12, forbids the legislature "passing any act of incorporation unless with the assent of at least two-thirds of each house," and the judgment of the legislature is required to be exercised upon the propriety of creating each particular corporation, and two-thirds of each house must sanction and approve each individual charter. Nesmith *v.* Sheldon, 7 How. 812, 12 L. Ed. 925.

16. A legislative power.—"All banking corporations in America are the creatures of legislative will, and no power to create such corporations belongs to either of the other departments of the state government." Mechanics' Bank *v.* Heard, 37 Ga. 401.

The issuing of a proclamation by the governor, pursuant to the eleventh section of the Ohio banking law of 1845, setting forth that a company organized as a branch of the state bank was authorized to commence and carry on the business of banking, was not one of the duties enjoined by the constitution on the governor and resting in the supreme executive discretion, but a ministerial act required by statute, which, upon his being satisfied of the existence of certain facts, the governor, upon neglect or refusal, might have been compelled, by a writ of mandamus, to perform, had the statutory authority continued in force. Whiteman *v.* Chase, 5 O. St. 528.

General laws in respect to incorporation, see post, "General Laws," § 26.

17. Exhaustion by exercise.—The fourth section of the Ohio banking

Authority Strictly Construed.—It is the settled rule of construction that statutes conferring special privileges in derogation of common right are to be strictly construed, and authority to create new corporations can not be derived from mere implication.[18]

Territorial Limitation.—But the power does not extend to chartering a bank to operate in another state.[19]

Fraudulent Conduct of Majority of Commissioners.—A legislature appointed nine commissioners, who, or any three of them, were authorized to organize a bank. A majority of the whole number corruptly agreed to transfer the franchise to a citizen of another state. It was held, that in such case three other of the commissioners had valid authority to proceed with the organization, and that letters patent issued in pursuance of such organization were valid.[20]

§ 23 (2) Conditional Incorporation—Conditions Precedent and Beginning of Corporate Existence.—In a constitutional provision that the general assembly shall not have power to establish or incorporate any bank or banking company for the purpose of issuing bills of credit except on conditions prescribed in the constitution, the conditions spoken of related exclusively to the subject of banking.[21]

Conditions Precedent.—A charter requirement that the capital stock be a certain amount is not a condition precedent to the operation of a bank.[22] So where the amount of capital stock is not stated as contemplated by the statute.[23] But where conditions precedent are prescribed, they must be

law of 1845 provided that the number of banking companies to be formed in a certain county should not exceed four. That number of companies was formed, and some of them subsequently ceased to do business. Held that, under the statute, as four companies had been chartered, no new companies could take the places of the former. Whiteman *v.* Chase, 5 Ohio St. 528.

18. **Authority strictly construed.**—Whiteman *v.* Chase, 5 O. St. 528, construing the Ohio Act of 1845, and holding the power of incorporation thereunder to have been exhausted.

19. **Territorial limitation.**—The state of Maryland has no right to charter a bank, with power to establish banking companies in Virginia; and such company assuming to act must be held unchartered, within the contemplation of the act against banking companies not deriving a charter from the state. Atterberry *v.* Knox (Ky.), 4 B. Mon. 90.

20. **Fraudulent conduct of majority of commissioners.**—Commonwealth *v.* McKean County Bank, 32 Pa. 185.

21. **Conditional incorporation.**—Wright *v.* Defrees, 8 Ind. 298, construing art. 11, § 1 of Indiana constitution.

22. **Subscription of prescribed capital stock.**—The provision in the act of congress, incorporating "the Mechanics' Bank of Alexandria," which requires, that the capital stock of the bank shall consist of 50,000 shares, of ten dollars each, is not a condition precedent; and the bank went legally into operation, with an actual capital less than that number of shares. Minor *v.* Mechanics' Bank, 1 Pet. 44, 7 L. Ed. 47. See, also, Scott *v.* Deweese, 181 U. S. 202, 45 L. Ed. 822; Aspinwall *v.* Butler, 133 U. S. 595, 608, 33 L. Ed. 779, 10 S. Ct. 417.

Corporate stock or capital of savings bank.—See post, "Stockholders," §§ 43-49.

On increase of stock.—See post, "Increase of Capital Stock," § 241 (2).

23. **Statement of amount of capital stock.**—The certificate of incorporation of a bank, filed in 1860, omitted to state the amount of capital stock.

fulfilled.[24]

Deposit of Securities.—Where the statute forbade the transaction of banking business until the required deposit of securities was made, all that could be done by the company, before such deposit, was to organize, deposit stocks as required by the act, and make needful preparations for the business contemplated by the law of its creation.[25]

Beginning of Corporate Existence.[26]—Where a bank charter is received, and takes effect on the first day of a certain month, the corporation may legally act under the charter on that day; and a legal transfer of shares in the bank may be made on the first day of the same month of the next year.[27] And a bank created by an act of legislature, providing that a certain number of directors shall be elected by the legislature, and giving them all the powers of a banking corporation, although the directors are not named and the institution is not expressly called so, is a corporation.[28] Where the incorporation statute provides that upon making the certificate specified and having it recorded the incorporation shall be effectual, from that time there is a body corporate,[29] but until this is done there is no legal corporate existence.[30]

§ 23 (3) Results of Incorporation—§ 23 (3a) As to Liabilities, Privileges and Powers.—Where a corporation is formed to suc-

Held, that although the Act of April 14, 1853, did not seem to authorize the incorporation of a company without a capital stock consisting of a specified number of shares, yet that under the amendatory and supplemental Acts of March 4 and March 24, 1870, and the curative Act of April 1, 1864, there could be no doubt as to the validity of the incorporation of the bank. People v. Perrin, 56 Cal. 345.

24. **Conditions precedent must be fulfilled.**—An association of persons can not claim a corporate existence under the free banking act, unless they shall have fulfilled the conditions precedent prescribed by that act. Workingmen's Accommodation Bank v. Converse, 29 La. Ann. 369.

25. **Deposit of securities.**—Medill v. Collier, 16 O. St. 599, construing § 44 of the Act of 1851 to authorize free banking. Section 44 was repealed by the act of April 24, 1879 (76 O. L. 74). See, also, ante, "Effect of Failure to Deposit," § 15 (4).

What constitutes sufficient organization—Issue of certificates.—State v. Butler, 86 Tenn. (2 Pickle) 614, 8 S. W. 586, citing National Bank v. Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039; Cook on Stock and Stockholders, § 10, and cases there cited, and saying: "While this is a circumstance that may be looked to in arriving at the good faith of the parties, and in determining the true nature of the transaction as to whether it were a transfer of stock so as to carry succession to the purchasers, or a mere sale of the charter, it is by no means conclusive. The issuance of certificates of stock is nonessential, either to the validity of the original organization or to the transfer of some to purchasers. The subscription to and payment for stock is all that is necessary."

26. **Incomplete organization and ineffective choice of directors.**—See post, "Election or Appointment, Qualification, and Tenure," § 51.

Transaction of business by incomplete organization as unauthorized banking, see ante, "In General," § 8.

27. **Beginning of corporate existence.**—Agricultural Bank v. Burr, 24 Me. 256.

28. **Corporation results although not so called.**—Mahony v. Bank, 4 Ark. 620.

29. **Making and recordation of certificate.**—Rafferty v. Bank, 33 N. J. L. 368; Palmer v. Lawrence, 5 N. Y. Super. Ct. 161.

30. Burrows v. Smith, 10 N. Y. 550; Valk v. Crandall (N. Y.), 1 Sandf. Ch. 179.

ceed to an unincorporated banking association, as between them the former succeeds to all the assets, rights and liabilities of the latter.[31] A state act of incorporation conferred on a bank a corporate character, but could give that corporate body no peculiar privileges in the courts of the United States, not belonging to it as a corporation. Those privileges do not exist, unless conferred by an act of congress.[32]

§ 23 (3b) Charter as Contract, and Amendment or Repeal.—A bank charter is a legislative contract.[33] It is a contract between the stock-

31. Liabilities of association incorporated unimpaired.—Where an unincorporated banking association was succeeded by a corporation organized to take its good assets and assume its liabilities, the directorates being partially if not wholly identical, as between the old bank and the new, the new bank is to be treated in all respects as the successor of the old, taking the assets that were turned over as they stood, and assuming the liabilities. All the knowledge of the old bank as to the rights of the parties to the securities transferred is chargeable in law on the new. Lanier *v.* Nash, 121 U. S. 404, 30 L. Ed. 947, 7 S. Ct. 919.

32. State incorporation confers no privileges in federal courts.—The act incorporating the bank professes to regulate, and could regulate, only those courts which were established under the authority of Virginia. It could not affect the judicial proceedings of a court of the United States, or of any other state, or exempt the bank from appeals against it there. Young *v.* Bank, 4 Cranch 384, 397, 2 L. Ed. 655.

"There is a difference between those rights on which the validity of the transactions of the corporation depends, which must adhere to these transactions everywhere, and those peculiar remedies which may be bestowed on it. The first are of general obligation; the last, from their nature, can only be exercised in those courts which the power making the grant can regulate." Young *v.* Bank, 4 Cranch 384, 2 L. Ed. 655.

Charter powers construed, see post, "Construction of Charters and Banking Laws," § 87.

Ohio.—The Act of 1838, to authorize free banking, placed associations formed thereunder very much upon the footing of natural persons. Niagara County Bank *v.* Baker, 15 O. St. 68.

33. Legislative contract.—State Bank *v.* Knoop (U. S.), 16 How. 369, 14 L. Ed. 977; Planters' Bank *v.* Sharp, 6 How. 301, 12 L. Ed. 447; Woodruff *v.* Trapnall (U. S.), 10 How. 190, 13 L. Ed. 383; Curran *v.* Arkansas, 15 How. 304, 310, 14 L. Ed. 705; Ohio Life Ins., etc., Co. *v.* Debolt (U. S.), 16 How. 416, 14 L. Ed. 997; Furman *v.* Nichol (U. S.), 8 Wall. 44, 19 L. Ed. 370; South Carolina *v.* Gaillard, 101 U. S. 433, 25 L. Ed. 937; Deposit Bank *v.* Frankfort, 191 U. S. 499, 513, 48 L. Ed. 276.

"A bank, in which stock is held by individuals, is a private corporation, and its charter is a legislative contract, which can not be changed without its consent." Jefferson Branch Bank *v.* Skelly, 1 Black 436, 449, 17 L. Ed. 173; Ohio Life Ins., etc., Co. *v.* Debolt (U. S.), 16 How. 416, 14 L. Ed. 997; State Bank *v.* Knoop (U. S.), 16 How. 369, 14 L. Ed. 977.

"If it be provided in the charter of a bank that the bills and notes of the institution shall be received in payment of taxes or of debts due to the state, such undertaking on the part of the state constitutes a contract between the state and holders of the notes, which the state is not at liberty to break, although notes issued after the repeal of the act are not within the contract, and may be refused." Pearsall *v.* Great Northern R. Co., 161 U. S. 646, 663, 40 L. Ed. 838; Woodruff *v.* Trapnall (U. S.), 10 How. 190, 13 L. Ed. 383; Paup *v.* Drew (U. S.), 10 How. 217, 218, 13 L. Ed. 394; Furman *v.* Nichol (U. S.), 8 Wall. 44, 19 L. Ed. 370; Keith *v.* Clark, 97 U. S. 454, 24 L. Ed. 1071; Antoni *v.* Greenhow, 107 U. S. 769, 27 L. Ed. 468, 27 S. Ct. 91; Poindexter *v.* Greenhow, 114 U. S. 270, 29 L. Ed. 185. See, also, post, "General Laws," § 26.

As to special charters or acts, see post, "Amendment, Renewal and Appeal," § 25 (3).

As to repeal or amendment when power therefor is reserved, see post, "Repeal or Amendment," § 34½.

holders and the state,[34] and is strictly construed against the former.[35] Thus, a charter provision making the bills or notes of a bank receivable for taxes or other claims of the state, was a contract.[36] But an act which merely provides a new remedy forms no part of the charter of an existing bank to

34. Between stockholders and state.—Nashville Bank *v.* Ragsdale (Tenn.), Peck 296; Union Bank *v.* State, 17 Tenn. (9 Yerg.) 490.

35. Between the stockholders and the state—Construction.—The charter of a bank is a contract between its stockholders and the state, which will be construed strictly against the former, and liberally in favor of the latter, and no privileges or powers will be implied. Bank *v.* Commonwealth, 19 Pa. St. 144.

Georgia.—Bank charters are held to be contracts and are to be interpreted as such. Adkins *v.* Thornton, 19 Ga. 325; Mechanics' Bank *v.* Heard, 37 Ga. 401, 411.

Hence the act creating a bank as a corporation can not be modified or repealed by the legislature without the free assent of the corporators, and then only when such alteration or repeal does not affect the rights of its creditors. It may be safely asserted that the legislature, its creator, has no power of its will merely to dissolve it. As long as it performs its engagement by the act creating it, it has a corporate existence within the limit of time fixed by the act which can not be shortened. Mechanics' Bank *v.* Heard, 37 Ga. 401, 411.

South Carolina.—South Carolina *v.* Gaillard, 101 U. S. 433, 25 L. Ed. 937.

Tennessee.—A charter of a corporation, is, after acceptance by the person incorporated, an inviolable contract between the corporation as it is; also, between the corporation and the stockholders. Neither can disregard its obligations, or alter its essential franchises, without the unanimous consent of the stockholders. Woodfork *v.* Union Bank, 43 Tenn. (3 Coldw.) 488.

A legislative grant of the ordinary franchises for banking is not a partial law, in the sense of the constitution. It is in the nature of a contract, rather than a "law of the land," as that term is understood to be used in the constitution. It has never, therefore, been considered that laws containing these exclusive grants of the privilege of banking are repugnant to the constitution, as not being "laws of the land" of general application. Hazen *v.* Union Bank, 33 Tenn. (1 Sneed) 115, citing Dartmouth College *v.* Woodward, 4 Wheat. 518, 4 L. Ed. 629; Union Bank *v.* State, 17 Tenn. (9 Yerg.) 490. See, also, Furman *v.* Nichol (U. S.), 8 Wall. 44, 19 L. Ed. 370; Woodruff *v.* Trapnall (U. S.), 10 How. 190, 13 L. Ed. 383.

Special charter or act.—See post, "Amendment, Renewal and Repeal," § 25 (3).

36. Receivability of notes for taxes.—The provision in § 12 of the charter of 1838 of the Bank of Tennessee, "that the bills or notes of said corporation, originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of the state, and by all tax collectors and other public officers, in all payments for taxes or other moneys due to the state," made a contract on the part of the state with all persons, that the state would receive for all payments for taxes or other moneys due to it, all bills of the bank lawfully issued, while the section remained in force. The guaranty was not a personal one, extending only to the benefit of the first holder, but attached to the note so issued; as much as if written on the back of it. It went with the note everywhere, as long as it lasted, and although after the note was issued, § 12 were repealed. Furman *v.* Nichol (U. S.), 8 Wall. 44, 19 L. Ed. 370. See, also, Woodruff *v.* Trapnall (U. S.), 10 How. 190, 13 L. Ed. 383.

Section 603 of the Tennessee Code of 1858, which enacted that besides federal money, controllers' warrants, and wildcat certificates, the collector should receive "such bank notes as are current and passing at par," did not amount to a repeal of the above quoted 12th section; the words of the code having no words of negation, the two enactments being capable of standing together, and implied repeals not being to be favored. Furman *v.* Nichol (U. S.), 8 Wall. 44, 19 L. Ed. 370.

This decision did not apply to issues of the bank while under the control of the insurgents. Furman *v.* Nichol (U. S.), 8 Wall. 44, 19 L. Ed. 370.

which it applies.[37] It is a franchise,[38] which can not be changed without its assent, unless such power is expressly reserved, or repealed so as to affect contract rights.[39]

§ 23 (3c) Sale of Franchise and Effect.—See note 40.

§ 23 (3d) Notice of Charter.—A party dealing with a bank will be

37. **Remedial act no part of charter.**—*South Carolina.*—The act of the general assembly of South Carolina, passed June 9, 1877, entitled "An act to provide the mode of proving bills of the bank of the state tendered for taxes, and the rules of evidence applicable thereto," created no new contract between the state and the taxpayer or billholder, but merely provided a new remedy which formed no part of the contract created by the charter of the bank, and after its repeal could not be availed of. South Carolina *v.* Gaillard, 101 U. S. 433, 25 L. Ed. 937.

38. **Franchise.**—State Bank *v.* Knoop (U. S.), 16 How. 369, 14 L. Ed. 977; Gordon *v.* Appeal Tax Court (U. S.), 3 How. 133, 11 L. Ed. 529; Jefferson Branch Bank *v.* Skelly, 1 Black 436, 17 L. Ed. 173.

39. **Inviolability.**—State Bank *v.* Knoop (U. S.), 16 How. 369, 14 L. Ed. 977; Curran *v.* Arkansas (U. S.), 15 How. 304, 310, 14 L. Ed. 705; Ohio Life Ins., etc., Co. *v.* Debolt (U. S.), 16 How. 416, 14 L. Ed. 997; Deposit Bank *v.* Frankfort, 191 U. S. 499, 513, 48 L. Ed. 276.

A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the legislature. But a bank, where the stock is owned by individuals, is a private corporation. Its charter is a legislative contract, and can not be changed without its assent. The preceding cases upon this subject, examined, and the case of the Providence Bank *v.* Billings, 4 Pet. 514, 7 L. Ed. 939, explained. State Bank *v.* Knoop (U. S.), 16 How. 369, 14 L. Ed. 977.

Every valuable privilege given by a bank charter, and which conducted to an acceptance of it and an organization under it, is a contract which can not be changed by the legislature, where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise, and necessary to the business of the bank, can not, without its consent, become a subject for legislative action. State Bank *v.* Knoop (U. S.), 16 How. 369, 14 L. Ed. 977; Ohio Life Ins., etc., Co. *v.* Debolt (U. S.), 16 How. 416, 429, 14 L. Ed. 997.

Repeal of charter.—Where a banking corporation had no other stockholder than the state, it is not doubted that the state might repeal its charter; but that the effect of such a repeal would be entirely to destroy the executory contracts of the corporation, and to withdraw its property from the just claims of its creditors, can not be admitted. If such were the effect of a repeal of an act incorporating a bank containing no express power of repeal, it might be difficult to encounter the objection, that the repealing law was invalid, as conflicting with the constitution of the United States. This argument was pressed on this court, in the case of Mumma *v.* Potomac Co., 8 Pet. 281, 8 L. Ed. 945, and it was met by the following explicit language: "We are of opinion, that the dissolution of the corporation, under the acts of Virginia and Maryland, can not in any just sense be considered, within the clause of the constitution of the United States on this subject as impairing of the obligation of the contracts of the company by those states, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of bona fide purchasers, but is still held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws." Curran *v.* Arkansas, 15 How. 304, 310, 14 L. Ed. 705.

40. **Sale of franchise.**—See post, "Assignment and Transfer of Rights, Franchises, etc.," § 30 (2).

bound by the charter of a bank, whose provisions are in conflict with the usual rules of commercial law.[41]

§ 23 (4) Amendment.—Where a constitutional provision requires amendments to acts authorizing banking corporations to be submitted to popular vote, this must be complied with.[42]

§ 24. Partnerships and Joint-Stock Companies.[43]—Joint-stock banking associations are not corporations, but special partnerships with certain corporate attributes.[44] Under a statute which provides for the filing with the comptroller, by each and every individual banker, of a certificate signed by every person interested with him, stating that such person is interested with such banker in the circulating notes obtained or to be obtained by him, and in the benefits of circulating the same, a party signing such certificate makes himself liable as a general partner with the individual banker.[45] And a banking partnership is within a prohibition against the use of fictitious names in partnerships.[46]

Power to Form Partnership.—A bank can not enter into a contract of partnership in the absence of express authority of law therefor, and particularly not when there is a constitutional prohibition of such action.[47]

§ 25. Special Charters or Acts—§ 25 (1) Power to Grant.—In

41. **Notice of charter.**—Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665.

42. **Amendment.**—The Act of March 29, 1869, incorporating the "Kendall County Banking Company," provided that it should "be located in the county of Kendall," in that state, and that the limit of increase to the capital stock should be $150,000. The stockholders met June 1, 1872, and, under the Act of March 26, 1872, relating to the changing of names, locations, and stock of corporations, etc., changed the name to "National Savings Bank," the location from Kendall county to Cook county, and increased the capital stock to $200,000. Held ultra vires, under Const. 1870, art. 11, § 5, providing that all amendments to acts authorizing banking corporations shall be submitted to the vote of the people, etc. Hunt *v.* National Sav. Bank (Ill.), 11 N. E. 170, affirmed on rehearing in 129 Ill. 618, 22 N. E. 288.

43. As to whether banks or no, see ante, "What Are Banks," § 2.

Under statutes requiring reports, see ante, "Duty to Make and Effect of Failure," § 16 (1).

Effect as giving an interest in property of partnership, see post, "In General," § 94.

44. **Not corporations.**—Curtis *v.* Leavitt (N. Y.), 17 Barb. 309.

45. **Liability of partners.**—Juliand *v.* Watson, 43 N. Y. 571, construing N. Y. Act of 1854, c. 242, § 6.

Alabama statute.—There can be no limited partnership for the purpose of banking or making insurance, and an association formed in 1838, for the purpose of issuing bills to circulate as money, was not prohibited by the statute from doing the act. The only consequence resulting from the act is to make all the partners alike responsible. McGehee *v.* Powell, 8 Ala. 827.

46. **Under prohibition against use of fictitious names.**—Cobble *v.* Farmers' Bank, 63 O. St. 528, 59 N. E. 221.

47. **Power to form partnership.**—A bank organized under the laws of the state is not only without capacity to enter into a contract of partnership with individuals for the building of levees, but is prohibited from so doing by Const., art. 265, and can not invoke the aid of a court to enforce a contract prohibited by the constitution, to which it never was and never could have been in legal contemplation a party. Interstate Trust, etc., Co. *v.* Reynolds, 127 La. 193, 53 So. 520.

the absence of constitutional prohibitions a state legislature may grant a special banking charter,[48] or a territorial government may do so.[49]

Constitutional Prohibition.—But such grants are now usually forbidden by the organic law.[50] A statute which remedies defects in the organization of a banking corporation already created is not a violation of a constitutional provision, prohibiting the granting of special charters for banking purposes,[51] unless disabled by contract from so doing.[52]

§ 25 (2) Operation and Effect.—The operation and effect depends, of course, upon the terms of the special act.[53]

§ 25 (3) Amendment, Renewal and Repeal.[54]**—Power.**—Unless the right of repeal or amendment be reserved, such banking franchise is an irrepealable contract, except by the unanimous consent of the stockholders,[55] but if extended it comes under the operation of a general reservation of the power to amend or repeal in an existing statute.[56]

48. In absence of constitutional prohibition.—Henderson Loan, etc., Ass'n *v.* People, 163 Ill. 196, 45 N. E. 141; Lampton *v.* Commonwealth's Bank (Ky.), 2 Litt. 300; Briscoe *v.* Bank (Ky.), 7 J. J. Marsh. 349; Bank *v.* Swindler (Ky.), 2 Dana 393; Craighead *v.* State Bank, 19 Tenn. (1 Meigs) 199.

Creation of the "commercial and agricultural bank" by decree no. 308, of the congress of Coahuila and Texas, in 1835.—Williams *v.* State, 23 Tex. 264.

49. Territorial government.—Bank *v.* Williams (N. Y.), 5 Wend. 478; People *v.* Marshall (Ill.), 1 Gilman 672.

50. Constitutional prohibition.—Smith *v.* State, 21 Ark. 294; Syracuse City Bank *v.* Davis (N. Y.), 16 Barb. 188, construing N. Y. Const., art. 8, § 4.

Arkansas.—Charter provisions authorizing banking business in general, see ante, "Charter Provisions," § 5.

The legislature has no constitutional power to confer banking privileges on a private corporation, engaged in mining and manufacturing slate. Smith *v.* State, 21 Ark. 294.

51. Remedying defective organization.—Syracuse City Bank *v.* Davis (N. Y.), 16 Barb. 188, construing N. Y. Const., art. 8, § 4.

52. Contract rights.—Duncan *v.* Maryland Sav. Inst. (Md.), 10 Gill & J. 299.

The state, by granting a charter conferring on a savings institution within the city of Baltimore power to receive deposits and discount paper, does not violate its pledge to the banks of that city by Acts 1813, c. 122, and Acts 1831, c. 131, providing that no charter should be granted to such an institution within those limits for a specified time empowering the corporation to issue negotiable notes. Duncan *v.* Maryland Sav. Ins. (Md.), 10 Gill & J. 299.

53. Operation and effect.—Powers conferred by charter, see post, "Time to Sue, and Limitations," § 219.

See State *v.* Lehre (S. C.), 7 Rich. Law 234, construing South Carolina, Act 1852 (12 Stat. 212) which renews the charter of the Planters' & Mechanics' Bank, and imposes additional liabilities and obligations. And see Williams *v.* State, 23 Tex. 264, construing Decree No. 308, of the congress of Texas and Coahuila, in 1835, granting the establishment of a bank.

54. Amendment, renewal, and repeal.—Dissolution of bank, see post, "Consolidation," § 67; "Effect of Dissolution," § 72.

55. Power to repeal or amend.—Woodfork *v.* Union Bank, 43 Tenn. (3 Coldw.) 488, construing charter of bank of Tennessee.

Bank of the United States.—Commonwealth *v.* Bank (Pa.), 2 Ashm. 349, construing Charter of the Bank of the United States. And see ante, "Charter as Contract, and Amendment or Repeal," § 23 (3b).

56. Extension subject to general reservation of right to amend.—Renewal, see post, "Extension or Renewal," § 30 (1).

The Kentucky statute of 1884 extending the charter of the Northern Bank of Kentucky without new con-

Form of Repealing Act.—It is not necessary that the repealing act should correspond exactly, in naming the corporation, with the act of incorporation which it is meant to repeal; but there must be such a correspondence as will leave no doubt of the intention of the legislature.[57] Six months, in an act extending a bank charter, has been held to mean six calendar months.[58]

Majority Required.—When a bank was chartered, the constitution required a two-thirds vote to alter a charter; but it was provided in the charter that the legislature might "at any time alter, modify, or repeal the same." The new constitution required a majority vote merely. It was held, that the bank had no "vested right" to have the charter changed by a two-thirds vote only.[59]

Reorganization as Creating New Corporation.—This has been held in a Louisiana case.[60]

Debts Not Affected.—Debts contracted with the bank previous to the passing of the repealing act, are not affected thereby.[61]

§ 26. General Laws.—A statute which provides for the incorporation of banks, with certain restrictions, in cities, towns, etc., of certain classes, does not prevent the organization of banks in cities having a larger population.[62] And a statute which enacted that members of banking associa-

ditions, except that the extension shall be formally accepted by the bank, shows no intention that the extended charter shall not be subject to repeal or amendment in accordance with the provisions of the Act of 1856. Northern Bank *v.* Stone, 88 Fed. 413.

57. Name of corporation—Accuracy required.—People *v.* Oakland County Bank (Mass.), 1 Doug. 282.

An act repealing the charter of the "Bank of Oakland County" can not be construed to be a repeal of the charter of "The President, Directors, and Company of the Oakland County Bank." People *v.* Oakland County Bank (Mass.), 1 Doug. 282.

The Kentucky Const., § 59, subsec. 4, prohibiting the legislature from passing local or special acts to regulate the punishment of crimes, in conjunction with Ky. St., § 1202, providing for the punishment of the offense of embezzlement by any officer or agent of any bank, operated to repeal a bank charter granted by special act of the legislature prior to the adoption of the constitution, to the extent that it provided for the punishment of the offense of embezzlement of the bank's funds by any of its officers or agents. Commonwealth *v.* Porter, 113 Ky. 575, 68 S. W. 621, 24 Ky. L. Rep. 364.

58. "Six months" construed.—Union Bank *v.* Forrest, Fed. Cas. No. 14,356, 3 Cranch C. C. 218.

59. Majority required.—In re Reciprocity Bank, 22 N. Y. 9, affirming 29 Barb. 369, 17 How. Prac. 323.

60. Reorganization as creating new corporation.—Acts 1853, No. 246, passed for the reorganization of the Citizens' Bank of Louisiana, and in order to relieve the state from its liability on certain bonds issued by it for the benefit of such bank, and creating the banking department of such bank, and the contract or articles of association of that year adopted by the creditors empowered under such act, created a new corporation. Hope *v.* Board, 108 La. 315, 32 So. 547.

The banking department of the Citizens' Bank of Louisiana, created by the act of 1853, being distinct from the bank, was not liable for the bonded debt of the state incurred in 1836 in aid of the bank. Hope *v.* Board, 108 La. 315, 32 So. 547.

61. Debts not affected.—Smith *v.* Bank, Fed. Cas. No. 13,011, 4 Cranch. C. C. 143; Ferguson *v.* State Bank, 8 Ark. 416.

62. General laws.—Dupee *v.* Swigert, 127 Ill. 494, 21 N. E. 622.

Acts relating to right of banking in

tions thereafter formed should be individually liable for the debts of the association, was not an implied incorporation of banking companies afterwards formed.[63] In the absence of indication of a contrary intent, a constitutional provision conferring on the legislature general powers to create corporations by general laws has been held to include banking corporations.[64] But a proviso excepting banking corporations prevails.[65]

Amendment or Repeal.—The charter of a bank incorporated under a general law may be modified or repealed by the legislature.[66] But the repeal of a general incorporation law, for the incorporation of banks, should not be construed, in the absence of express provisions, to repeal the charters of corporations formed thereunder, when the manifest purpose is to revise the former laws upon the subject and to substitute a new law extending the provisions of the old, without interfering with corporations formed under it.[67]

§ 27. Defective Incorporation or Organization.[68]—Failure to Pay in Capital.—The failure to pay in the specie required by the charter does not invalidate the incorporation, if the rights of third persons are not prejudiced,[69] nor does the failure to file the affidavit of such payment.[70]

general, see ante, "Constitutional and Statutory Provisions," § 4.

Incorporation under general laws, see ante, "Nature and Formation in General," § 22.

63. Implied incorporation.—Myers *v.* Irwin (Pa.), 2 Serg. & R. 368, construing Penn. Statute of 1808.

64. General constitutional provision held applicable.—Const. 1846, art. 8, §§ 1-3, providing for the formation of corporations, the alteration or repeal of laws or special acts creating them, and defining the term "corporations" as used in said article, apply to banking corporations, though § 7 declares and defines the liability of stockholders in banks of issue, and § 4 provides for chartering savings banks by general law, prohibits special charters to banks, and requires them to be incorporated under general laws. Barnes *v.* Arnold, 45 App. Div. 314, 61 N. Y. S. 85, affirmed in Barnes *v.* Arnold, 169 N. Y. 611, 62 N. E. 1093.

65. Proviso excepting banking corporations.—A certificate of incorporation filed under Revision 1896 (P. L. p. 277), § 6, which provides that nothing contained in the act shall authorize the formation of any trust company or banking corporation, can not include powers of a banking corporation or those of a trust company or such as are intended to derive profit from the loan and use of money. McCarter *v.* Imperial Trustee Co., 72 N. J. L. (43 Vr.) 42, 60 Atl. 223.

66. Amendment or repeal.—Barnes *v.* Arnold, 23 Misc. Rep. 197, 51 N. Y. S. 1109; People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684.

67. Repeal of general law—Charters obtained thereunder not repealed.—Smock *v.* Farmers' Union State Bank, 22 Okl. 825, 98 Pac. 945. See, also, ante, "Charter as Contract, and Amendment or Repeal," § 23 (3b); "Amendment, Renewal and Repeal," § 25 (3).

68. Defective incorporation or organization.—Effect of failure to deposit securities in safety fund, see ante, "Reserves," § 14.

Liabilities of persons engaged in unauthorized banking, see ante, "Validity of Transactions and Liabilities Incurred," § 9.

Proceedings by stockholder questioning sufficiency of incorporation, see post, "Rights and Liabilities as to Bank," § 43.

69. Failure to pay in capital.—Where a bank has been organized and bills issued without the actual payment in of the specie required by its charter, so that by reason thereof the

70. Failure to file affidavit of payment.—The fact that the organizers of a state bank failed to file with the county clerk an affidavit of the pay-

Personal Liability.—The promoters and organizers of a bank which attempts incorporation, but does not complete the same, are liable as partners for debts contracted in the course of business.[71] But mere irregularities in organizing a banking corporation will not deprive the officers and stockholders of the protection of the charter, or subject them to private liability, when sued as unauthorized bankers.[72]

De Facto Incorporation—What Constitutes.—An attempt in good faith to incorporate under an existing law authorizing incorporation for banking purposes, and the issuance of articles of incorporation, and acting thereunder by holding meetings, electing directors and doing other acts as a corporation, constitutes a corporation de facto in spite of defects and irregularities in the articles of incorporation, and only the state can inquire

state might at any time have recalled its corporate franchise, or a stockholder have resisted the payment of stock, or a debtor his liability to the bank, provided the rights of third persons were not prejudiced, it is still a valid corporation, so far as to make it liable to creditors for its own acts, and its stockholders liable to innocent bill holders under its charter for the ultimate redemption of the bills put in circulation by the bank. McDougald *v.* Bellamy, 18 Ga. 411.

Where the charter of a bank requires a certain amount of stock to be paid in before the bank can go into operation, and the statute requires the capital of banks to be paid in cash, if a subscriber for stock is allowed by the directors to give a note for his stock, instead of paying cash, and the bank goes into operation in violation of the charter on a capital which the note is reckoned as a cash payment for stock, the illegality of the transaction can not be set up in defense to an action by the bank on the note. Pine River Bank *v.* Hodsdon, 46 N. H. 114.

71. **Personal liability.**—Pettis *v.* Atkins, 60 Ill. 454; McLennan *v.* Anspaugh, 2 Kan. App. 269, 41 Pac. 1063; following McLennan *v.* Hopkins, 2 Kan. App. 260, 41 Pac. 1061.

Where persons enter into articles of association for banking purposes, and, without any charter, assume a name, open a stockbook, subscribe for shares of stock, and a portion pay small sums thereon, hold meetings, elect directors, publish their names, none of whom take any steps to inform the public that they do not belong to the association, enter into and transact business as a bank, held, that they are all liable as partners. Pettis *v.* Atkins, 60 Ill. 454.

A stockholder in Iowa is personally liable on his stock in a Kansas savings bank for the debts of the corporation, if a material article of the corporation's charter was not signed, and the signatures to the charter itself were not acknowledged, as required by the incorporation acts of Kansas, although the necessary certificates before a savings-bank business could be commenced were duly filed. Kaiser *v.* Lawrence Sav. Bank, 56 Iowa 194, 8 N. W. 772, 41 Am. Rep. 85.

The president of a bank, who signs notes intending to bind the bank, is himself liable thereon, if the bank, by reason of a void charter, has no legal existence. Allen *v.* Pegram, 16 Iowa 163.

The president of a bank is chargeable with constructive notice of the management of its affairs by the cashier and other subordinate officers; and, where such bank is doing business without legal organization, he can not escape the responsibility resulting from such notice, by showing that he supposed himself the president of a legally constituted bank, if he has contributed the influence of his reputation to give undeserved credit to a spurious corporation. Hauser *v.* Tate, 85 N. C. 81, 39 Am. Rep. 689.

ment of its capital stock, as required by law, can only be objected to by the state, and can not be made a defense by one who in the usual course of business has incurred obligations to the bank. Bank *v.* Darling, 91 Hun, 236, 36 N. Y. S. 153, 72 N. Y. St. Rep. 54.

72. **Mere irregularities not sufficient.**—Bartholomew *v.* Bentley, 1 O. St. 37.

in a direct proceeding whether it is a corporation de jure.[73] The act of an incorporated bank in changing its name and place of business, under an unconstitutional law, and the subsequent exercise of corporate powers under the new name, with the implied, if not the direct, consent of the state, makes the bank a de facto corporation.[74] But an unincorporated bank exclusively owned by one person, which never adopted articles of incorporation or pretended to possess or exercise corporate powers, is not a corporation de facto, though the business was conducted by a president and cashier.[75]

Necessity for Authority of Law to Incorporate.—Where there was no territorial law under which a corporation could be formed for banking purposes, an attempted incorporation for that purpose is not within the protection of a statute of the territory protecting de facto corporations from collateral attack, as that provision only applied to de facto corporations, which this is not, and the incorporators may be charged as partners on legal contracts made in the name of such pretended corporation.[76]

Retrospective Curative Legislation.—Where a banking corporation was attempted to be formed when there was no territorial law authorizing such incorporation, and subsequently the law was amended so as to authorize banking corporations to be created, and a statute provided that any company theretofore incorporated for banking should be entitled to the benefit of the amended statutes on filing a certificate with the secretary of the territory setting forth its acceptance of such statutes, such bank, though not filing the certificate, was, when thereafter receiving deposits, a de facto corporation.[77]

Right to Sue.—An unauthorized bank has been held incapable of suing on a note discounted by it.[78]

Right to Question Corporate Existence.—The general rule, applicable to all corporations, that the franchise of a corporation can not be impeached or inquired into collaterally, is applicable to corporations exercising banking franchises.[79] Its existence can not be questioned by one who

73. **De facto incorporation—What constitutes.**—Shawnee, etc., Sav. Bank Co. *v.* Miller, 24 O. C. C. 198, 14-24 O. C. D. 198.

74. Richards *v.* Minnesota Sav. Bank, 75 Minn. 196, 77 N. W. 822.

75. Longfellow *v.* Barnard, 59 Neb. 455, 81 N. W. 307, affirming on rehearing, 58 Neb. 612, 79 N. W. 255, 76 Am. St. Rep. 117.

76. **Necessity for authority of law to incorporate.**—Davis *v.* Stevens, 104 Fed. 235.

77. **Retrospective curative legislation.**—Mason *v.* Stevens, 16 S. Dak. 320, 19 N. W. 424.

78. **Right to sue.**—The general assembly of Michigan, before the admission of that state into the Union, attempted to incorporate a bank in territory then in dispute between that state and Ohio, which territory was settled to belong to Ohio. After this settlement, the bank continued to do business, and discounted the note sued on in this case. Held, that the bank is unauthorized, and can not therefore maintain the action. Myers *v.* Manhattan Bank, 20 O. 283.

79. **Right to question corporate existence.**—Bartholomew *v.* Bently, 1 O. St. 37. See, also, Shawnee, etc., Sav. Bank Co. *v.* Miller, 14-24 O. C. C. 198, 24 O. C. D. 198.

In a suit against a stockholder of a national bank by its receiver for assessments, the validity of the incorporation of the bank is a collateral is-

has dealt with it and thus admitted its existence;[80] and where an amendment to the charter of a bank was offered to the stockholders thereof for their acceptance in a prescribed mode, and the bank proceeded to exercise and enjoy the privileges and immunities secured by the amendment, neither the bank nor such of its stockholders as consented to and accepted the amendment can deny that the amendment was accepted in the prescribed mode, as against the claims of third persons, although in fact the amendment was not accepted as prescribed.[81]

§ 28. Evidence of Existence—§ 28 (1) In General—§ 28 (1a) Presumptions and Burden of Proof.—Commencement of business need not be shown where it is shown that the bank has been duly incorporated.[82] And it has been held that the name of a bank may connote incorporation.[83]

Presumption from Legislative Recognition.—Well-considered cases have gone so far as to hold that when the existence of a corporation has been recognized by acts of the legislature, all inquiry into the original creation of the corporation is precluded.[84]

sue, and the stockholder is estopped from asserting that it is not a corporation de jure. Davis *v.* Watkins, 56 Neb. 288, 76 N. W. 575.

80. Estoppel to deny corporate existence.—Persons dealing with a bank by executing a note and mortgage thereto after its term of corporate existence had expired, were estopped from maintaining that the mortgagee had no corporate existence when the note was executed. Citizens' Bank *v.* Jones, 117 Wis. 446, 94 N. W. 329; Campbell *v.* Perth, etc., Engineering Co., 70 N. J. Eq. 40, 62 Atl. 319.

Where a bank had done all the law required, previous to the appointment of a commissioner by the governor to examine its vaults, which the governor neglected to do, a person who had done business with the bank and admitted its existence by the receipt of its funds could not, in a suit against him by the receivers of the bank, question the legality of the organization. Bank *v.* Renick, 15 O. 322.

Where one contracts with a bank organized under the Indiana Free Bank Act of 1855, he can not as a defense to such contract avail himself of the provisions of § 18 of such act, requiring that the place where the bank is located, if not a county seat, shall contain not less than 1,000 inhabitants. Allison *v.* Hubbell, 17 Ind. 559.

Where a bank collects checks payable to and indorsed in the name of plaintiff as a corporation, the bank is estopped afterwards to deny plaintiff's corporate character. Craig Medicine Co. *v.* Merchants' Bank, 59 Hun 561, 14 N. Y. S. 16, 36 N. Y. St. Rep. 923.

81. Amendment accepted in other than prescribed manner.—Owen *v.* Purdy, 12 O. St. 73.

82. Proof of commencement of business unnecessary.—On trial of an indictment for uttering certain forged bills with intent to defraud a bank, where it is shown that the bank has been duly incorporated, it is unnecessary to show that it has commenced business. People *v.* Peabody (N. Y.), 25 Wend. 472.

83. Incorporation presumed from name.—A finding that plaintiff creditors dealt with a bank as a corporation is sustained by evidence that the bank was named the "Minnesota Savings Bank," Laws 1879, c. 109, § 46, forbidding any unincorporated bank to solicit deposits as a "savings bank," in the absence of any evidence by plaintiffs to the contrary. Richards *v.* Minnesota Sav. Bank, 75 Minn. 196, 77 N. W. 822.

A mortgage in the form of an absolute deed, reciting that the deed is subject to the claim of the Anglo-California Bank, Limited, imports that the bank is a corporation, and, in a suit by the bank to foreclose its claim under a mortgage, furnishes prima facie evidence of plaintiff's corporate character. Anglo-Californian Bank *v.* Field, 146 Cal. 644, 80 Pac. 1080. See, however, Hungerford Nat. Bank *v.* Van Nostrand, 106 Mass. 559.

84. Presumption from legislative recognition.—State *v.* Butler, 86 Tenn.

§ 28 (1b) Judicial Notice.—Where the charters of banks are, by statute, made general laws, of which the courts are bound to take notice, the court will therefore take notice whether or not a particular bank is an authorized institution.[85] But not of a bank charter granted by a territorial legislature,[86] or of a foreign bank.[87]

§ 28 (1c) As Question for Jury.—In a suit by a bank, an alleged corporation, on a note made payable to W. or order, the fact that the note is payable "at such bank" is not conclusive that it is a corporation, but the existence of the corporation is a question of fact to be submitted to the jury.[88]

§ 28 (1d) Of National Banks.—The mode provided by the national banking act for proving the organization of national banks should be followed.[89]

§ 28 (2) Charter or Certificate.—A bank charter granted by the governor of a state,[90] or a legislative act of incorporation,[91] which is pre-

(2 Pickle) 614, 8 S. W. 586, citing Society for Propagation of the Gospel *v.* Pawlet, 4 Pet. 480, 7 L. Ed. 927; In re New York, etc., R. Co., 70 N. Y. 327, 338.

Repeated recognitions of a bank by the legislature, in various public laws, as a legally existing corporation, is, so far as third persons are concerned, conclusive evidence of such legal existence, against which no testimony can be heard of the nonfulfillment of the conditions upon which, by the charter, such legal existence was made dependent. Williams *v.* Union Bank, 21 Tenn. (2 Humph.) 339.

"Again it becomes by such recognition ipso facto a legal corporation, and any defect or irregularity in the proceedings required by law to be taken for its organization will be deemed to have been waived. Black River, etc., R. Co. *v.* Barnard (N. Y.), 31 Barb. 258; Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228; White's Creek Turnpike Co. *v.* Davidson Co., 3 Tenn. Ch. 396. In which last case it is said by Judge Cooper, that 'after repeated recognitions of the existence of a turnpike corporation up to and inclusive of the last legislature, a collateral impeachment of its existence, based on pre-existing facts, can not be entertained.' See, also, Waterman on Corp., § 42." State *v.* Butler, 86 Tenn. (2 Pickle) 614, 8 S. W. 586.

85. Judicial notice of corporate existence.—Watson *v.* Brown, 14 O. 473; Brown *v.* State, 11 O. 276; State *v.* Shelton, 26 Tenn. (7 Humph.) 31; Shaw *v.* State, 35 Tenn. (3 Sneed) 86; Bonner *v.* Burke, 41 Tenn. (1 Coldw.) 623.

The charter of a bank of circulation, although the corporation may be correctly denominated a private corporation, is a public law, and need not be given in evidence. Williams *v.* Union Bank, 21 Tenn. (2 Humph.) 339. See post, "Charter as Notice," § 34 (2).

The act of Virginia incorporating the Bank of Alexandria is a public law. Young *v.* Bank, 4 Cranch 384, 2 L. Ed. 655.

86. Territorial bank charter.—Alexander *v.* Brown, 2 Disn. 395, 13 O. Dec. 241.

87. Of foreign bank.—Brown *v.* State, 11 O. 276; Lewis *v.* Bank, 12 O. 132, 40 Am. Dec. 469.

88. As question for jury.—Hungerford Nat. Bank *v.* Van Nostrand, 106 Mass. 559. See, however, ante, Presumptions and Burden of Proof," § 28 (1a), as to presumption from corporate name.

89. Of national bank.—First Nat. Bank *v.* Randall, 1 App. Civ. Cases, § 971.

90. Charter or certificate.—A bank charter granted by the governor of a state, reciting his authority, by the laws of that state, to make such grants, and authenticated by the great seal thereof, in the absence of proof that its laws did not warrant such an exercise of authority on the part of the governor, is sufficient evidence, per se, to prove the existence of such bank. Agnew *v.* Bank (Md.), 2 Har. & G. 478.

91. Act of incorporation.—It is not

sumed to have been legal and valid,[92] or the original certificate of incorporation recorded in the proper office, are sufficient evidence of incorporation.[93] The charter is proved by an authenticated copy or the public statute book containing it.[94]

§ 28 (3) Parol Evidence.—While it has been held that parol evidence is not admissible to establish the existence of a free bank,[95] yet on trial of an indictment for uttering certain forged bills with intent to defraud a bank, parol evidence has been held admissible to prove the bank's existence.[96]

necessary, in order to maintain an action by an incorporated bank, that such bank should show a regular organization according to the directions of Rev. St., c. 44. It is, in general, sufficient to give evidence of the act of incorporation, and the actual use of the powers and privileges thereby conferred. Farmers', etc., Bank *v.* Jenks (Mass.), 7 Metc. 592.

If a plea of nul tiel corporation be filed to a declaration by a bank on a note, and issue be joined thereon, a copy of the act of incorporation, together with proof of user under the charter, is sufficient evidence in behalf of the bank. Henderson *v.* Mississippi Union Bank, 14 Miss. (6 Smedes & M.) 314.

And it has been held that proof of user in addition is not necessary. People *v.* Peabody (N. Y.), 25 Wend. 472.

Of foreign bank.—In an action by a bank, purporting to be a foreign corporation, to foreclose a mortgage assigned to it, the only proof of incorporation was a legislative act of the foreign state incorporating it. Held, that possession of the note and mortgage, with proof of purchase and assignment to plaintiff in its corporate name, proved an acceptance of the charter. Lancaster Sav. Bank *v.* Elwell, 17 Wash. 446, 49 Pac. 1070.

92. Presumption of validity.—Upon the denial of the corporate existence of a bank, the court will not assume that the act of incorporation took place, if at all, under the statute passed since the adoption of the constitution of 1851, and is therefore void for want of compliance with the provisions of such constitution. Ridenour *v.* Mayo, 29 O. St. 138.

93. Original certificate.—In an action by a banking association formed under the general banking law of 1838, the original certificate recorded in the county clerk's office, together with proof that the association had done business and issued bills which were countersigned, was sufficient evidence of the association's organization, without direct proof that a copy of its certificate had been filed with the secretary of state. Leonardsville Bank *v.* Willard, 16 Abb. Prac. 111, affirmed in 25 N. Y. 574. See, also, People *v.* Peabody (N. Y.), 25 Wend. 472.

94. Authenticated copy of charter or the statute book.—Where an indictment for passing counterfeit banknotes alleged the existing of the banking corporation in another state, whose bills were counterfeited, it is held, that it is necessary upon the trial to produce in evidence an authenticated copy of the charter of said bank, or a book purporting to be the public statute book of said state, in which said charter is printed. Jones *v.* State, 37 Tenn. (5 Sneed) 346.

A properly certified copy of an amended charter of plaintiff banking corporation, signed by the state auditor, and a deposition of plaintiff's cashier that the bank had been duly organized and acting under the charter, and for ten years previous had been doing business under a previous charter; that he had been connected with it from its first organization; and that it had never been dissolved, and was still doing business, to which were appended the minutes of a meeting, containing a copy of the first charter, and an account of the reorganization under the second, was sufficient evidence, where, uncontradicted, to justify a finding that the bank was a corporation. Bank *v.* Carr, 130 N. C. 479, 41 S. E. 876.

95. Parol evidence.—Trice *v.* State, 39 Tenn. (2 Head) 591.

96. Dennis *v.* People (N. Y.), 1 Parker Cr. R. 469; People *v.* Chadwick, 2 Parker Cr. R. 163; Cady *v.* Commonwealth, 51 Va. (10 Gratt.) 776. See State *v.* Williams, 152 Mo. 115, 53 S. W. 424, 75 Am. St. Rep. 441, when such evidence was held sufficient in a prosecution for forging of a note.

§ 28 (4) User and Repute.—The existence of a banking corporation may be proved by reputation,[97] or user,[98] without direct proof of the filing of the certificate as required by law,[99] and this applies to a foreign corporation.[1]

Existence of National Bank.—On the preliminary examination of the accused, charged with embezzlement, evidence of the actual existence of a certain national bank, and of acts done by the accused as president thereof, is sufficient evidence of the legal incorporation of the bank, and of the connection of the accused with it.[2]

§ 29. Term of Existence.—In General.—The legal existence of a bank continues as long as the act incorporating it remains in force.[3]

Statutory Extension Subsequent to Dissolution.—Of course the life of a corporation may, for certain purposes, by statute or the charter, be extended for certain time after its dissolution.[4]

97. User and repute.—State *v.* Fitzsimmons, 30 Mo. 236.

98. Williams *v.* Union Bank, 21 Tenn. (2 Humph.) 339.

In suit by a bank upon a note, proof that plaintiff is doing business as a bank, in the name in which it sued, has a president and other officers, and keeps a discount register, is sufficient to establish its status. For the purpose of the suit, it is immaterial whether it be a mere association of persons or an incorporated company. Farmers', etc., Bank *v.* Williamson, 61 Mo. 259.

In a suit by a bank, in which its corporate existence is in issue, it is sufficient for them to show the charter, and to give parol evidence that they are transacting business as a bank. Bank *v.* Allen, 11 Vt. 302.

Where the charter of a bank required notice of its organization by a certain date, and it was found in operation afterwards, under the charter, it must be presumed, in the absence of evidence to the contrary, that the bank was organized as early as the time prescribed. Bank *v.* Lyman, Fed. Cas. No. 924, 20 Vt. 666, 1 Blatchf. 297.

Evidence of office of discount.—Evidence that, at a place having the name of a bank over its entrance, notes were discounted and accounts kept there, is admissible to show that the place is a bank. Way *v.* Butterworth, 106 Mass. 75.

Evidence that bills are in general circulation.—Evidence that the bills of a banking corporation are in general circulation is sufficient evidence of the organization of the bank to sustain an allegation to that effect in an indictment for forging a bank note. State *v.* Carr, 5 N. H. 367.

99. Without proof of filing of certificate.—In an action by a banking association, the original certificate recorded in the county clerk's office, with proof that the association who did business and issued bills which were countersigned, is sufficient evidence of its due organization, without direct proof that a copy of the certificate was filed with the secretary of state, as required by statute. Leonardsville Bank *v.* Willard, 16 Abb. Prac. 111, affirmed in 25 N. Y. 574.

1. Foreign corporation.—Gaines *v.* Bank of Mississippi, 12 Ark. 769; Jennings *v.* People, 8 Mich. 81; State *v.* Fitzsimmons, 30 Mo. 236; Reed *v.* State, 15 O. 217; Sasser *v.* State, 13 O. 453.

2. Existence of national bank.—In re VanCampen, Fed. Cas. No. 16,835, 2 Ben. 419.

3. Term of existence.—Lindell *v.* Benton, 6 Mo. 361.

4. Statutory extension subsequent to dissolution.—Where a statute gives to all companies incorporated under it three years, after a dissolution of said corporations by limitation, legislative repeal, or otherwise, to wind up and settle the affairs of said companies, they may, therefore, sue and be sued as corporations at any time within three years after dissolution. Ferguson *v.* Miners, etc., Bank, 35 Tenn. (3 Sneed) 609. See Nashville Bank *v.* Petway, 22 Tenn. (3 Humph.) 522, for example of extension by charter provision.

Subsequent Acts Extending the Period.—Subsequent acts extending the period of corporate existence incorporate themselves with the original charter, and give the same effect to its provisions with the respect to the period of extension as they had with reference to the original period.[5]

§ 30. Extension, Renewal, or Transfer of Franchise—§ 30 (1) Extension or Renewal.[6]—Terms and Conditions.—An act to extend the charter of a corporation, by usage, includes the terms or conditions upon which said extension is granted.[7]

Continuation of By-Laws in Force.—Where a bank's charter is renewed by direction that the period of its existence shall be extended as fully as if the extended period had been named in the original charter, the directors, in a suit by its receiver against them, can not claim that a by-law adopted previous to the extension, and relied on by the receiver, was not binding because of the expiration of the original charter.[8]

Extension by Action of Stockholders—Failure to Give Notice of Meeting.—Where the law authorizes the stockholders to extend the corporate existence at any meeting called for that purpose, the failure to give the usual statutory notice of such meeting will not invalidate the extension if otherwise regular.[9]

§ 30 (2) Assignment and Transfer of Rights, Franchises, etc.—In General.—It has been held that the rights, franchises, and exemptions granted to a banking corporation by its charter may exist, and be validly transferred, without issuance or transfer of stock certificates, where there is other satisfactory proof of subscription and payment of stock, and of organization of the corporation, and of a bona fide transfer, not merely of the paper charter, but of the stock, franchises, and exemptions of the corporation.[10]

5. **Subsequent acts extending the period.**—Nashville Bank *v.* Petway, 22 Tenn. (3 Humph.) 522.

And, therefore, where the charter provided that the powers and obligations of the corporation shall continue for the purpose of bringing to a final settlement its affairs which shall be depending on the day the charter expires, specifying the day, and the existence of the corporation was subsequently extended for twenty years after that date, it was held, that the powers of the corporation for the purpose of settlement would continue as if there had been no extension. Nashville Bank *v.* Petway, 22 Tenn. (3 Humph.) 522.

6. **Special charters or acts.**—See ante, "Special Charters or Acts," § 25.

7. **Usage as to terms and conditions.**—Robinson *v.* Bank, 18 Ga. 65.

8. **Continuation of by-laws adopted before extension.**—Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120.

9. **Extension or renewal.**—Cascade Bank *v.* Yoder, 39 Mont. 202, 103 Pac. 499, construing Rev. Codes of Montana, § 3907.

10. **Assignment and transfer of rights, franchises, etc.**—State *v.* Butler, 86 Tenn. (2 Pickle) 614, 8 S. W. 586.

A statute, providing that it shall not be lawful for an individual banker issuing circulating notes under the general banking laws to sell or transfer the business of banking, upon the securities deposited by him, does not prevent an absolute sale by such banker of the bank and banking operations, including the securities deposited with the bank department. Metcalf *v.* Messenger (N. Y.), 46 Barb. 325.

An insurance company can not absorb a bank, either directly or indirectly, so as to draw unto itself the rights, franchises, and exemptions contained in the bank charter; but there is no legal objection to the purchase of the stock, franchises, etc., of the bank by shareholders in the insurance company. Of this latter character is the transaction in this case.[11] But a transfer of a mere charter conferring a franchise does not convey the franchise to the transferee.[12]

The judicial sale of a bank franchise transfers to the purchaser only the right to reorganize as a corporation, not an existing franchise to be such corporation with any of its personal privileges and exemptions.[13]

§ 31. Name—§ 31 (1) Statutory Requirements.—Under a statute requiring the name of the county or city in which a bank is formed to appear in its name, either is sufficient.[14] And where a statute requires that

11. **Absorption by insurance company and purchase by stockholders thereof distinguished.**—State *v.* Butler, 86 Tenn. (2 Pickle) 614, 8 S. W. 586, where the court said: "For the complainant it is urged that the transaction just detailed was a merger of the bank into the insurance company, or was a sale by the bank of all its stock to the Merchants' Insurance Company for the purpose of carrying to the latter its corporate entity and franchises, to enable the insurance company to control the organization and to become a bank, and that the mere interposition of the directors as trustees to hold the stock does not change the effect. The legal proposition advanced is sound. There is no doubt but that the insurance company had no power to purchase, and the bank no power to sell, so as to vest all the stock and franchises of the latter in the former, there being no express authority to do so in either charter, nor by any additional legislative grant or provision. Green's Brice's Ultra Vires, 166; Cook on Stocks, etc., § 60, pp. 315-317. And it is equally true that if the purchase was by the one corporation for the purpose of controlling or absorbing the other, the mere interposition of the directors as trustees would not validate the transaction. Central R. Co. *v.* Pennsylvania R. Co., 31 N. J., Eq. 475." State *v.* Butler, 86 Tenn. (2 Pickle) 614, 8 S. W. 586.

12. **Transfer of charter conferring franchise.**—State *v.* Butler, 83 Tenn. (15 Lea) 104.

13. **Judicial sale of franchise.**—The judicial sale of the franchise of a banking corporation does not transfer to the purchaser the franchise to be such a corporation, but only the right to reorganize as a corporation, subject to the laws, constitutional and otherwise, existing at the time of the reorganization. The franchise to be a corporation is distinguished from the franchise to exercise as a corporation the banking powers named in this charter. The exemption from taxation was a personal privilege in favor of the corporation therein specifically referred to, and it did not pass with the sale of that charter, and there is no express or clear intention of the law requiring that exemption to pass as a continuing franchise to the purchaser thereof. Morgan *v.* Louisiana, 93 U. S. 217, 23 L. Ed. 860; Wilson *v.* Gaines, 103 U. S. 417, 26 L. Ed. 401; Louisville, etc., R. Co. *v.* Palmes, 109 U. S. 244, 27 L. Ed. 922, 3 S. Ct. 193. In the face of the constitutional provision prohibiting exemption, it can still less be claimed that the sale of the charter carried the exemption. Mercantile Bank *v.* Tennessee, 161 U. S. 161, 173, 40 L. Ed. 656, 16 S. Ct. 461.

A banking corporation may exist under and by virtue of the purchase of the charter at a receiver's sale, and the legislative recognition and the assumption of the state that it is a corporation, and yet not have the title to the exemption given by that charter, because it is not in fact or in law the same corporation originally incorporated. Mercantile Bank *v.* Tennessee, 161 U. S. 161, 173, 40 L. Ed. 656, 16 S. Ct. 461.

14. **Local designation.**—Erb *v.* Grimes, 94 Md. 92, 50 Atl. 397.

the certificate of incorporation of a corporation reincorporating under that article shall state the proposed name of the new corporation and the former name of said corporation, where the W. Savings Institution reincorporated as the W. Savings Bank, the alteration of the name did not affect the validity of the new corporation.[15] Under a statute prohibiting a foreign corporation from doing a banking business under a name identical with or similar to that of a domestic corporation, while the domestic corporation would be entitled to an injunction against such use of such name, yet where used with an addition which prevents it from being misleading, the statute is not infringed.[16] "The president and directors of" has been held not a part of a bank's name.[17]

§ 31 (2) Change of Name.—Power to Change and Effect.—While the state, by its legislature, may change the name of a corporation, and to this extent recognize its then existence as a corporation, it does not thereby assure to it any other or different franchises than those which it is, at the time of such recognition, entitled to.[18]

15. Erb. *v.* Grimes, 94 Md. 92, 50 Atl. 397, construing Maryland Code, art. 23, § 83.

16. International Trust Co. *v.* International Loan, etc., Co., 153 Mass. 271, 26 N. E. 693, 10 L. R. A. 758.

Laws 1889, c. 452, § 2, provides that no foreign corporation shall carry on a banking, mortgage loan and investment, or trust business in Massachusetts under a name previously in use by a domestic corporation, or so nearly identical as to mislead. Held, that the name "International Loan & Trust Company of Kansas City," or the same with the addition of the abbreviation "Mo.," is not so nearly the same as "International Trust Company" as to mislead; and a domestic corporation which has previously owned and done business under the latter name is not entitled to an injunction against a foreign corporation to restrain it from doing business under the former name, though defendant's corporate name is actually "International Loan & Trust Company." International Trust Co. *v.* International Loan, etc., Co., 153 Mass. 271, 26 N. E. 693, 10 L. R. A. 758.

A foreign corporation engaged in the business of buying and selling investment securities, consisting chiefly of its own debenture bonds, issued against mortgages taken by it in other states, and mercantile paper discounted by it elsewhere and sent into Massachusetts for rediscount, is engaged in the banking or loan and investment business within the meaning of the statute. International Trust Co. *v.* International Loan, etc., Co., 153 Mass. 271, 26 N. E. 693, 10 L. R. A. 758.

The proper party to petition for injunction under § 3 of the act, which provides that any of its provisions may, on petition, be enforced by injunction, is the party aggrieved by the actions of the foreign corporation; and a domestic corporation engaged in loaning and investing moneys received by it on securities, and receiving, discounting, and paying interest on deposits, is an aggrieved party, if the foreign corporation does business under an identical name, or one so similar as to mislead, as the business of the two corporations are the same or similar. International Trust Co. *v.* International Loan, etc., Co., 153 Mass. 271, 26 N. E. 693, 10 L. R. A. 758.

17. The corporate name of the bank incorporated by Act Cong. March 3, 1817, § 23, is "The Central Bank of Georgetown and Washington," and not "The President and Directors of" said bank. Central Bank *v.* Tayloe, Fed. Cas. No. 2,548, 2 Cranch, C. C. 427.

18. Power to change and effect thereof.—State *v.* Butler, 83 Tenn. (15 Lea.) 104, 111.

Similarity of new name to that of existing corporation.—An order allowing a corporation to change its name from the "Bank of Attica" be-

Changing Name by Special Act.—An act which merely changes the name of a pre-existing corporation is not obnoxious to a constitutional provision that "no corporation shall be created or its powers increased or diminished by special laws."[19]

Grant of Charter with Privilege to Change Name.—Sometimes a charter carries the privilege of change of name.[20]

Necessity for Submission to Popular Vote.—Where a banking corporation has attempted to change its name under the provisions of an act which does not apply to banking corporations (because not submitted to a popular vote as required of all acts creating banking corporations or amendments thereof) another statute, which ratifies and validates all such attempted changes, and was adopted by popular vote, does not cause the changed name to become the legal name of the corporation until the date when said section went into effect.[21]

§ 32. Location and Place of Business.[22]—Residence of Bank.—If the charter of a bank says the bank shall be established at a particular place, the charter itself means to say that the bank shall be a resident of that place;[23] and where the charter of a bank provided that its operations of discount and deposit should be carried on in the village of Ithaca, and not elsewhere, and the cashier discounted a note at the city of New York, canceling a debt due the bank from the person at whose request the discount was made, and paying him the balance in cash, it was held that the transaction was not a violation of the charter, and that the note was valid.[24]

Legislative Determination.—And where the principal bank and

cause of its similarity to the "Bank of Attica in Attica," another banking corporation, to the "Buffalo Commercial Bank," will not be disturbed on the ground of its similarity to the "Bank of Commerce in Buffalo." In re Bank, 59 Hun 615, 12 N. Y. S. 648.

19. Change of name by special act.—State *v.* Butler, 86 Tenn. (2 Pickle) 614, 8 S. W. 586, construing art. 11, § 8 of Tenn. Const. of 1870, and citing Wallace *v.* Loomis, 97 U. S. 146, 24 L. Ed. 895; Jones *v.* Habersham, 107 U. S. 174, 27 L. Ed. 401, 2 S. Ct. 336.

20. Grant of charter with privilege to change name.—The Tennessee act of 1854, ch. 294, § 68, chartered the Eastern Division Mining Company, with banking powers, and the privilege of changing its name and title whenever deemed necessary. Under the power thus conferred, the name of said corporation was changed to the Central Bank of Tennessee. Lillard *v.* Porter, 39 Tenn. (2 Head) 177.

21. Submission to popular vote.—Sykes *v.* People, 132 Ill. 32, 23 N. E. 391.

Under Const. Ill., art. 11, § 5, which provides that no acts creating banking corporations, nor amendments thereto, shall go into effect unless ratified by popular vote, the Act of March 26, 1872, providing for the change of corporate names (Rev. St. 1889, c. 32, § 50), not having been submitted to popular vote, does not apply to banking corporations. Sykes *v.* People, 132 Ill. 32, 23 N. E. 391.

22. Location and place of business.—Control and regulation of foreign banks, see ante, "Foreign Banks," § 18.

Limitation of number of banks in a locality, see ante, "Nature and Formation in General," § 22; "Special Charters or Acts," § 25.

Rights to establish branches, see post, "Branches," § 33.

Place of exercise powers of foreign banks, see post, § 86 (3).

23. Residence of bank.—Central Bank *v.* Gibson, 11 Ga. 453; Davis *v.* Central R., etc., Co., 17 Ga. 326.

24. Potter *v.* Bank (N. Y.), 7 Hill 530.

branches of the state bank were located by the legislature at certain designated points, they could only be removed by the same power.[25] And where the requirements of law have been complied with a certificate of authority to transact a banking business can not be refused by the secretary of state because the business is to be conducted in a department store.[26]

§ 33. Branches—§ 33 (1) Distinct Corporate Existence and Authority.—While it has been held that branch banks have a distinct corporate existence and authority, by which they may contract for, and acquire, the ownership of property,[28] the weight of authority is that a bank and its branches constitute but one corporation.[29] The relation is that of principal and agent, e. g., that between the bank of the United States and

25. Legislative determination.—Bank *v.* Woodson, 45 Tenn. (5 Coldw.) 176.

The Farmers' Bank of Virginia, being a domestic corporation in Virginia, before the division, and having branches in the territory which became West Virginia, from the date of the division continued in law and in fact a domestic corporation of the latter state as effectually as it had been under the former state, and as such was liable to be sued, and was not liable to be proceeded against as a foreign corporation. Farmers' Bank *v.* Gettinger, 4 W. Va. 305; Farmers' Bank *v.* Willis, 7 W. Va. 31.

26. In department store.—Jones *v.* Cook, 174 Mo. 100, 73 S. W. 489.

28. Branches—Distinct corporate existence.—McNeil *v.* Wyatt, 22 Tenn. (3 Humph.) 125; Bonner *v.* Burke, 41 Tenn. (1 Coldw.) 623. See post, "Powers," § 33 (3).

29. Wallace *v.* State Bank, 7 Ark. 61; Elliott *v.* Branch, etc., Bank, 4 Ark. 424; Bower *v.* Bank, 5 Ark. 234; Murphey *v.* State Bank, 7 Ark. 57; Bank *v.* Dunn, 17 La. 234; Trezevant *v.* Bank (La.), 1 Rob. 465; Farmers' Bank *v.* Garten, 34 Mo. 119; Bank *v.* Smith, 33 Mo. 364; Merchants' Bank *v.* Farmer, 43 Mo. 214; Tompkins *v.* Branch Bank, 38 Va. (11 Leigh) 372; Mason *v.* Farmers' Bank, 39 Va. (12 Leigh) 84; Farmers' Bank *v.* Willis, 7 W. Va. 31; Smith *v.* Lawson, 18 W. Va. 212, 14 Am. Rep. 688.

No estoppel on a bank establishing a branch bank under § 9, Act Jan. 12, 1872, requiring it to treat the branch bank as an independent bank, exists, since that would be to create an independent corporation, which it could not do. Worth *v.* Bank, 122 N. C. 397, 29 S. E. 775.

Construction of statute.—In Bank *v.* McVeigh, 61 Va. (20 Gratt.) 457, it was held, that the act of March 3, 1861, authorizing payment of debts due to mother banks within the federal lines to be made to branch banks within the confederate lines, was not obligatory upon the mother banks, but was unconstitutional as to debts contracted before its passage, although payment had been made in confederate money to a branch bank.

A bank located within the federal lines took possession, after the war, of the assets of its branch bank located within the confederate lines, the assets were much less than the indebtedness of the branch bank to the mother bank. Held, that the bank did not thereby sanction and ratify the acts of the branch bank done under the Acts of March 29 and May 16, 1862. Yeaton *v.* Bank, 62 Va. (21 Gratt.) 593.

Payment of debts to parent bank.—The provision in the Code of Virginia, that, "though a bank had a branch * * * all its notes should be received in payment of debts to the bank, whether contracted at the parent bank, or a branch," applied only while the debts remained due to the bank. When a negotiable promissory note discounted by the Farmers' Bank of Virginia had been assigned by the bank to trustees, for the payment of antecedent debts, and the maker, having notice of the assignment, afterwards acquired notes of the bank, he could not, with these, pay his debt so assigned, or set them off against it. Farmers' Bank *v.* Willis, 7 W. Va. 31.

Notes discounted by branch.—In Smith *v.* Lawson, 18 W. Va. 212, 14 Am. Rep. 688, it was held, that the mother bank has a right to receive payment of a negotiable note discounted by the branch.

its branches.[30] A statute defining "branch banks" has been held not to include branches of foreign banking corporations, these being included under "banks."[31]

§ 33 (2) Creation.—The creation of branch banks by the legislature is constitutional,[32] and a clause in the constitution providing that the general assembly may incorporate one state bank, and branches, does not prohibit the establishment of one banking institution, with any number of offices of deposit to transact its business; and it may locate these offices at as many points as it may deem advisable,[33] in the absence of a charter restriction,[34] or a statutory one.[35] But there must be legislative authority before a bank can establish a branch.[36]

§ 33 (3) Powers.—The powers of branch banks are limited to the authority delegated to them by charter,[37] and even the conferring of authority by charter, which is opposed to the incorporating clause and the general objects of the charter, is void.[38]

Acquisition of Property.—Branch banks have a distinct corporate existence by which they may contract for and acquire property, the title to which, however, becomes vested in the principal bank in whose name suit can be maintained for its recovery.[39]

§ 33 (4) Actions.—And while it has been held that a branch bank

30. Relation of principal and agent.—Bank *v.* Goddard, Fed. Cas. No. 917, 5 Mason 366; Farmers' Bank *v.* Calk, 4 Ky. L. Rep. (abstract) 617; Murphey *v.* State Bank, 7 Ark. 57.

31. Flumerfelt *v.* Engle, 50 Wash. 207, 96 Pac. 1045.

32. Constitutional exercise of legislative power.—People *v.* Marshall (Ill.), 1 Gilman 672; Farmers' Bank *v.* Garten, 34 Mo. 119.

33. Number and location of offices unrestricted.—State *v.* Ashley, 1 Ark. 513.

34. Charter restriction.—Where a bank is located in one county by its charter, it violates its charter by establishing an agency in another county, where it receives deposits and buys and sell exchange; but it may lawfully have an agency to redeem its bills. People *v.* Oakland County Bank (Mass.), 1 Doug. 282.

35. Statutory restriction—Scope.—Act April 16, 1850, § 50, providing that "each and every bank in this commonwealth, or any other state, is hereby prohibited from establishing * * * any branch or agency for the transaction of banking business * * * at any other place than that fixed and named in its charter for its location and the transaction of its business, without the express authority of an act of assembly of this commonwealth to do so," the penalty being a forfeiture of charter, is inoperative so far as it refers to banks chartered by the laws of other states. Bowman *v.* Cecil Bank (Pa.), 3 Grant Cas. 33.

36. Legislative authority essential.—Bruner *v.* Citizens' Bank, 134 Ky. 283, 120 S. W. 345.

37. Authority limited.—State *v.* Ashley, 1 Ark. 513.

The local boards of a state bank can not pass any by-law or ordinance affecting any other part of the corporation than that over which they respectively preside, and even then their authority is subjected to the control of the central board. State *v.* Ashley, 1 Ark. 513.

38. State *v.* Ashley, 1 Ark. 513.

Ratification of acts of branch bank.—Yeaton *v.* Bank, 62 Va. (21 Gratt.) 593. See ante, "Distinct Corporate Existence and Authority," § 33 (1).

39. Acquisition of property.—M'Neil *v.* Wyatt, 22 Tenn. (3 Humph.) 125; Bonner *v.* Burke, 41 Tenn. (1 Coldw.) 623. See, however, ante, "Distinct Corporate Existence and Authority," § 33 (1).

may sue and be sued as a corporation,[40] yet the better rule is that such suits must be brought by or against the mother bank.[41]

Garnishment—Duty of Branch.—It is the duty of a branch bank, when served with garnishee process, to make the fact known within the shortest time reasonably practicable to the main bank and to its branches, where it is known that the depositor whose funds have been garnished has an account with the other branch.[42]

§ 34. Constitution, Charter and By-Laws[43]—§ 34 (1) In General.—Collateral Attack on Charter.—The question as to whether a bank has violated its charter, can not be inquired into in a collateral proceeding. This must be done in a proceeding having that single object in view.[44]

§ 34 (2) Charter as Notice.—Provisions of Charter Bind Third Persons.—Persons dealing with a banking corporation must take notice of, and are affected by the provisions contained in its charter.[46] But while knowledge of the provisions of a state bank charter is presumed,[47] this is not true of the charter of a private bank, which stands on the footing of a special private act.[48]

§ 34 (3) By-Laws.[49]—Adoption.—Banks may enact by-laws to regulate the means of attaining their corporate ends; but these by-laws must be reasonable and consistent with the general laws of the land; and whether they be so, a court must determine.[50] They must not be in restraint of trade, as one restricting alienation of stock has been held to be.[51] A stat-

40. **Actions.**—Branch *v.* Rhew, 37 Miss. 110.

41. Elliott *v.* Branch, etc., Bank, 4 Ark. 424; Wallace *v.* State Bank, 7 Ark. 61; State *v.* Ashley, 1 Ark. 513; Bower *v.* Bank, 5 Ark. 234; Bank *v.* Dunn, 17 La. 234; Bonner *v.* Burke, 41 Tenn. (1 Coldw.) 623; Mason *v.* Farmers' Bank, 39 Va. (12 Leigh) 84; Tompkins *v.* Branch Bank, 38 Va. (11 Leigh) 372.

42 **Garnishment—Duty of branch.**—Bank *v.* Clark, 108 Ill. 163.

43. **Charter as contract.**—See ante, "Charter as Contract, and Amendment or Repeal," § 23 (3b).

44. **Collateral attack on charter.**—Crump *v.* United States Min. Co., 48 Va. (7 Gratt.) 352, 56 Am. Dec. 116; Banks *v.* Poitiaux, 24 Va. (3 Rand.) 136, 15 Am. Dec. 706. See post, "Grounds for Forfeiture of Franchise or Dissolution," § 68.

46. **Provisions of charter as binding third persons.**—Bohmer *v.* City Bank, 77 Va. 445; Hays *v.* Bank, 18 Tenn. (M. & Y.) 179.

47. **Charter of state bank.**—All persons within the limits of the state are presumed to know the purpose of the creation of the state bank, and the nature, character and extent of its powers. Bank *v.* Woodson, 45 Tenn. (5 Coldw.) 176. See, also, Nashville *v.* Bank, 31 Tenn. (1 Swan) 269.

48. **Private bank.**—King *v.* Doolittle, 38 Tenn. (1 Head) 77.

49. By-laws of savings bank as part of contract with depositor, see post, "By Laws or Pass Books as Part of Contract," § 300.

Rules for transaction of business with public, see post, "Rules of Bank," § 88.

50. **Adoption—Must be reasonable.**—State *v.* Bank, 5 Mart. (N. S.) 327.

51. **Restraint of trade—Alienation of stock.**—The right of alienation is an incident of property, and a by-law of a bank prohibiting the alienation of stock therein, or putting restrictions thereon, is void, as being in restraint of trade. Moore *v.* Bank, 52 Mo. 377.

ute requiring corporations generally to adopt by-laws within one month has been held not to apply to banks.[52]

Regulation of Business.—The regulation of its business and division into departments is the proper subject of a by-law,[53] or the regulation of stock transfers and the reservation of a lien.[54]

Construction.—A by-law of a bank is a contract between the stockholders; and the ordinary rules of construing contracts apply in its construction.[55] The construction to be placed on the by-laws and resolutions of an incorporated bank, in evidence in a case, is for the court.[56]

Mode of Proof.—Evidence of the cashier of a bank as to what the by-laws of the bank are is inadmissible.[57]

Binding Force.—Although an incorporated bank be authorized to make by-laws, rules and regulations, etc., such by-laws and rules can not affect the rights or interests of third persons.[58]

§ 34½. Repeal or Amendment.—Power of Legislature to Repeal, Alter or Modify.—Under the power reserved in the charter of a private banking corporation, to repeal, alter or modify the charter, the legislature may repeal the charter, but can not modify it without the consent of the corporation. But if the corporation refuses to consent to the modification, it must discontinue its business as a corporate body.[59] And the acceptance by the stockholders must be unanimous, where the alterations are fundamental.[60]

52. Smock *v.* Farmers' Union State Bank, 22 Okl. 825, 98 Pac. 945.

53. Regulation of business.—Palmer *v.* Yates, 5 N. Y. Super. Ct. 137.

54. Regulation of stock transfers and liens.—Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253.

55. Construction.—In re Dunkerson, Fed. Cas. No. 4,156, 4 Biss. 227.

56. Construction of by-laws for court.—Jumper *v.* Commercial Bank, 48 S. C. 430, 26 S. E. 725.

57. Mode of proof—Evidence of cashier.—Lumbard *v.* Aldrich, 8 N. H. 31, 28 Am. Dec. 381.

58. Binding force—Interests of third persons unaffected.—Farmers', etc., Bank *v.* Smith, 19 Johns. 115.

As to showing mistake in account of deposits, see post, "Making, Receipt, and Entry of Deposits in General," § 121.

As to liability for special deposits, see post, "Special Deposits," § 153.

59. Power of legislature to repeal, alter or modify.—Yeaton *v.* Bank, 62 Va. (21 Gratt.) 593.

Where a bank is doing business under the general principles of law applicable to corporations, or by reason of the provisions of its charter, it is competent for the legislature to restrict it, or to take it away altogether. Of course this right of the state to alter or repeal a charter, where the legislature has reserved that power, is undoubted. Robinson *v.* Gardiner, 59 Va. (18 Gratt.) 509.

An action of a branch bank, not having been assented to by the mother bank, did not operate to amend the charter of the mother bank. Yeaton *v.* Bank, 62 Va. (21 Gratt.) 593.

Receipt of banknotes in payment of taxes.—The legislature of Tennessee had the right, at any time, to repeal so much of the charter of the Bank of Tennessee, as made it the duty of the tax collectors to receive its bills or notes, in payment of all taxes due the state. Furman, etc., Co. *v.* Nichol, 43 Tenn. (3 Coldw.) 432.

60. Acceptance by stockholders.—Legislative alterations, in the charter of a private corporation, when merely auxiliary and not fundamental changes of the same, may be accepted by a majority of the corporators, and such acceptance will bind the whole; but,

Submission to Popular Vote.—Where a constitutional provision requires all amendments to acts authorizing banking corporations to be submitted to popular vote, this must be done as to all material amendments.[61]

Action under New and Old Charter Both.—A banking corporation already in being, acting under a former charter or prescriptive usage, which accepts a new charter before the expiration of the old, may still act under the former, or partly under both.[62]

Impairment of Obligation of Contracts.—The power can not be exercised to impair the obligation of a contract, such as one which the corporation has entered into with a third party.[63]

Effect of Secession on Rights of State Bank.—The acts by which it was attempted to declare a state independent, and to dissolve her connection with the Union, had no effect in changing the charter of a bank therein, but it had the same powers after as before these acts, to carry on a legitimate banking business.[64]

if such alteration are fundamental, radical, or vital, the acceptance must then be unanimous. Woodfork *v.* Union Bank, 43 Tenn. (3 Coldw.) 488.

61. Submission of material amendment to popular vote.—Hunt *v.* National Sav. Bank (Ill.), 11 N. E. 170, affirmed on rehearing in 129 Ill. 618, 22 N. E. 288.

62. Action under new and old charter both.—Woodfork *v.* Union Bank, 43 Tenn. (3 Coldw.) 488.

63. Impairment of obligation of contracts.—Under the reserved power of the legislature "to alter, modify, or repeal a charter of any bank," it has not the power to change or modify an act of incorporation in such a way as to affect in a material particular, a contract which the corporation has entered into with a third party. Such an exercise of legislative power would be unconstitutional and invalid, because it would impair the obligation of a contract. Bank *v.* McVeigh, 61 Va. (20 Gratt.), 457; Yeaton *v.* Bank, 62 Va. (21 Gratt.) 593; Durfee *v.* Old Colony, etc., R. Co. (Mass.), 5 Allen 230; Hamilton Mut. Ins. Co. *v.* Hobart (Mass.), 2 Gray 543.

But where the general assembly has reserved the right to alter or repeal the charter of a bank, an act entitled "An act requiring the banks of this commonwealth to go into liquidation," is not obnoxious to the charge of interfering with vested rights or impairing the obligation of contracts. Robinson *v.* Gardiner, 59 Va. (18 Gratt.) 509.

The power of the legislature to change, modify, enlarge or restrain, a banking corporation, is limited to such measures as are merely ancillary to the main design of the corporation. It can not repeal, impair, or alter the rights and privileges conferred by the charter, against the consent, and without the default of the corporation, judicially ascertained and declared. Woodfork *v.* Union Bank, 43 Tenn. (3 Coldw.) 488.

An act which repeals so much of a previous act as conferred banking powers upon the corporations created by said act, is a valid and constitutional enactment, where the right to alter or repeal was reserved. Ferguson *v.* Miners, etc., Bank, 35 Tenn. (3 Sneed) 609.

See ante, as to impairment of the contract with the corporation itself, "Charter as Contract, and Amendment of Record," § 23 (3b).

64. Effect of secession on rights of state bank.—State *v.* Bank, 64 Tenn. (5 Baxt.) 1; Lane & Co. *v.* Bank, 56 Tenn. (9 Heisk.) 419.

CHAPTER III.

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§ 42 (2dbb) Indebtedness Incurred before Notice of Transfer.
§ 42 (2dbc) Debts Contracted after Notice of Assignment.
§ 42 (2dbd) Loan to Stockholder Larger than Authorized.
§ 42 (2dbe) Certificate for Repayment of Cancelled Stock.
§ 42 (2dc) Pledges.
§ 42 (2dd) Creditors and Purchasers at Execution or Sheriff's Sale.
§ 42 (2de) Right to Refuse Transfer.
§ 42 (3) Discharge, Estoppel, Forfeiture, Release or Waiver.
§ 42 (3a) Waiver or Discharge.
§ 42 (3aa) Authority.
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§ 42 (4) Enforcement and Settlement.
§ 42 (4a) Manner.
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§ 42 (4d) Process.
§ 42 (4e) Limitations.
§ 42 (4f) Pleading.
§ 42 (4g) Redemption.
§ 42½. Voting Power of Stock.

B. CAPITAL, STOCK AND DIVIDENDS.[1]

§ 35. Statutory Provisions.—The general rules as to the validity and construction of statutes apply to statutes respecting bank stock and stockholders.[2]

§ 36. Amount of Capital and Shares.—The capital of a bank is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but is composed of substantial property, and is that which gives

1. Of national banks, see post, "Capital and Shares," § 241; "Lien of Bank on Stock or Dividends," § 245.

Power of bank to purchase and hold its own stock, see post, "Purchasing and Holding Bank's Own Stock," § 91.

Power of bank to purchase and hold stock in other banks or corporations in general, see post, "Purchasing and Holding Stock in Other Corporations," § 92.

Stock as security for loan by a bank to stockholders, see post, "Loans to Stockholders and Stock as Security," § 180.

Assessment of stock to make good impairment of capital, see post, "Rights and Liabilities as to Bank," § 43.

Set-off of deposit in actions to recover dividends wrongfully paid, see post, "Assets and Receivers on Insolvency," § 77.

Civil liability of officer for declaring dividends after insolvency, see post, "Civil Liability on Insolvency," § 82.

2. **Construction of "Hereafter."**—See post, "Lien of Bank on Stock and Dividends," § 42.

Amount of capital.—See post, "Amount of Capital and Shares," § 36.

value and solidity to the stock of the institution. It is the foundation of its credit in the business community.[3] Capital used in the business of banking is none the less so because it is borrowed. The mere fact that the money permanently invested in the business is borrowed does not alter its character as capital, but a temporary loan obtained to meet an emergency is not capital.[4]

The capital stock of a bank is the whole undivided fund paid in by the stockholders, the legal right to which is vested in the corporation, to be used in trust for the benefit of the members.[5] If a large surplus be accumulated and laid by, that does not become a part of it.[6]

Capital and Capital Stock Distinguished.—"Capital" and "capital stock" of a bank, while sometimes used interchangeably, are not one and the same thing. "Capital" includes the entire assets of the bank whether represented by money paid in for stock, surplus, undivided profits or other property of the bank while "capital stock" represents only the total amount derived from the issuance of the shares of stock.[7]

Capital Stock and Shares Distinguished.—The capital stock of a bank, and the shares of the capital stock, are distinct things.[8] The shares

3. Nature of capital.—Bank Tax. Case, 2 Wall. 200, 208, 17 L. Ed. 793. And see Per Story, J., dissenting, Briscoe *v.* Bank (U. S.), 11 Pet. 257, 9 L. Ed. 709.

Individual and corporate alike.—"There is no difference in the business of banking as conducted by individuals from the business as conducted by corporations, which would warrant any different meaning to be given to the term capital in the two cases. Nor can any good reason be stated why a distinction should be made between banking corporations and individual bankers in this respect." Bailey *v.* Clark (U. S.), 21 Wall. 284, 22 L. Ed. 651.

4. Borrowed capital.—Bailey *v.* Clark (U. S.), 21 Wall. 284, 22 L. Ed. 651.

5. Capital stock.—Union Bank *v.* State, 17 Tenn. (9 Yerg.), 490.

The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations. It represents whatever it may be invested in. Farrington *v.* Tennessee, 95 U. S. 679, 24 L. Ed. 558.

6. Surplus.—Farrington *v.* Tennessee, 95 U. S. 679, 24 L. Ed. 558.

7. Capital and capital stock distinguished.—West *v.* Newport News, 104 Va. 21, 51 S. E. 206.

8. Capital stock and shares different things.—Farrington *v.* Tennessee, 95 U. S. 679, 24 L. Ed. 558; Van Allen *v.* Assessors (U. S.), 3 Wall. 573, 18 L. Ed. 229; New York *v.* Commissioners (U. S.), 4 Wall. 244, 18 L. Ed. 344; Bradley *v.* Illinois (U. S.), 4 Wall. 459, 18 L. Ed. 433; First Nat. Bank *v.* Kentucky (U. S.), 9 Wall. 353, 19 L. Ed. 701; Bank *v.* Tennessee, 161 U. S. 134, 40 L. Ed. 645; Bank *v.* Tennessee, 163 U. S. 416, 41 L. Ed. 211; New Orleans *v.* Citizens' Bank, 167 U. S. 371, 42 L. Ed. 202, 17 S. Ct. 905.

"The shares of capital stock are usually represented by certificates. Every holder is a cestui que trust to the extent of his ownership. The shares are held and may be bought and sold and taxed like other property. Each share represents an aliquot part of the capital stock. But the holder can not touch a dollar of the principal. He is entitled only to share in the dividends and profits. Upon the dissolution of the institution, each shareholder is entitled to a proportionate share of the residuum after satisfying all liabilities. The liens of all creditors are prior to his." Farrington *v.* Tennessee, 95 U. S. 679, 687, 24 L. Ed. 558.

The corporation, though holding and owning the capital stock, can not vote upon it. It is the right and duty of the shareholders to vote. They in this way give continuity to the life of the corporation, and may thus control and direct its management and operations. Farrington *v.* Tennessee, 95 U. S. 679, 24 L. Ed. 558.

of stock are owned by the stockholders individually, but the capital stock and the profits earned by its use belong to the bank.[9] No portion of a bank's capital stock is private.[10] Bank stock consists of a certificate of the bank that the stockholder is entitled to so many shares of the capital stock of the bank. It entitles him to his proportion of the profits or dividends which may be declared from time to time, and, when the institution closes the business, to his proportion of the capital stock and profits which may remain to be divided. The stock of an individual is, then, property in his own hands and subject to his own control.[11] Bank stock is personal property,[12] in the nature of a chose in action, having no locality;[13] but it is not a legal right to any portion of the property or assets of the corporation, but only an immediate right to receive a share of the dividends as they are declared, and a remote right to a share of the effects upon the dissolution of the institution.[14] The bank stock of an individual does not consist of so much money owned by him in the bank; the money in the bank is the property of the institution, to the ownership of which the stockholder has no more claim than a person has who is not at all connected with the bank.[15]

Amount of Capital.—The amount of paid-up capital without which an incorporated company or private person is prohibited from engaging in the business of banking is fixed by statute.[16]

9. State *v.* Farmers' Bank, 11 O. 94; State *v.* Franklin Bank, 10 O. 91; Brightwell *v.* Mallory, 18 Tenn. (10 Yerg.), 196.

10. No portion of stock private.—Nashville *v.* Bank, 31 Tenn. (1 Swan) 269; Bank *v.* Woodson, 45 Tenn. (5 Coldw.) 176.

11. Brightwell *v.* Mallory, 18 Tenn. (10 Yerg.) 196.

12. Personalty.—Chapman *v.* National Bank, 56 O. St. 310, 47 N. E. 54, reversing 9 O. C. C. 79, 4 O. C. D. 252; Stafford *v.* Produce Exch. Banking Co., 16 O. C. C. 50, 8 O. C. D. 483.

The stocks of incorporated banks are personal property. It needed no statutory enactment to make them so. They are so, upon the common-law definition. Nashville *v.* Thomas, 45 Tenn. (5 Coldw.) 600.

National bank shares are personal property. Chapman *v.* National Bank, 56 O. St. 310, 47 N. E. 54, reversing 9 O. C. C. 79, 4 O. C. D. 252.

13. Chose in action.—Union Bank *v.* State, 17 Tenn. (9 Yerg.) 490; McLaughlin *v.* Chadwell, 54 Tenn. (7 Heisk.) 389.

14. McLaughlin *v.* Chadwell, 54 Tenn. (7 Heisk.) 389.

"By bank stock," as used in art. 2, § 28, Tenn. constitution of 1836, "is meant individual interest in the dividends as they are declared, and a right to a pro rata distribution of the effects of the bank on hand at the expiration of the charter," and not the capital stock of the bank. Union Bank *v.* State, 17 Tenn. (9 Yerg.) 490.

15. Union Bank *v.* State, 17 Tenn. (9 Yerg.) 490; Brightwell *v.* Mallory, 18 Tenn. (10 Yerg.) 196.

16. Amount of capital.—Rosenberg *v.* Weeks, 67 Tex. 578, 4 S. W. 899; Engelke *v.* Schlenker, 75 Tex. 559, 12 S. W. 999.

Rev. St. 1899, § 1299, provides that no persons shall engage in the business of private bankers "without a paid-up capital of not less than $5,000." Section 1278 provides that incorporated companies shall not engage in the business of banking in cities with a population of 150,000 or more with a less paid-up capital than $100,000, and § 1301 provides that all provisions of the article, so far as the same are applicable, apply to private bankers. Held, that individuals desiring to engage in the business of private banking in a city of over 150,000 inhabitants are not required to have a paid-up capital of over $5,000. Jones *v.* Cook, 174 Mo. 100, 73 S. W. 489.

Presumption of Subscription of Minimum Stock.—Creditors of a bank have a right to presume that the minimum capital stock allowed by the charter has been subscribed, from the commencement of business by the bank, hence to the extent of the minimum stock, the stockholders are liable.[17]

Value of Bank's Shares.—The value of a bank's shares depends upon the value of its franchise, capital, and property of all kinds, less the amount of its debts.[18]

§ 37. Increase of Capital Stock and Number of Associates.—Limitation of indebtedness, see ante, "Limitation of Indebtedness," § 13.

§ 37 (1) In General.—A bank may have the right to increase its capital or the number of its associate members from time to time as is thought proper,[19] but where the capital stock is limited by the act of incorporation, it can not be increased without an enabling act.[20]

Maximum and Minimum Capital.—A bank incorporated with the privilege of creating a stock not less than one sum, nor greater than another, may commence business with the smaller capital, and afterwards increase it to the larger.[21]

§ 37 (2) Mode and Validity.—A banking corporation may increase its capital stock only in the manner prescribed by its charter or by the method prescribed by statute for increasing capital stock. The formalities required by such charter or statute must be substantially complied with.[22] Thus compliance with requirements as to notice of a stockholders' meeting,[23] favorable action of the stockholders,[24] formalities as to filing and

17. **Presumption that minimum stock subscribed.**—Hill *v.* Silvey, 81 Ga. 500, 8 S. E. 808, 3 L. R. A. 150.

18. **Value of shares.**—Rosenbery *v.* Weeks, 67 Tex. 578, 4 S. W. 899; Engelke *v.* Schlenker, 75 Tex. 559, 12 S. W. 999.

19. **Increase of capital or associates.**—It was so held as to an association formed under the general banking act of New York of 1838. Comstock *v.* Willoughby (N. Y.), Labor's Supp. (Hill & Denio) 271.

20. Bank *v.* Schuylkill Bank (Pa.), 1 Pars. Eq. Cas. 180.

Liability of stockholders to creditors, see post, "In General," § 47 (1).

Under Banking Act, § 2 (3 Starr & C. Ann. St. p. 105; Rev. St. c. 16a), which provides that the application to the auditor for permission to organize shall state the amount of capital, an application which states the capital stock at $100,000, with a purpose to increase it to $300,000, has no effect in the matter of increasing the capital stock. McNulta *v.* Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954.

21. **Maximum and minimum capital.**—Gray *v.* Portland Bank, 3 Mass. 364, 3 Am. Dec. 156.

22. **Mode and validity.**—A corporation organized under the banking act can increase its capital stock only in the manner prescribed by § 12 of the act, 63 Ill. App. 593 (1895) affirmed. McNulta *v.* Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954.

23. **Notice of stockholders' meeting.**—A state bank, desiring to increase

24. **Power of directors without reference to action of stockholders.**—A resolution passed by a board of directors can not fix in advance a time for increasing the capital stock of a corporation without reference to the action of the stockholders, or the method prescribed by statute for increasing stock. 63 Ill. App. 593 (1895) affirmed. McNulta *v.* Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954.

publication of the amendment of the articles of incorporation,[25] submission of the proposed amendment to the vote of the people,[26] and payment of the amount of increase,[27] is essential to a valid increase of the capital stock of a bank.

A fraudulent overissue of certificates of stock by a bank cashier does not operate an increase of the capital stock of the bank.[28]

§ 37 (3) Apportionment and Disposition of Increased Stock.—Where a banking corporation increases its capital stock, a stockholder ordinarily has the right to acquire a quota of the increased shares in proportion to the amount already owned by him.[29]

its capital stock in 1891, when the only statutes in force as to corporations were Comp. St. 1887, div. 5, c. 25, regulating corporations generally, and chapter 27, applicable to banks, having fully complied with division 5, c. 27, § 526, declaring it shall be lawful for any corporation organized under the act by its by-laws to provide for an increase of capital stock, etc., such increase was valid, though it did not comply with chapter 25, §§ 468, 469, requiring six weeks' notice of a stockholders' meeting to increase the stock. Cascade Bank *v.* Yoder, 39 Mont. 202, 103 Pac. 499.

25. Filing and publication of amendment of charter.—Gen. St. 1878, c. 33, § 18 (Gen. St. 1894, § 2498), providing that it shall be lawful for any association organized under the provisions of chapter 33 to provide by its articles of association for an increase of capital stock, authorizes banks organized under said chapter to increase their capital stock by amending the articles of incorporation though the same formalities as to the filing and publication of the amendment are required as are required of the original articles. Palmer *v.* Bank, 72 Minn. 266, 75 N. W. 380.

26. Submission to vote of people.—The Act of March 29, 1869, incorporating the "Kendall County Banking Company," provided that it should "be located in the county of Kendall," in that state, and that the limit of increase to the capital stock should be $150,000. The stockholders met June 1, 1872, and, under the act of March 26, 1872, relating to the changing of names, locations, and stock of corporations, etc., changed the name to "National Savings Bank," the location from Kendall county to Cook county, and increased the capital stock to $200,000. Held ultra vires, under Const. 1870, art. 11, § 5, providing that all amendments to acts authorizing banking corporations shall be submitted to the vote of the people, etc. Hunt *v.* National Sav. Bank (Ill.), 11 N. E. 170, affirmed on rehearing 129 Ill. 618, 22 N. E. 288.

27. Payment "in cash" for whole amount of increase.—Where a part of an increase of capital stock of a bank was purchased by the president, and paid for with city funds deposited in other banks in his name as city treasurer, such stock is not absolutely void, though Gen. St. 1878, c. 33, § 18, as amended by Gen. Laws 1881, c. 77, § 3, provides that "no increase of capital stock shall be valid until the whole amount of the increase proposed is paid in cash." Dunn *v.* State Bank, 59 Minn. 221, 61 N. W. 27.

28. Fraudulent overissue by cashier.—A bank cashier having fraudulently overissued certificates of stock, the bank, under authority of the legislature, took part of its earnings, with which it purchased and withdrew nearly all the surplus stock over the original capital. On the balance of this surplus, nothing had ever been paid into the bank. Held, that its capital stock had not been increased. Commonwealth *v.* Bank (Ky.), 9 B. Mon. 1.

29. Apportionment of increase.—Under the act incorporating the bank of Charleston (§ 5), providing that, at any time before the expiration of their charter, the said company may, by paying a bonus of two and one-half per cent, extend the amount of capital stock subscribed to a further sum of $2,000,000, to be paid in the same manner with that herein already provided for, the stockholders have the right to apportion the increased capital stock among themselves. State *v.* Bank (S. C.), Dud. 187.

Right to damages for denial of right.—Where a banking corporation has

§ 38. Reduction of Capital Stock.—Oversubscription of stock, see post, "Subscription to and Issue of Stock," § 39.

§ 38 (1) In General.—A banking corporation can not reduce its capital stock in the absence of charter or legislative authority.[30]

§ 38 (2) Mode and Validity.—The formalities prescribed by the authority under which a reduction of the capital stock of a bank is to be made must be duly performed. A valid reduction pro tanto of a bank's capital stock is not effected by the purchase of its own stock by the bank,[31] or by withdrawing stock under the form of loans on private security.[32]

§ 38 (3) Disposition of Proceeds of Surrendered Stock.—If a bank reduce its capital stock without constraint, for the purpose of with-

increased its capital stock, a stockholder can not recover damages of it for its action in refusing him the right to acquire his quota of the increased shares, proportionate to the amount already owned by him, unless he has demanded the shares and offered to subscribe and pay for them within a reasonable or fixed time. Bonnet *v.* First Nat. Bank, 24 Tex. Civ. App. 613, 60 S. W. 325 (see 94 Tex. 703, no op.).

Measure of damages.—Where there has been an increase in the capital stock of a corporation in which a stockholder has the right to share, the measure of damages for a denial of such right is the excess of the market value of the stock above its par value at the time of its issuance, with interest on such excess. Bonnet *v.* First Nat. Bank, 24 Tex. Civ. App. 613, 60 S. W. 325 (see 94 Tex. 703, no op.).

30. **Reduction of capital stock.**—A bank created with a capital stock limited by the act of incorporation can not diminish the capital but by a license from the legislature. Bank *v.* Schuylkill Bank (Pa.), 1 Pars. Eq. Cas. 180.

In the absence of a clause in a bank charter authorizing a reduction of the capital stock to which it has been raised under a discretionary power to increase it, the question, as to whether any such power would exist, could not be raised, unless it clearly appears that the corporation ordered the reduction to be made. Neither equivocal acts, nor inferences, nor unauthorized acts of a president or directors, will have the effect. Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

Banks of circulation and banks of discount.—Acts 1859-60, c. 27 (Act Feb. 6, 1860), providing that no part of the capital stock of any bank shall be withdrawn until its whole liabilities are satisfied, applied only to banks of issue, all its provisions being made with a view to protecting the circulating medium, and practically all banks of that period being authorized to issue circulating notes; and hence none of its provisions apply to banks of discount and deposit, as to which an entirely new and a complete system was inaugurated by General Incorporation Act 1875, c. 142. Lellyett *v.* Brooks (Tenn.), 62 S. W. 596.

Decline in value of security first accepted.—Act April 2, 1832 (incorporating the Union Bank of Louisiana), § 24, relating to the reduction of the number of shares of stock when the security offered by the subscribers to the corporation is insufficient, does not authorize a reduction of the number of shares where the property first offered and accepted to secure the whole becomes less valuable. Byrne *v.* Union Bank (La.), 9 Rob. 433.

31. **Purchase of its own stock.**—Where a solvent banking corporation, not in contemplation of insolvency, purchases its own stock in payment of a previously existing debt due from a stockholder, such stock does not constitute a reduction pro tanto of the bank's capital; the shares under such circumstances being treated as the property of the bank, subject to be sold or held for the benefit of creditors and the remaining stockholders, together with any dividends earned thereon. Draper *v.* Blackwell, 138 Ala. 182, 35 So. 110.

32. **Withdrawing stock under the form of loans on private security,** if done with intent to reduce the effective capital below the amount required by the charter, is a violation of the charter. State *v.* Essex Bank, 8 Vt. 489.

drawing the excess capital above the amount to which it was reduced, the excess is distributable among the shareholders,[33] and can not be retained as a surplus fund;[34] but where the original capital had become impaired, the stockholders have no right to a distribution of any part of such fund,[35] without provision being first made for payment of the bank's debts.[36]

§ 38 (4) Relief against Reduction.—A stockholder can not have the benefits of an illegal reduction of the stock of a bank by recovering on deposit tickets executed in lieu of the cancelled stock and in the same suit obtain a decree annulling the transaction.[37]

§ 38½. Surrender of Stock to Bank.—Under a charter giving a bank power to do a banking business and exercise incidental powers, and vesting the management of the business in the directors, the latter have no power to agree that a stockholder may surrender his stock, and receive back all, or any part of, the capital he has paid in.[37a]

33. Disposition of proceeds.—McCann *v.* First Nat. Bank, 112 Ind. 354, 14 N. E. 251; Wools *v.* First Nat. Bank, 112 Ind. 600, 14 N. E. 255; Seeley *v.* New York Nat. Exch. Bank (N. Y.), 4 Abb. N. C. 61, 8 Daly 400, affirmed in 78 N. Y. 608.

34. A portion of capital remaining after a reduction can not be retained as a surplus fund. Seeley *v.* New York Nat. Exch. Bank (N. Y.), 8 Daly 400, 4 Abb. N. C. 61, affirmed in 78 N. Y. 608.

35. Capital stock impaired.—McCann *v.* First Nat. Bank, 112 Ind. 354, 14 N. E. 251; Wools *v.* First Nat. Bank, 112 Ind. 600, 14 N. E. 255.

Where bank subsequently realizes on "bad debts."—The capital of a national bank had become impaired by the nonpayment of the interest on some bills and notes, which were among its assets, to the amount of $71,000; and, in order to avoid an assessment by the comptroller, the stockholders reduced its capital stock, and carried the bills and notes to the account of suspended or "bad debts," which were not thereafter included as assets, although retained in its custody. Some years afterwards the bank realized $75,000 from collaterals pledged for the security of the bills and notes. On a suit by one of the stockholders for the purpose of compelling the bank to distribute to him a share of the amount realized, proportioned to the amount of stock surrendered, held, that he could not recover. McCann *v.* First Nat. Bank, 112 Ind. 354, 14 N. E. 251; Wools *v.* First Nat. Bank, 112 Ind. 600, 14 N. E. 255.

36. State *v.* Bank, 65 Neb. 20, 90 N. W. 961, 91 N. W. 497.

Where a bank held as collaterals a part of the stock of another bank, and surrendered the same, and accepted in lieu thereof one-half in new stock and one-half in certificates of deposit issued to the stockholders on the reduction of the stock of the bank, as to this reduction the bank stood in the shoes of an ordinary stockholder, and, where the certificates were issued without consideration, could not recover against the receiver on its deposit certificates. State *v.* Bank, 65 Neb. 20, 90 N. W. 961, 91 N. W. 497.

37. Relief against reduction.—Plaintiff recited that defendant bank reduced its stock, while worth its par value, from $25,000 to $12,500; that on the same day the bank, through its cashier, paid its stockholders $17 on each $100 of their respective shares of stock, and executed its deposit tickets for a like amount to the various stockholders of the bank, payable January 1, 1897; and that the reduction of the stock of the bank, resulting as above stated, was in violation of statute, and at a time when the bank was solvent. Plaintiff also sued on one of the certificates. The petition further charged mismanagement of the affairs of the bank by the president and the cashier, and prayed for a receiver and full equitable relief. Held, that the remedy at law was adequate. Mansfield *v.* Bank, 74 Mo. App. 200.

37a. Surrender of stock to bank.—Pettibone *v.* Hawkins, 2 N. Y. Leg. Obs. 210; Mathes *v.* Bates, Id. 213.

§ 39. Subscription to and Issue of Stock—§ 39 (1) Right to Subscribe.[38]—The right of the public or any individual,[39] the state, or any college, ecclesiastical society, school corporation, or association for charitable purposes, to subscribe for the stock of an incorporated bank, and the right of the bank to receive subscriptions from such person, etc., depend upon its charter or the law authorizing it to receive subscriptions.[40]

All the stock of a state bank may be owned by the state.[41]

An attorney may subscribe for bank stock in the name of his principal.[42]

Unsubscribed stock is held in trust to be disposed of for all the subscribers and a subscriber who is in arrears in his installments is entitled to his proportion thereof.[43]

Denial of Right.—The refusal to allow a person entitled to subscribe for stock in a bank must be complained of by such person and not by the state or a third person,[44] and the party complaining must show a demand and offer to subscribe.[45]

38. Right of bank to purchase and hold its own stock, see post, § 225.

39. Right to subscribe.—State *v.* Bank (S. C.), Dud. 187. And see McCulloch *v.* State, 11 Ind. 424.

40. College, school, society, etc.—The Act of 1855, which provides that "all banks and banking associations organized under the Act of 1852, authorizing the business of banking in this state, shall, in addition to the number of shares authorized, be opened to subscription from the funds of this state, the school fund, or from the funds of any college, ecclesiastical society, school corporation, or association for charitable purposes, etc., provided that such additional subscriptions shall in no case exceed ten per cent of the amount of the capital of any bank or banking association actually paid in," applies only to the banks organized under the Act of 1852, and not to the chartered banks. Charitable Soc. *v.* Farmers' etc., Bank, 26 Conn. 60.

Within the meaning of § 7 of the Act of October, 1811, constituting the Eagle Bank a body corporate, and providing that the bank shall receive subscriptions to its shares from the funds of any college, ecclesiastical society, school, or corporation for charitable purposes, the "Trustees for Receiving Donations for the Support of the Bishop," incorporated by the Act of May, 1799, is a corporation for charitable purposes. Bishop's Fund *v.* Eagle Bank, 7 Conn. 476.

41. Ownership by state.—The Bank of Tennessee is a public corporation, acting upon the funds and credit of the state, and none of its stock is private. Nashville *v.* Bank, 31 Tenn. (1 Swan) 269.

42. Attorney.—The provision in the charter of a bank that "it shall not be lawful for any person to subscribe for shares in the name of other persons" does not exclude a bona fide subscription by an attorney in the name of his principal. But the commissioners to take the subscription may, if they doubt the good faith of the subscription, require further evidence than the mere production of a power of attorney, to remove their doubts. State *v.* Lehre (S. C.), 7 Rich. Law 234.

43. Unsubscribed stock.—Where a bank is incorporated when only a portion of its capital stock is subscribed, under a law authorizing such action, the bank holds the balance of stock in trust to be disposed of for all the subscribers, so that it can not divide such balance only among those who have paid up their installments, denying to those in arrears their proportion thereof. Reese *v.* Bank, 31 Pa. 78, 72 Am. Dec. 726.

44. Denial of right.—Under the act incorporating the State Bank, it was the duty of the commissioners to allow all who presented themselves at the appointed time to subscribe, but their failure so to do must be complained of by those not allowed, and not by the state upon a quo warranto against the bank, it being a mere irregularity. McCulloch *v.* State, 11 Ind. 424.

45. Demand and offer to subscribe.—A stockholder of a bank entitled to a pre-emption of additional stock is-

§ 39 (2) Form and Requisites, Validity and Effect—§ 39 (2a) Bona Fides of Subscription.—When commissioners are appointed by law, to receive subscriptions of stock to a bank, and the subscriptions are required to be bona fide, they have the discretion to determine what is a bona fide subscription.[46]

Fraudulent Subscriptions.—Where the subscriptions were fraudulently made, with a view to evade the provisions of the charter, the law will hold the parties bound by their subscriptions, and compellable to comply with all the terms and responsibilities imposed upon them, in the same manner as if they were bona fide subscribers. It will not make the subscription itself a nullity, but it will deprive the subscribers of the power of availing themselves of the same, and such a fraud can not be set up to the injury of subsequent purchasers of the stock who became bona fide holders of the same, without participation in, or notice thereof.[47]

§ 39 (2b) Form and Sufficiency.—An actual subscription for stock in a bank is not necessary. There may be a virtual subscription, deducible from the acts and conduct of the parties;[48] hence, no particular form is essential to the validity of a contract of subscription for shares of stock in a banking corporation. It is not necessary that the subscription should be in writing. It may be made by parol. It may be made in any way in which other contracts may be made. Whenever an intent to become a subscriber is manifested, even without a formal subscription, or where it is irregular, the courts are inclined to infer the contract from acquiescence and acceptance of the benefits of membership.[49] When one accepts or assumes the position and duties, and claims the rights, privileges and emoluments of a stockholder, and the bank accepts or acquiesces therein, such person is estopped to deny that he is a subscriber even though there may have been something irregular or defective in the formal manner of his subscription, or there may have been no formal subscription at all.[50]

sued by it can not maintain an action against the bank for refusing to allow him to subscribe for the stock without proof of a demand and offer to subscribe. Wilson *v.* Bank, 29 Pa. 537.

46. Bona fides.—Napier *v.* Poe, 12 Ga. 170.

47. Fraudulent subscriptions.—Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

48. Form and sufficiency.—Pacific Nat. Bank *v.* Eaton, 141 U. S. 227, 35 L. Ed. 702, 11 S. Ct. 984. See, also, Scott *v.* Deweese, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585; Thayer *v.* Butler, 141 U. S. 234, 35 L. Ed. 711, 11 S. Ct. 987; Finn *v.* Brown, 142 U. S. 56, 71, 35 L. Ed. 936, 12 S. Ct. 136.

49. Somerset Nat., etc., Receiver *v.* Adams, 24 Ky. L. Rep. 2083, 72 S. W. 1125.

50. Estoppel to deny subscription.—Somerset Nat., etc., Receiver *v.* Adams, 24 Ky. L. Rep. 2083, 72 S. W. 1125.

Signature of certificate of association.—The New Jersey statute declares that persons associating themselves together for the purpose of conducting a banking business shall, under their hands and seals, make a certificate, "by the terms of which such association shall be bound," which shall specify the names and residences of the shareholders, and the number of shares held by each of them respectively, etc. Held, in an action by a receiver to enforce payment of stock subscription, that, where a certificate of association specified the number of shares of stock held by defendant, and was signed by him, he was estopped from denying his subscription. Dayton *v.* Borst, 20 N.

§ 39 (2c) Nature and Effect of Obligation.—Each individual stockholder, by the acceptance of the bank's charter, becomes a party to the contract, and is bound by all its provisions.[51]

§ 39 (2d) Rescission of Subscription.—A subscription for stock of a bank and the issue of the same may be rescinded upon the same grounds and in the same manner as other contracts of subscription for stock.[52] The right to rescind may be waived.[53]

§ 39 (3) Oversubscription and Overissue.—Where the charter of a bank or the law under which it is organized provides a method of reducing an oversubscription to its stock, it must be followed,[54] and can not be

Y. Super. Ct. 115, affirmed in 31 N. Y. 435.

Directors bound by statement in subscription book.—Where the minutes of the proceedings of a corporation show an order for the opening of books for subscription to stock therein, and the amount taken by each subscriber is there distinctly set forth, and where it appears that such subscribers had been directors of the corporation and has the right of access to the book containing said statement; held, bound by the record to the amounts there shown, although no actual subscriptions to stock were produced. Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

51. Shareholder party to charter contract.—Adkins *v.* Thornton, 19 Ga. 325.

52. Rescission.—Rev. St. 1898, § 2024, subsec. 18, provides that any number of persons may associate and become incorporated, and subsection 19 declares that such person shall make a certificate stating the names of the shareholders and the number of shares subscribed by each, which shall be filed with the register of deeds. Articles of incorporation for a bank were signed by W. R. and R. R. on condition that they were not to be bound unless M. R., the third member of the firm of R.'s Sons, should also sign and agree that the firm should take $2,500 worth of shares. M. R. refused to sign, and the promoter of the corporation, without the knowledge of W. R. and R. R., filed the articles with their signatures. Held, that the fact that the firm refused to accept the shares when tendered was not sufficient to show a rescission of the contract in the absence of evidence that the corporation accepted the rescission, since on the filing of the certificate the contract became an executed one, and hence irrevocable, without the consent of both parties. Rehbein *v.* Rahr, 109 Wis. 136, 85 N. W. 315.

53. Waiver of right to rescind.—The right to rescind an issue of bank stock for fraud is waived by the bank's acceptance of a surrender of the certificate by a pledgee of the stock, and issue of a new one in its place to the pledgee. Tecumseh Nat. Bank *v.* Russell, 50 Neb. 277, 69 N. W. 763.

A person purchasing stock from a bank held not entitled, after insolvency and the institution of a proceeding to wind up its affairs, to rescind the purchase for fraud although he lived at a considerable distance from the bank, and it would have been inconvenient for him to ascertain the bank's condition. Little *v.* Owensboro Savings Bank & Trust Co.'s Receiver, 150 S. W. 334.

54. Oversubscription.—Union Bank *v.* McDonough, 5 La. 63.

Defendant's charter authorized its commissioners to open stock subscription books, and, in the event of an excess of subscriptions, to distribute the stock in such manner as the commissioners should deem most advantageous to the bank; that persons subscribing for twenty shares and upward should not receive less than twenty shares, unless such subscribers or those for a less amount exceeded the whole amount of the stock; and that each commissioner should not receive more than two hundred and fifty shares, if without it the whole stock was taken. There was an excess of subscriptions, and those for twenty shares and upward exceeded the whole stock. Held, that the commissioners were entitled to two hundred and fifty shares each, and were then entitled to divide the remainder among the other subscribers, according to their discretion; that they were not obliged to give every subscriber some stock, nor

evaded by subdividing a subscription among several nominal subscribers;[55] but where no means is provided for effecting a reduction, the commissioners can not arbitrarily apportion the stock among part, leaving out others of the subscribers.[56]

Overissue.—Mere formal subscription for all the stock to be issued by a bank, the subscribers being practically trustees for such new stockholders as could be induced to subscribe, is not an overissue, rendering the subsequent subscriptions invalid.[57]

§ 39 (4) Stock Certificates.—A certificate of bank stock is authentic evidence of title to stock, but it is not the stock itself. It certifies a fact which exists independently of itself.[58]

Necessity for Certificate.—Without express regulation to the contrary, a person becomes a stockholder in a bank by subscribing for stock, paying the amount to the company or its proper officer, and being entered on the stock book as a stockholder. He may take out a certificate or not, as he sees fit. A certificate is not necessary to the existence of bank stock.[59]

Form and Requisites.—A certificate of stock conforming in all re-

to ratably apportion it, and, in the absence of fraud, their exercise of discretion would not be interfered with. Clarke *v.* Brooklyn Bank (N. Y.), 1 Edw. Ch. 361.

Under the Act of 1852 (12 Stat. 212), chartering certain banks, the commissioners appointed to take subscriptions had no power, in case of oversubscription to the stock, to apportion it among the subscribers. It belonged to the corporation to reduce the subscriptions pro rata. State *v.* Lehre (U. S.), 7 Rich. Law 234.

55. The charter of a bank provided that, if subscriptions to its capital stock should exceed the aggregate limit, the excess should be deducted from the largest subscription till they equal the next below in amount. A subscriber sought to evade this provision by subdividing his subscription among several nominal subscribers. Held, that the directors could go behind the face of the subscriptions under the implied provision of the charter against one subscriber acquiring too much stock, and could erase the nominal subscriptions. Union Bank *v.* McDonough, 5 La. 63.

56. Under an act incorporating a bank, and designating commissioners to receive subscriptions, and providing that the capital should be a certain amount, but making no provision in case of an excess of subscriptions, where there is an excess, the commissioners, in effecting a reduction, can not arbitrarily apportion the stock among part, leaving out others, but must deduct the excess from the largest subscriptions in such manner that no subscription is reduced while any one remains larger. Meads *v.* Walker (N. Y.), 1 Hopk. Ch. 587.

57. Overissue.—Tulare Sav. Bank *v.* Tabot, 131 Cal. 45, 63 Pac. 172.

To facilitate the reorganization of a state bank as a national bank, it was agreed that certain stockholders should subscribe for all the stock, which was afterwards to be apportioned among those stockholders of the state bank who desired to take it. Subsequently one of the stockholders in the state bank subscribed for shares, and certificates were issued to him. Held, that there was no overissue, invalidating the last subscription. Somerset Nat., etc., Receiver *v.* Adams, 24 Ky. L. Rep. 2083, 72 S. W. 1125.

58. Stock certificate.—Pacific Nat. Bank *v.* Eaton, 141 U. S. 227, 35 L. Ed. 702, 11 S. Ct. 984. See, also, Scott *v.* Deweese, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585; Thayer *v.* Butler, 141 U. S. 234, 35 L. Ed. 711, 11 S. Ct. 987; Finn *v.* Brown, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

59. Certificate unnecessary to subscription.—Pacific Nat. Bank *v.* Eaton, 141 U. S. 227, 35 L. Ed. 702, 11 S. Ct. 984. See, also, Scott *v.* Deweese, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585; Thayer *v.* Butler, 141 U. S. 234, 35 L. Ed. 711, 11 S. Ct. 987; Finn *v.* Brown, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

spects to the requirements of the charter or law under which a bank is authorized, is sufficient.[60]

A corporate seal is not essential to the validity of a certificate of bank stock.[61]

Duplicate Certificate.—When certificates of bank stock are lost or stolen, upon proof of the loss and execution of a sufficient bond, to indemnify the bank against loss by the original certificates coming into the hands of an innocent holder, the owner thereof is entitled to duplicate certificates. This right may be enforced by mandamus.[62]

§ 39 (5) Payment[62a]**—§ 39 (5a) Medium.**—Where the charter or law under which a bank is organized prescribes the medium of payment of subscriptions to its stock, an organization without such payment is a nullity.[63] Ordinarily payment is to be made in money,[64] cash,[65] or specie.[66] A banking corporation, in the absence of an enabling statute, is without authority to accept such property as notes, judgments,[67] mortgages,[68] other stocks,[69] etc., in payment of stock subscriptions, aliter when authorized by

60. Form of certificate.—A certificate in all respects according to the requirements of chapter 260 of the Act of 1838, to authorize the business of banking, and concluding with the words, "We have hereunto respectively subscribed and set our hands and seals," etc., "and the number of shares of the capital stock of the corporation aforesaid taken and held by each of us respectively," is sufficient to render the signers stockholders, and liable to pay for the number of shares set against their names. Cole *v.* Ryan (N. Y.), 52 Barb. 168.

61. Corporate seal.—Fitzhugh *v.* Bank (Ky.), 3 T. B. Mon. 126, 16 Am. Dec. 90.

62. Duplicate certificate.—Hof *v.* Western German Bank, 6 Wkly. L. Bull. 665, 8 O. Dec. R. 245.

62a. Liability for debts and acts of bank, see post, "Liability for Debts and Acts of Bank," § 46; "Actions and Proceedings to Enforce," § 49.

Lien of bank on stock, and dividends, see post, "Lien of Bank on Stock and Dividends," § 42.

63. Medium.—Pacific Trust Co. *v.* Dorsey, 72 Cal. 55, 12 Pac. 49.

64. Money.—Pacific Trust Co. *v.* Dorsey, 72 Cal. 55, 12 Pac. 49.

65. Cash.—Dunn *v.* State Bank, 59 Minn. 221, 61 N. W. 27.

66. Specie.—When a charter requires payments to be made on the stock in specie, before organization, and the bank is organized without such payment, it is a mere nullity, and can not exercise any of the privileges of the charter. Napier *v.* Poe, 12 Ga. 170.

The capital stock of a bank is a trust fund for the payment of the note holders and creditors of the bank; and therefore, where a subscriber to stock is garnished for a debt of the bank for a balance due on his subscription, he can not pay in notes of the bank. Payment must be made in specie. King *v.* Elliott (Miss.) 5 Smedes & M. 428.

Where a stockholder of a bank was delinquent in stock payments, and was garnished by judgment debtors of the bank, he was liable for the payment of the delinquency in specie, the bank stock being payable only in specie. King *v.* Elliott (Miss.), 5 Smedes & M. 428.

67. Notes and judgments.—Coddington *v.* Cannady, 157 Ind. 243, 61 N. E. 567.

Where, by the act of incorporation of a bank, the subscribers to stock were required to pay, at the time of subscription, ten per cent in specie, on the amount subscribed for, a mere subscription to stock, without paying the ten per cent in specie, the subscriber executing his note merely to the bank for that sum, would not constitute the subscriber a stockholder. Such subscription would be void, and would impose no obligation on the stockholder. Hayne *v.* Beauchamp (Miss.), 5 Smedes & M. 515.

68. Mortgages.—See post, "Stock Mortgages and Bonds," § 39 (6).

69. Payment in stock.—When not

its charter, act of incorporation, or other statute, to except money paid, labor done or property actually received in payment of such subscriptions.[70]

§ 39 (5b) Time.—Where no time is designated for the payment of the first installment of subscriptions for bank stock, it need not be contemporaneous with the subscription.[71] The commissioners to receive subscriptions and payments may allow a reasonable time.[72]

State a Subscriber.—Where the charter of a bank reserved to the state the privilege of subscribing to a certain portion of the stock, "to be paid for at such time or times as might be convenient for the state," it was op-

prohibited by law or the charter, payment for the capital stock of a bank may be made in stock, and if so paid in and accepted, the stock becomes the common property of the association. Holbrook *v.* Union Bank (U. S.), 7 Wheat. 553, 5 L. Ed. 521.

Stock, paid in as a part of the capital of the Union Bank of Alexandria, before its incorporation, became the common property of the association, so as to be subject to be sold and distributed among the members, after the charter, which directed that the capital stock should consist of money only, was accepted; and those who subscribed the road stock, or their assignees, were not entitled to have the same returned specifically to them. Holbrook *v.* Union Bank (U. S.), 7 Wheat. 553, 5 L. Ed. 521.

"Each share represented an equal part of the whole capital, comprehending each description of road stock, and of the money paid in; and there was nothing on the face of the certificate, which was transferable, indicating that one share was more valuable than another. If, instead of obtaining the act of incorporation, the company had expired or been dissolved by consent, the shares would have been equal, and would have entitled the holders to equal portions of the whole capital. The dividends, during the continuance of the company, must have been equal. Had the road stock been sold, it must have been carried to the credit of the whole company." Holbrook *v.* Union Bank (U. S.), 7 Wheat. 553, 5 L. Ed. 521.

70. Notes for property actually received.—Const., art. 12, § 11, provides that no corporation shall issue its stock "except for money paid, labor done, or property actually received." Act April 1, 1876 (St 1876, p. 729), requires every banking corporation to publish biennial statements of the amount of capital actually paid in, and declares that nothing shall be deemed capital so paid except money bona fide paid to the bank; and that under no circumstances shall the note or other obligation of a stockholder be treated as a part of such paid-up capital. And Pen. Code, § 560, provides that "every director of a corporation who concurs in any vote or act of the directors by which it is intended to discount or receive any note or other evidence of debt in payment of any stock subscription called or required to be paid, with the intent to provide the means of making such payment, is guilty of a misdemeanor." Held, that the note of a stockholder given to a bank as security for the payment of his first stock installment was "property actually received," within the provision of the constitution, for which the bank was authorized to issue its stock; that such note was not void under the above provisions; and that the amount thereof might be recovered by the bank from the maker. Pacific Trust Co. *v.* Dorsey, 72 Cal. 55, 12 Pac. 49.

71. Time.—The charter of a bank declared that "when the amount of $250,000 shall have been subscribed bona fide, and the sum of ten per cent paid thereon in specie, the commissioners shall give notice for the election of directors," etc. Held, that payment of the ten per cent need not be contemporaneous with the subscription; but, if the subscribers give a draft for the payment of the ten per cent in thirty days, the subscription is good against those afterwards applying for the stock, and tendering the money for the ten per cent within the thirty days. Napier *v.* Poe, 12 Ga. 170.

72. Discretion of commissioners.—If commissioners are required to receive upon the stock ten per cent in gold or silver, and no time is designated for the payment, they have the discretion to allow a reasonable time. Napier *v.* Poe, 12 Ga. 170.

tional with the state to pay at any time before the termination of the charter.[73]

§ 39 (5c) Assessments or Calls for Payment.—See post, "Levy of Assessment and Sale of Stock," § 39 (7fa).

§ 39 (5d) What Constitutes Payment.—A subscription to the stock of a bank must be fully paid in and dedicated to the business of the bank in order to discharge the subscriber's obligation.[74]

Pretended payment will not discharge the subscriptions.[75]

Where notes are executed in payment of subscriptions to bank stock, the obligation to pay the amount subscribed, will be considered as a debt subsisting independently of such notes until actually paid.[76] The notes themselves are binding,[77] though the original subscription was void.[78] Pay-

73. Subscriptions of state.—Attorney General *v.* State Bank, 21 N. C. 545.

74. What constitutes.—McNulta *v.* Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203.

Where the stock subscription of a city in a certain bank was to be paid in city bonds bearing interest, to be met by its dividends, when the bank had to advance the interest before the dividends became sufficient, the city was bound to refund the amount with interest. Commercial Bank *v.* New Orleans, 11 La. 217.

75. Pretended payments.—Subscribers to stock can not release their obligations by fraudulently providing funds to be counted by the auditor as the paid-up capital of the bank, and immediately withdrawing them, leaving the bank without funds till the stock is sold. McNulta *v.* Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954.

76. Notes.—Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

Wrongful cancellation of notes.—Certain persons purchased the charter of a banking corporation, paying part cash and executing their note for the balance. After reorganizing the bank, the vendor of the charter agreed to accept stock for his debt, which was accordingly issued to him, and the note was transferred to the bank and canceled without payment. The cash payment to him, as well as the note, was charged to the bank. Held, that the note so transferred was the property of the bank, was not subject to cancellation without payment, and was assets of the bank, liable to the claim of its creditors; and that the cash payment was improperly charged to the bank; and inasmuch as the stock issued to the vendor was intended to go to him as paid up stock, the stockholders for whose benefit the charter was purchased are liable for its satisfaction in proportion to the amount of their respective subscriptions. Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

Where, the stockholders of a banking corporation ordered the books to be opened to increase the capital stock of the corporation a fixed amount, and authorized one of their number to give his and their notes for the amount so increased in payment of the same, which he did, and subsequently, the stockholders so executing the note, instructed the cashier to reduce the stock by the amount thus subscribed, alleging the circulation issued upon it had been redeemed; held, that the stock could not be so reduced, and that the creditors of the bank were entitled to have the amount so subscribed paid up by the stockholders, the proceeds arising therefrom to be applied to the satisfaction of their claims. Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

77. In the absence of any statute, a note given to a bank for a portion of its capital stock, which the bank itself had previously purchased, is not void merely because given for the contract price of the stock, nor because it was discounted by the bank for the purpose of enabling the purchaser to pay for the stock. United States Trust Co. *v.* Harris, 15 N. Y. Super. Ct. 75.

78. Where the commissioners who were appointed to receive the subscriptions to a bank and the cash payment took, in lieu of the latter, the note of the subscriber, which was discounted by the bank, and the proceeds on the check of the subscriber, being drawn

ment of stock by stockholders of a bank with mutually indorsed notes of stockholders or directors is not authorized by a bank charter requiring the capital stock to be paid in coin, or in bills or notes deemed by the corporators or directors the equivalent to, or better than, specie.[79] Where subscriptions to the capital stock of a bank are paid with such mutually indorsed notes of the stockholders or directors, without authority conferred by the bank charter, such notes are to be regarded as valid obligations for the protection of the issues of the bank and its general creditors, and will bear interest and be subject to the statute of limitations, and, when paid or collected, are to be credited as payments pro tanto on the unsatisfied stock.[80]

The note of a third party deposited by a stockholder of a bank in payment of his stock and subsequently collected by him, will be treated by a court of equity as the property of the bank, and such stockholder will be charged with the proceeds and interest from the time it was collected, and upon payment his stock will be credited according to the arrangement made at the time it was so deposited.[81]

Payment in Depreciated Bills.—Where a subscriber to bank stock has paid for his stock in depreciated bills of the bank, he is entitled to be credited with their value at the time of payment.[82]

§ 39 (5e) Presumption and Proof of Payment.—Whether a bank has paid in its capital stock, in gold or silver, within the appointed time after receiving its charter, is to be ascertained and proved in the manner provided by the statute, by the certificate of the commissioners appointed for that purpose.[83] Where a bank has been in operation for several years, it is to be presumed that its capital stock has been paid within the time appointed after the reception of its charter.[84]

§ 39 (6) Stock Mortgages and Bonds.—A bond and mortgage given for subscription to stock in a bank are valid.[85] When not perfectly satisfied with the validity of titles to property offered for mortgage, as security for a stock subscription, the directors, in the exercise of a proper discretion, should withhold the expression of their satisfaction.[86] Such bonds and mortgages can not be enforced against stock-

therefor, put to his credit on his stock account, it was held that, though the original subscription for stock was void, yet the note would be binding, and regarded as given for the purchase of so much stock. Hayne *v.* Beauchamp (Miss.), 5 Smedes & M. 515.

79. **Mutually indorsed notes of stockholders.**—Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

80. Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

81. **Notes of a third party deposited by stockholder.**—Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

82. **Payment in depreciated bills.**—Marr *v.* Bank, 72 Tenn. (4 Lea) 578.

83. **Presumption and proof.**—Agricultural Bank *v.* Burr, 24 Me. 256.

84. Agricultural Bank *v.* Burr, 24 Me. 256.

85. **Bond and mortgages—Validity.**—Valk *v.* Crandall (N. Y.), 1 Sandf. Ch. 179. Liability of transferee of stock on stock mortgage, see post, "Transfer of Stock," § 40. Liability of stock mortgages for debts and acts of bank, see post, "In General," § 47 (1).

86. **Approval of directors.**—Walden *v.* Union Bank, 6 La. 248.

holders until the conditions upon which they are to be used are performed.[87] Stock mortgages are the property of the bank[88] to secure the payment of the stock subscription and are held for the benefit of the creditors of the bank,[89] and bear interest.[90]

Priorities.—The equities of the creditors in such mortgages are prior and paramount to the equity of the bank.[91]

Discharge and Satisfaction.—The final payment of the subscription which the mortgage was given to secure operates as a discharge of the mortgage indebtedness.[92]

Foreclosure and Sale.—The bank may subject the mortgaged property to the satisfaction of the debt upon failure of the stockholder to pay his interest or principal, or both.[93]

87. Performance of conditions precedent.—Where bonds and mortgages on incumbered lands are left with the commissioners of an association formed under the general banking law, who were appointed to procure subscriptions to stock, it being distinctly understood that such bonds and mortgages were to be used only in case the association advanced money by which the incumbrances on the land could be removed, the subscription based on such bonds and mortgages can not be enforced against the stockholders until the condition is carried out. Burrows *v.* Smith, 10 N. Y. 550.

88. Union Bank *v.* Parkhill, 2 Fla. 660.

89. The mortgages executed to the Real-Estate Bank by its stockholders to secure the payment of the stock subscribed are held for the benefit of the bondholders, and to guaranty the state against loss for her bonds loaned to the bank to procure capital. Duncan *v.* Biscoe, 7 Ark. 175.

90. Interest.—Where a stockholder in a bank gave it a bond and mortgage in payment for his stock, he can not refuse to pay interest provided thereby, because the directors of the bank do not declare a dividend on the stock from the bank's profits; nor will the collection of such interest be restrained until a dividend is declared. Ely *v.* Sprague (N. Y.), Clarke Ch. 351.

91. Priorities.—The charter of the Real-Estate Bank provided that all subscriptions to the capital stock of the bank should be secured by mortgages executed to the bank, which should be conditioned for the payment of all money received from the bank on account of subscriptions, and for the final payment of the bonds of the state issued in aid of the bank, and that, to guaranty the bonds so issued by the state, the mortgages should be transferred to the state and the holders of the bonds. Held, that the equity of the state and the bondholders in the stock mortgages so executed was prior and paramount to the equity of the bank. Wilson *v.* Biscoe, 11 Ark. 44.

The two conditions in the stock mortgages to the Real-Estate Bank—the one for the payment of the bonds of the state and interest thereon, and the other for payment of moneys received from the bank on stock subscriptions—are separate and distinct, and the former, being prior in time and equity to the latter, can not be extinguished by sale under decree for the satisfaction of the latter. Chapman *v.* State, 39 Ark. 274.

92. Discharge.—Act 1853, No. 246, authorizing the directors of the Citizens' Bank to transfer or set apart a stated number of shares of stock as cash shares, did not discharge a mortgage given by a shareholder to secure the unpaid price of his shares, or release the stock held by the mortgagor from payment of calls. Breard *v.* Citizens' Bank, 47 La. Ann. 1374, 17 So. 875.

93. Foreclosure—Right of bank.—The act incorporating the Union Bank (§ 1) provides that the capital shall be raised by means of a loan on the faith of the territory, by the directors of the bank. Section 8 provides that, to secure the principal and interest of the bonds to be issued by the territory for the purpose of raising the capital, the subscribers shall give a bond and mortgage on property. Section 9 provides that the bonds and mortgages so given shall be deposited in the offices of said institution, and that any stockholder may at any time release his property by paying his subscription and loans

The death of the mortgagor does not effect the bank's right to seize and sell the mortgaged property.[94]

Parties.—The trustees of the bank are the proper parties to foreclose stock mortgages and they may do so without making the creditors parties to the action.[95] The bank comptroller, and not the receiver, is the proper person to bring a suit on a stockholder's bond.[96]

Judgment.—Where judgment upon a stockholder's bond was entered by the bank comptroller under a warrant of attorney for that purpose, the judgment, if otherwise regular and just, may be allowed to stand.[97]

§ 39 (7) Liability for and Collection of Unpaid Balances—§ 39 (7a) In General.—Stockholders are bound to pay up all arrearages of stock when there are creditors of the bank.[98] Each stockholder is liable

that have been made on the faith of it. Section 10 provides that the bonds issued by the territory shall be payable to the bank, and negotiated by it. Section 11 provides that both principal and interest of said bonds shall be paid by the bank as the same shall become due. Held, that the stock mortgages belong exclusively to the bank, and that, therefore, it is competent for the bank to subject the mortgaged property to the satisfaction of the debt upon failure of the stockholder to pay his interest. Union Bank *v.* Parkhill, 2 Fla. 660.

The assignees of the Real-Estate Bank have no interest whatever, either general or special, in the mortgages executed by stockholders to secure the amount of stock subscribed for by them, and they possess no right of action whatever upon such mortgages for the purpose of foreclosure. Duncan *v.* Biscoe, 7 Ark. 175.

The securities referred to by § 25 of the original banking law, to be sold by the comptroller in certain cases, are those required to be deposited by §§ 5, 6 of that law, and do not include a stockholder's bond. Van Steenwyck *v.* Sackett, 17 Wis. 645.

94. Death of mortgagor.—The bank's right under the charter (§ 24) to seize and sell property mortgaged for stock is not impaired by the mortgagor's death; and the bank may proceed according to circumstances, either via executiva or via ordinaria. If the proceeds of the mortgaged property be insufficient, the bank must go into the probate court for the balance, and, if not admitted, sue the representatives of the deceased there; and this, whether the original proceedings were via executiva or via ordinaria. And these proceedings, to avoid the delays from which it was the intention to relieve the bank, must necessarily be before the ordinary tribunals. Union Bank *v.* Marigny (La.), 11 Rob. 209.

95. Parties.—The charter of the Real-Estate Bank provided that all subscriptions to the capital stock of the bank should be secured by mortgages executed to the bank conditioned for the payment of all money received from the bank on account of subscriptions, and for the payment of the bonds of the state issued in aid of the bank; that, to guaranty the bonds so issued, the mortgages should be transferred to the state and the holders of the bonds. Held, that the trustees of the bank may, without making the state or the bondholders parties to the action, foreclose the mortgages, and sell the lands, to enforce the payment of the stock loans secured thereby, subject to the prior lien of the state and bondholders. Wilson *v.* Biscoe, 11 Ark. 44.

96. It was so held under Wis. Rev. St. C. 71, § 40. Rusk *v.* Van Norstrand, 21 Wis. 159, overruling Van Steenwyck *v.* Sackett, 17 Wis. 645.

97. Judgment.—Van Steenwyck *v.* Sackett, 17 Wis. 645, overruled on another point Rusk *v.* Van Norstrand, 21 Wis. 159.

98. Liability for unpaid balances.—Lewis *v.* Robertson (Miss.), 13 Smedes & M. 558.

A note given for a subscription of stock, and discounted by the bank for that purpose, the first and several other calls having been first paid, is a valid obligation, and may be enforced by the trustee appointed under the statute of 1843, who succeeds to all the rights of the bank. Lewis *v.* Robertson (Miss.), 13 Smedes & M. 558.

for the deficiency of the stock standing in his name,[99] and it is immaterial whether the bank was organized under a general incorporation act or an act providing for the incorporation of banks.[1]

§ 39 (7b) Persons Liable—§ 39 (7ba) State.—A state is liable for an unpaid balance of its subscription to the stock of a bank, but may restrict or annul the right to call in the unpaid installments of its original subscription by an act extending the charter of the bank where such extension was applied for and accepted by the bank.[2]

§ 39 (7bb) Married Women.—A holder of bank stock who is a married woman is liable for an unpaid balance of the original subscription.[3]

§ 39 (7bc) Trustees.—Bank stockholders of record are liable for unpaid installments though in fact they hold it as trustees for others.[4]

§ 39 (7bd) Assignor or Transferrer.—In some of the states an original subscriber to the stock of a bank is liable for the whole amount of his subscription although he has assigned his stock,[5] but in most juris-

99. Where several persons associated to establish an office of discount, deposit, and circulation under the bank Act of February 27, 1850, and seven of the number subscribed for only 5 shares each, and the balance of 3,000 shares was subscribed for by the eighth associate, who was also the president elect, and one-third of the value of each share of stock was paid in by the president, and the other associates paid in nothing, held, that in case of insolvency each of the associates was liable to pay the deficiency of the stock standing in his name, not exceeding the amount of each share as fixed by the charter. Kinsela *v.* Cataract City Bank, 18 N. J. Eq. 158.

1. In an action by a creditor of a bank against the subscribers to its capital stock, the question whether such bank was organized under Gen. St., §§ 948-974, providing for the organization of corporations to aggregate, save, and invest the funds of members, and prohibiting the issue of certificates of shares until all the subscription shall be paid, and providing that stock shall not be considered as acquired until payment in full, or under the general incorporation act, is immaterial, as it was the duty of subscribers under the former act to pay their subscription in advance, and, not having done so, they are still liable. Ross *v.* Bank, 20 Nev. 191, 19 Pac. 243.

2. State.—A bank was incorporated with a capital stock of $1,000,000, divided into 10,000 shares of $100 each, 5,000 of which were subscribed for by the state. Upon these 65 per cent, or $325,000, was paid in prior to 1834. In that year, upon petition of the president and directors of the bank, an act was passed, extending its charter, with this proviso: "Nor shall anything be so construed as to authorize the president and directors to call in an additional installment upon the stock owned by the state." Creditors, subsequent to 1834, claimed that the unpaid $175,000 was a trust fund, out of which they were entitled to be paid. Held that, notwithstanding the unpaid capital stock of incorporated companies is deemed a trust fund for the payment of corporation debts, yet the right to call in the unpaid installments upon the state stock was taken away by the act of 1834. Robinson *v.* Bank, 18 Ga. 65.

3. Married women.—Simmons *v.* Dent, 16 Mo. App. 288.

4. Trustees.—Rankin *v.* Fidelity Ins., etc., Co., 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553; Hawkins *v.* Glenn, 131 U. S. 319, 33 L. Ed. 184, 9 S. Ct. 739.

5. Assignor or transferror.—Under the general banking act of 1859-60, an original subscriber to the stock of a bank is liable for the whole amount of his subscription, although he has assigned his stock; and it is immaterial that the bank was chartered before the passage of the act. The assignee, however, is first liable. Marr *v.* Bank, 72 Tenn. (4 Lea) 578.

dictions a bona fide assignment and transfer on the books of stock in a solvent bank relieves the assignor from all liability for an unpaid balance on his subscription,[6] even where the assignment is by a husband to his wife.[7]

Stockholder of Record.—Stockholders of record are liable for unpaid installments, though in fact they may have parted with their stock.[8]

§ 39 (7be) Assignee or Transferee.—Where the right of bona fide transfer is secured by the charter or law under which a bank is organized, a transferee of the stock succeeds to all the legal responsibilities of the original owner and is liable for an unpaid balance of the subscription,[9] even in case of a transfer by a husband to his wife.[10]

§ 39 (7c) Facts Relieving from Liability—§ 39 (7ca) Banks Having No Legal Existence.—Where the conditions on which a stock subscription under the banking law was made have never been complied with by the association, and no stock has been issued, and where the subscriber has never been treated as a stockholder by such association, it will be concluded from thereafter claiming the subscription; and therefore a receiver can not recover it.[11] An original subscriber to the capital stock of a bank can not deny liability on his subscription by showing that the corporation had no legal existence, or that the issue of the shares was invalid.[12]

6. **Bona fide assignment.**—Simmons *v.* Dent, 16 Mo. App. 288; Gilmore *v.* Bank, 8 O. 62.

7. **Husband to wife.**—Simmons *v.* Dent, 16 Mo. App. 288.

8. **Stockholder of record.**—Rankin *v.* Fidelity Ins., etc., Co., 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553; Hawkins *v.* Glenn, 131 U. S. 319, 33 L. Ed. 184, 9 S. Ct. 739.

9. **Assignee or transferee.**—Simmons *v.* Dent, 16 Mo. App. 288.

The right of bona fide transfer relates to the honest conditions of the parties at the time of the transfer. When this transfer is fairly made, new certificates generally issue, and the stock assumes a new character as to the ownership. The new owners incur the responsibilities of their position, and those who honestly make the transfers are discharged. The extent of these responsibilities is usually settled at the time of transfer. If not then adjusted, the liabilities of those implicated may depend upon circumstances." Gilmore *v.* Bank, 8 O. 62.

10. Gen. St. 1865, p. 366, § 14, providing that "married women may become stockholders, and may deposit money with any bank or savings institution incorporated under the laws of this state," held to impose on a married woman stockholder all a stockholder's liabilities for unpaid stock, and therefore a bona fide assignment by a husband to his wife of his stock in a solvent corporation relieved him from all liability. Simmons *v.* Dent, 16 Mo. App. 288.

11. **Bank having no legal existence.**—Burrows *v.* Smith, 10 N. Y. 550.

12. Palmer *v.* Lawrence, 5 N. Y. Super. Ct. 161.

Stockholders in a bank which has acted as a corporation can not, in a suit by a receiver to enforce payment of their subscriptions, set up that the bank had no legal existence, because it had not complied with the requirements of the law. Voorhees *v.* Bank, 19 O. 463.

Under the illegal banking Act of 1855, a stockholder, sued for his subscription, is not estopped to plead the violation of the act by the corporation in bar of the suit. Rev. Code, 1855, c. 16, §§ 4, 9, North Missouri R. R. Co. *v.* Winkler, 33 Mo. 354.

§ 39 (7cb) Irregularity of Organization.—A subscriber to the stock of a bank can not plead a mere irregularity or imperfection[13] in the organization of the bank as a defense to an action to enforce an unpaid subscription.

§ 39 (7cc) Irregularities in Subscription.—Where the subscribers to the stock of a bank gave their notes in payment of their subscriptions and became stockholders, they can not claim, as a defense to an action on the notes, that the bank improperly received the notes in payment instead of requiring them to pay the money,[14] or that they had a secret agreement that they should have the option to surrender the stock and have the notes returned.[15]

Stock Held by Bank as Collateral for Purchase Price.—A purchaser of stock, who gave his note for the purchase price and pledged his certificate with the corporation as collateral for payment thereof, could not avoid his subscription contract under an act prohibiting a bank from accepting, as collateral, its own capital stock except where necessary to prevent loss upon a debt previously contracted in good faith, but not imposing any penalty or forfeiture for its violation.[16]

§ 39 (7cd) Fraud and Misrepresentation.—That the subscription was fraudulently made,[17] or was obtained by misrepresentation,[18] will not, as against creditors, relieve a subscriber to the stock of a bank from liability to pay his subscription.

13. Irregular or imperfect organization.—A subscriber to a certificate of a banking association formed under the laws of New Jersey can not claim exemption from liability to pay for his stock, as against creditors of the company, on the grounds that his associates never chose a board of directors, or obtained deposits, but only issued circulating notes, and accepted bills of exchange. Dayton *v.* Borst, 20 N. Y. Super. Ct. 115.

14. Irregularities in subscription.—Finnell *v.* Sandford (Ky.), 17 B. Mon. 748; Farmers', etc., Bank *v.* Jenks (Mass.), 7 Metc. 592.

15. In an action by a receiver of a bank on a note given for the price of shares of stock in the bank, which did not become due until after the bank's insolvency and the vesting of the creditors' rights, defendant can not set up as a defense a secret agreement with the president of the bank that he should have the option of surrendering the stock when the note matured, and having the note returned. Atwater *v.* Stromberg, 75 Minn. 277, 77 N. W. 963.

16. Stock held by bank as collateral for purchase price.—Meholin *v.* Carlson, 17 Idaho 742, 107 Pac. 755, revised Code of Idaho, § 2976.

17. Fraudulent subscription.—Bates *v.* Lewis, 3 O. St. 459. See ante, "Bona Fides of Subscription," § 39 (2a).

The fact that a note sued on was given for bank stock, subscribed, without any intention to pay it, merely for the purpose of pretending to the public that the stock was greater than it really was, or for the purpose of preventing the predominance of certain stockholders, is no defense to the action of the trustee of the bank. Bates *v.* Lewis, 3 O. St. 459.

Sale not repudiated till after insolvency of bank.—Defendants, having purchased stock from a bank, and taken no steps to repudiate the same for fraud until after the bank had gone into the hands of a receiver, were liable for the price, though no certificates were issued to them, and they did not appear as stockholders, and took no part in the affairs of the bank. Robertson *v.* Owensboro Savings Bank & Trust Co.'s Receiver, 149 S. W. 1144.

18. Misrepresentation as to articles contained in charter.—Where defendant subscribed to a proposed bank,

§ 39 (7ce) Agreements Relieving against Liability.—Any agreement or arrangement among the stockholders[19] or directors[20] whereby they attempt to relieve themselves of their liability to the creditors of the bank for unpaid balances of their subscriptions, is void, but does not render the subscription void. A release by the board of directors of a bank of its stockholders from a portion of their subscriptions,[21] or acceptance of less

and executed his notes therefor, the fact that the bank's charter, subsequently obtained, did not contain a number of the articles set out in the subscription list signed by defendant did not constitute a defense to an action on the notes. Petrie *v.* Coulter, 10 Okl. 257, 61 Pac. 1058.

19. Agreements relieving against liability.—The stockholders of a banking corporation, whose charter, verified certificate, and advertisements proclaim its capital stock to be $50,000, and whose verified statements recite that only $10,000 has been paid in upon such stock, can not, without changing its charter, verified certificates, advertisements, or verified statements, relieve themselves of their liability to the creditors of such corporation by any agreement among themselves, whether the creditors were such before or after such agreement. Putnam *v.* Hutchison, 4 Kan. App. 273, 45 Pac. 931.

20. Agreement among directors.—Palmer *v.* Lawrence, 5 N. Y. Super. Ct. 161

An agreement among the original subscribers to the capital stock of a bank that they would not be personally liable on their subscriptions is void, but it does render the subscriptions themselves void, or affect the personal liability of the subscribers. Palmer *v.* Lawrence, 5 N. Y. Super. Ct. 161.

Evidence that the original subscribers to a bank were assured that, if they were unable to pay or secure the shares subscribed, other persons could, doubtless, be found who would relieve them from their subscriptions, is not proof of an agreement among the subscribers that they were not to be personally responsible, or that their subscriptions should be binding only at their election. Palmer *v.* Lawrence, 5 N. Y. Super. Ct. 161.

Vote of directors that no further calls be made.—A banking company was organized under the general banking law. After the calls on the subscribers amounted to one-half the nominal sum, the directors voted that no further calls should be made. The company became insolvent. Held, that the vote of the directors that there should be no further calls was void as to the receiver appointed in insolvency. Sagory *v.* Dubois (N. Y.), 3 Sandf. Ch. 466.

A banking company was organized under the general banking law of New York of 1838. The articles provided that the stock should be divided into shares of $100 each; and that, if any shareholder should omit to pay any installment on his shares, pursuant to any call of the directors, his shares, and all previous payments, should be forfeited. The associates signed a paper, by which they subscribed for and agreed to take the number of shares against their respective names, and to fulfill all the engagements contained in the articles. The association made several calls for assessments, and made dividends on the stock paid in, and applied the same to meet some of the calls, the last of which dividends was contrary to the law. After the calls amounted to about one-half the nominal amount of the shares, the directors voted that no further calls should ever be made, and discontinued the company. The company became insolvent, and on application of a creditor a receiver was appointed. The receiver filed a bill to compel a stockholder, who had subscribed for 25 shares, to pay the unpaid balance of his share. Held, that the stockholder was liable to pay the whole amount of his subscription not previously paid. Sagory *v.* Dubois (N. Y.), 3 Sandf. Ch. 466.

21. Release by directors.—Right of one who is a director when the board of directors of a bank improperly released its stockholders from a portion of their subscriptions, and who afterwards becomes a creditor of the bank, to have the transaction undone for his benefit in a proceeding by him against a stockholder. See Walton *v.* Hake, 9 Mo. App. 596, memorandum.

than par value of the certificates in pursuance of an agreement with the subscriber,[22] is void as against creditors of the bank.

§ 39 (7cf) Payment, Release or Discharge.—Payment of a call for contributions from stockholders does not discharge them from liability for further call on their stock.[23]

§ 39 (7cg) Redemption of Share of Bank's Bills.—The fact that holders of unpaid stock may have severally redeemed their share of the bills of the bank does not release them from liability for the amount due on their stock subscriptions.[24]

§ 39 (7ch) Reduction of Capital Stock.—An arrangement made in good faith among the stockholders of a banking corporation whose subscription to its capital stock had never been made public, entered into before the corporation had incurred debts, whereby, instead of issuing stock to the amount of the original subscription, each subscriber is given full paid-up stock to the amount that he had actually paid on his subscription, is valid as against creditors; and they can not enforce the original subscription, except as to the deficiency between the amount of paid-up stock so issued, and the minimum allowed by the charter for the transaction of business.[25]

§ 39 (7ci) Part of Shares Assessed.—Where part of the shares of stock in a bank are assessed at the same amount that they would have been if all the other shares had been assessed, it is no objection to the liability of the holders of such shares that the remainder were not assessed.[26]

§ 39 (7cj) Estoppel of Director Who Became Creditor.—Estoppel of one who was a director when the board of directors of a bank improperly released its stockholders from a portion of their subscriptions, and who afterwards becomes a creditor of the bank, to assert that he gave

22. Acceptance of less than par value.—Where a bank assesses certificates of stock on less than par value, in pursuance of a contract between it and the buyer that he shall not be required to pay more, and accepts such stockholder's proportion of fictitious profits in discharge of his liability to pay money for the stock, creditors of the bank, on its insolvency, have a cause of action for the difference between the amount paid and the par value, which never existed in the corporation, as a fraud on them against the estate of such stockholder. Gager *v.* Paul, 111 Wis. 638, 87 N. W. 875.

23. Payment of call.—Act No. 100 of 1847, relating to the Citizens' Bank, does not, by giving the bank the right to call for contributions from its stockholders, create a contract between the state and the stockholders, by which the latter, on paying the contribution, are discharged from liability for further calls on their stock. Citizens' Bank *v.* Gay, 47 La. Ann. 551, 17 So. 148.

24. Marsh *v.* Burroughs, Fed. Cas. No. 9,112, 1 Woods 463. See post, "Redemption of Share of Bank's Bills," § 39 (7cg).

25. Reduction of capital stock.—Hill *v.* Silvey, 81 Ga. 500, 8 S. E. 808, 3 L. R. A. 150.

26. Part of shares assessed.—In re Reciprocity Bank, 22 N. Y. 9, reversing 29 Barb. 369, 17 How. Prac. 323.

the bank credit on the faith that the stock thus retired was still unpaid; is a defense to a proceeding by him against a stockholder.[27]

§ 39 (7ck) Collusion between Bank and Judgment Creditors.—When a judgment creditor of a bank has exhausted his remedy at law, and seeks in equity to enforce payment of stock subscriptions, the stockholders can not go behind the judgment rendered against the bank, and question the original cause of action, unless they can show collusion between the creditor and the bank for the purpose of defrauding them.[28]

§ 39 (7cl) Purchase of Shares by Bank.—Where bank stock, upon which there are unpaid installments, is redeemed or purchased by the bank, or received by it from debtors in payment of their debts, it becomes the property of the bank, to which the remaining stockholders have no immediate claim, and therefore they can not be held liable for the unpaid installments, in an action against them by creditors of the bank.[29]

§ 39 (7cm) Illegal Transaction of Business.—See ante, "Bank Having No Legal Existence," § 39 (7ca).

§ 39 (7d) Ascertainment of Balances Due and Adjustment of Liabilities.—Payment in Bank Notes.—In adjusting the equities between the stockholders of a bank, those who paid their stock in notes of the bank, will be allowed only what they paid for the notes.[30]

Note Collected by Stockholder.—In adjusting the liabilities of stockholders of a bank, a note of a third person, given by a stockholder in payment of his stock, and afterwards collected by him, will be treated as the property of the bank, and the stockholder charged with the proceeds, and interest from the date of collection.[31]

Interest.—Actual payments upon stock will bear interest.[32]

Redemption of Bills of Bank.—See ante, "Redemption of Share of Bank's Bills," § 39 (7cg).

§ 39 (7e) Operation of Assignment for Benefit of Creditors.—The liability of stockholders for unpaid balances on stock subscriptions passes under a general assignment of the bank's property, assets, etc.[33]

27. **Estoppel of director who became creditor.**—Walton *v.* Hake, 9 Mo. App. 596, memorandum.

28. **Collusion between bank and judgment creditor.**—Marsh *v.* Burroughs, Fed. Cas. No. 9,112, 1 Woods, 463.

29. **Purchase of shares by bank.**—Robinson *v.* Bank, 18 Ga. 65.

30. **Payment in bank notes.**—Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471; Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

31. **Note collected by stockholder.**—Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

32. **Interest.**—In adjusting the liabilities of subscribers to stock in a banking corporation, actual payments on stock will bear interest from the date at which they were made. Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

33. **Passage under general assignment.**—Terry *v.* Anderson, 95 U. S. 628, 636, 24 L. Ed. 365.

Compared to statutory individual lia-

An assignment by a bank of its effects to which the creditors are not parties or consenting can not deprive them of the right to sue stockholders and directors for breach of duty.[34]

§ 39 (7f) Enforcement—§ 39 (7fa) Levy of Assessment and Sale of Stock.—Collection of Unpaid Subscriptions to Pay Debts of Bank.—See post, "Nature and Extent," § 57; "Actions and Proceedings to Enforce," § 58. Effect of adjudication of insolvency as to enforcement of stock assessment, see post, "Insolvency and Its Effect in General," § 73.

Power to Assess.—Where an amount of stock in a banking corporation exists subscribed and unpaid, the corporation may call for payment.[35]

Necessity—Condition Precedent to Suit.—During the solvency of a bank, the stockholders' subscription liability can only be enforced by assessment made in conformity with the by-laws of the corporation.[36]

The directors of a bank adjudged to be insolvent have power without authority of the court first obtained to assess shareholders for unpaid capital stock for the purpose of liquidating the bank's indebtedness and making final settlement of its affairs, certainly where the bank commissioners acquiesce.[37]

bility.—The liability of the stockholders upon their unpaid subscriptions is that of debtors to the bank. Ogilvie *v.* Knox, Ins. Co., 22 How. 380, 16 L. Ed. 349. Consequently the balances passed to the assignees under the assignment, which was "of all the property, estate, credits, and assets of the" bank. The liability of a stockholder for his subscription is entirely different from that imposed by the charter "for the ultimate redemption of the bills" issued by the bank. The subscription inures to the benefit of all creditors, while the individual liability under the charter operates only in favor of billholders. Terry *v.* Anderson, 95 U. S. 628, 636, 24 L. Ed. 365.

That balance is a debt to the bank, and enures to the benefit of all its creditors, while the individual liability for the redemption of its bills operates only in favor of the holders of them. Terry *v.* Anderson, 95 U. S. 628, 24 L. Ed. 365.

34. Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

35. Assessments or what constitutes a call.—Where an amount of stock in a banking corporation exists subscribed and unpaid, and books are opened for the subscription of other stock for which a stock note is executed, the court can not by construction declare the stock purporting to be subscribed a mere call on the old unpaid stock. Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

Statutory prohibition upon calling in installments on stock held by state.—See ante, "State," § 39 (7ba).

36. Covell *v.* Fowler, 144 Fed. 535.

Prior to the levy of an assessment, a stockholder of a bank can not be pursued by suit to enforce his subscription liability. Covell *v.* Fowler, 144 Fed. 535.

37. Power of directors.—It was so held under the California Banking Act of 1895 (St. 1895, p. 175), providing that, if a bank is adjudged insolvent, the court shall enjoin it from transacting any further business, "and shall order the [bank] commissioners to surrender to the corporation the property thereof in their possession for the purpose of liquidation," giving to the court power to remove directors for cause and to appoint others, and declaring that "subject to this right of removal and appointment the directors or trustees * * * shall be permitted to continue the management * * * during the process of liquidation, under the direction of the bank commissioners." Union Sav. Bank *v.* Dunlap, 135 Cal. 628, 67 Pac. 1084.

The directors of an insolvent bank may, as against the objections of the stockholders, issue a call for the un-

Sale of Stock.—Sale of the stock of a shareholder who fails to pay an installment of his subscriptions is one of the remedies usually provided for the enforcement of payment of subscriptions to the stock of a bank. Such sales to be valid must be in conformity to the requirements of the charter of the bank or the statute authorizing such sales. A sale where the conditions precedent to the power to levy the assessment had not been complied with is void, and the subscriber or a transferee of such stock may maintain an action to compel the bank to recognize it.[38]

§ 39 (7fb) Nature and Form of Action.—Personal Action.—A bank may bring an action against one who refuses to pay his subscription to stock, though made before the bank is in operation.[39] The right to bring a personal action is not affected by the existence of cumulative redress against a stockholder who fails to pay an installment, by way of forfeiture of his shares or sale under a mortgage to secure payment of the subscription.[40]

Bill in Equity.—See post, "Jurisdiction," § 39 (7fc); "Parties Plaintiff," § 39 (7ffa).

Garnishment.—The indebtedness of a delinquent stockholder of a bank for stock not paid in is subject to be garnished, at least, by the judgment creditors of such bank.[41]

paid portion of the capital stock, though the bank commissioners created by St. 1895, p. 175, c. 167, had directed the levy of an assessment by the directors under Civ. Code, § 332, authorizing assessments by directors of a corporation for paying debts, etc., the statute of 1895 merely giving the bank commissioners the power to direct a speedy settlement of the affairs of the bank, but not interfering with the right of the directors to convert the assets of the bank into cash; and hence, if the bank commissioners acquiesce in the method adopted, no one can complain. People's Home Sav. Bank *v.* Rauer, 2 Cal. App. 445, 84 Pac. 329.

38. Where a bank levied assessments on certain shares, and not on others, the shares being sold at public auction for delinquency, and one-fourth of its capital stock had not been subscribed, which is a condition precedent to the power to levy assessments by Civ. Code, § 331, such assessments were void, and an action by a party holding such stock as security, to compel the bank to recognize it as a stockholder, is not barred by, or included within, § 347, providing that no action must be sustained to recover stock sold for delinquent assessments on the ground of irregularity in the assessment, unless the sum for which the stock is sold be first tendered, or within Code Civ. Proc., § 341, subd. 2, providing that an action must be commenced within six months to recover stock sold for a delinquent assessment, as provided in Civ. Code, § 347. Herbert Kraft Co. Bank *v.* Bank, 133 Cal. 64, 65 Pac. 143.

39. Personal action.—Stanton *v.* Wilson (N. Y.), 2 Hill 153.

40. Forfeiture of share.—The articles of a banking company provided that, if any shareholder omitted to pay any installment, his share should be forfeited. Held, that the provision for a forfeiture was a cumulative remedy, and did not affect the direct liability created by the subscription of the stock. Sagory *v.* Dubois (N. Y.), 3 Sandf. Ch. 466.

The remedy of the Citizens' Bank of Louisiana against stockholders who have given mortgages to secure payment of their subscriptions of stock is not confined to the security or to seizure and sale of the stock, but may be enforced against the stockholders personally. Citizens' Bank *v.* Gay, 47 La. Ann. 551, 17 So. 148.

41. Garnishment.—King *v.* Elliott (Miss.), 5 Smedes & M. 428.

§ 39 (7fc) Jurisdiction.—Equity.—On the insolvency of a bank, the right of the receiver to maintain suit against the individual stockholders to enforce their liability on unpaid subscriptions does not constitute such a plain, adequate remedy at law as to defeat a suit in equity against the stockholders for the collection of the corporate assets for the benefit of the creditors.[42]

A repeal of the statute under which the suit was brought does not defeat the action.[43]

§ 39 (7fd) Limitations and Time to Sue.—The statute of limitations will not commence to run until a call has been made for the unpaid stock.[44]

§ 39 (7fe) Appearance and Process.—A stockholder of bank stock may enter a voluntary appearance in an action to enforce his liability for an unpaid stock subscription, but an appearance in an action to determine the fact of insolvency of a bank and for a receivership is premature and ineffectual.[45]

Process.—Service of process before the accrual of a cause of action against a holder of bank stock for an unpaid balance of his stock subscription is premature.[46]

§ 39 (7ff) Parties—§ 39 (7ffa) Parties Plaintiff.—Creditors.—Equity may invest a judgment creditor with power to sue to compel payment of an unpaid stock subscription.[47] Sed, quære, can a creditor of a

42. Jurisdiction.—Dill *v.* Ebey, 27 Okl. 584, 112 Pac. 973.

43. Repeal of statute.—Where the receiver of the effects of a bank, who was appointed on motion of the bank commissioners, pursuant to St. 1838, c. 14, brings an action in the name of the bank against a stockholder to recover the amount of a note for stock subscribed for, such stockholder can not defeat the action by showing the repeal of said statute after suit. Farmers', etc., Bank *v.* Jenks (Mass.), 7 Metc. 592.

44. Limitations and time to sue.—Marr *v.* Bank, 72 Tenn. (4 Lea) 578; Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398. See post, "Appearance and Process," § 39 (7fe).

45. Appearance and process.—Const. Neb., art. 11, § 4, providing that in cases of claims against corporations the amount due shall be ascertained, and after the corporate property has been exhausted the subscribers shall be liable to the extent of their unpaid stock subscriptions, prescribes a time when a cause of action accrues against stockholders, and applies to the liability of stockholders of banking corporations imposed by § 7, so that a voluntary appearance of a stockholder of a bank, in an action to determine the insolvency of the bank and for the appointment of a receiver, before such accrual, is premature and ineffectual. Hazlett *v.* Woodhead, 28 R. I. 452, 67 Atl. 736.

46. Process.—Const. Neb. 1875, art. 11b, § 4, providing that in cases of claims against corporations the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers shall be individually liable to the extent of their unpaid subscription, prescribes a time when a cause of action will accrue against stockholders and applies to the liability of stockholders in banking corporations imposed by § 7, so that service of process on stockholders of a bank before such accrual would be premature. Hazlett *v.* Woodhead, 27 R. I. 506, 63 Atl. 952.

47. Creditors.—Gilmore *v.* Bank, 8 O. 62.

dissolved bank, who has not recovered a judgment and exhausted his remedies at law, proceed in equity to subject unpaid balances on stock subscriptions, to the payment of his demand.[48]

§ 39 (7ffb) Parties Defendant.—All Stockholders.—A judgment creditor need not make all the stockholders of the bank parties to his bill to subject unpaid balances on stock subscriptions to the payment of his demand.[49] Where the stockholders of a bank are liable, by the terms of the charter, for the redemption of the bills of the bank in proportion to the number of shares held by each, an action can not be maintained in equity against an individual stockholder to recover any debt he may owe the bank for unpaid subscriptions to stock. The action, it seems, should be against all the stockholders.[50]

Trustee or Cestui Que Trust.—Where a person holds stock in a banking association as trustee, he is a proper party defendant, to the exclusion of his beneficiary, in an action brought by a depositor against the stockholders to recover the balance due him at the time of the suspension of the bank.[51]

§ 39 (7fg) Pleading.—The complaint in an action by the receiver to recover unpaid subscriptions must state sufficient facts to authorize a court of equity to assume jurisdiction.[52]

§ 39 (7fh) Set-Off.—In a suit to collect a bank stock note, the ordinary rules of set-off apply and are not affected by statutory provisions for special proceedings to enforce such notes.[53]

48. **Enforcement in equity.**—"If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund which will be administered by a court of equity in the absence of a trustee; the principle being that equity will not permit a trust to fail for want of a trustee." Terry *v.* Anderson, 95 U. S. 628, 636, 24 L. Ed. 365.

49. **All stockholders.**—It was not the complainant's duty to marshal the assets of the bank, or to adjust the equities between the corporators. In all that he had no interest. The defendants may have had such an interest, and, if so, it was quite in their power to secure its protection. They might have moved for a receiver, or they might have filed a cross bill, obtained a discovery of the other stockholders, brought them in, and enforced contribution from all who had not paid their stock subscriptions. Their equitable right to contribution is not lost. Hatch *v.* Dana, 101 U. S. 205, 25 L. Ed. 885.

50. Terry *v.* Martin, 10 S. C. 263.

51. **Trustee or cestui que trust.**—Wadsworth *v.* Hocking, 61 Ill. App. 156.

52. **Pleading.**—Complaint in equity where a receiver joined subscribers to the capital stock of a bank as defendants to recover unpaid subscriptions, which alleges that the judge who appointed the receiver on application of creditors supported by a showing that the bank was insolvent and without assets entered an order directing the receiver to retain counsel and sue defendants as subscribers on their unpaid subscriptions, or for the stock issued to them for the benefit of all the creditors, and that the suit is filed under such order, warrants the court to treat such suit as brought by the creditors of the insolvent bank, over which equity has jurisdiction, and in which all the subscribers may be joined as defendants. Dill *v.* Ebey, 27 Okl. 584, 112 Pac. 973.

53. **Set off.**—In an action on a note under the Act of 1845 (43 Ohio Laws, 308), authorizing the trustee of the Mechanics' & Traders' Bank of Cin-

§ 39 (7fi) Evidence.—Declaration of Bank Officer as to Ownership of Stock.—In fixing the ownership of stock, it is not competent to give in evidence the declarations of the officers and agents of the bank, for that purpose. Third persons are not bound by their sayings.[54]

§ 39 (7fj) Findings and Judgment.—A finding of nonpayment of a balance on a note given in payment of a subscription to the stock of a bank is justified by proof of a resolution of the stockholders whereby such balance was attempted to be paid out of the holder's share of the accumulated profits.[55]

Satisfaction—Medium of Payment.—See ante, "Medium," § 39 (5a).

§ 40. Transfer of Stock—§ 40 (1) Assignability.—Effect on liability for debts and acts of bank, see post, "Effect of Transfer of Stock," § 48. Stock subject to lien, see post, "Lien of Bank on Stock or Dividends," § 42. Liability of pledgee for assessment, see post, "Rights and Liabilities as to Bank," § 43.

Every bank stockholder, unless prohibited by statute or the charter of the bank, or by-laws legally enacted, has the right to sell, assign and transfer his stock freely and without limitation,[56] and charter provisions limiting this right are intended for the protection of the bank itself and of purchasers without notice, and do not affect the rights of the parties to a transfer in breach thereof as between themselves.[57] When application is made

cinnati to sue on notes, etc., given to said bank and against delinquent stockholders, defendant can not set off against the claim the amount paid by him since the action was commenced, upon execution on a judgment rendered against him and others as partners in said bank. Bates *v.* Lewis, 3 O. St. 459.

54. Declarations of bank officer as to ownership of stock.—Robinson *v.* Lane, 19 Ga. 337.

55. Finding of nonpayment.—Where, in an action against the representatives of a deceased stockholder in an insolvent bank, who gave a stock note when he took his first share of stock, there is evidence that deceased paid but sixty per cent on the first share of stock and none on the second, and it is shown that it was attempted to pay the balance due on the first share out of accumulated profits, a finding of payment of only the sixty per cent is justified, though it does not appear what became of the stock note. Gager *v.* Paul, 111 Wis. 638, 87 N. W. 875.

56. Freedom of transfer.—"So well established is this right that a by-law of a bank putting restrictions upon the transferability of stock in the hands of its members has been held void as being in restraint of trade." Morgan *v.* Struthers, 131 U. S. 246, 33 L. Ed. 132, 9 S. Ct. 726.

Tennessee.—Bank stock is transferable. Nashville Bank *v.* Ragsdale, 7 Tenn. (Peck) 296.

"The stockholder has an entire and perfect ownership over his own stock, and may sell and transfer it to whomsoever he pleases, and from which the bank has no power to restrain him." Brightwell *v.* Mallory, 18 Tenn. (10 Yerg.) 196; McLaughlin *v.* Chadwell, 54 Tenn. (7 Heisk.) 389; Union Bank *v.* State, 17 Tenn. (9 Yerg.) 490.

57. Effect of charter regulations.—Leyson *v.* Davis, 170 U. S. 36, 42 L. Ed. 939, 18 S. Ct. 500, and affirmed in Farmers' Nat. Bank *v.* Robinson, 176 U. S. 681, 44 L. Ed. 637, 20 S. Ct. 1027, and see Moores *v.* Citizens' Nat. Bank, 111 U. S. 156, 28 L. Ed. 385, 4 S. Ct. 345. In Black *v.* Zacharie & Co., 3 How. 483, 513, 11 L. Ed. 690, it was held that such a regulation relates to the transfer of the legal title, and not to any equitable interest in the stock subordinate to that title. In the case of Union Bank *v.* Laird (U. S.), 2 Wheat. 390, 4 L. Ed. 269, the court took notice of the distinc-

for the transfer of stock in a bank in conformity with its by-laws by one prima facie entitled to have the same transferred, the bank has no control or discretion as to the transfer, or right to prevent it on their transfer book;[58] where it has no claim on the stock at the time it is assigned[59] unless it is insolvent or its capital impaired.[60]

§ 40 (2) Persons Who May Acquire or Sell—§ 40 (2a) In General.—See ante, "Assignability," § 40 (1).

§ 40 (2b) Directors of Bank.—The directors of a bank are not estopped from purchasing with their own money shares of stock owned by other stockholders at as low price as the owners are willing to dispose of them, the fact that the price was too low being a matter for the vendors of the stock to complain of, and the directors are then entitled to sell the stock to another corporation, of which they are directors, at as high a price as possible.[61]

§ 40 (2c) Bank Itself.—In the absence of a law or charter provision prohibiting banks from acquiring title to their own stock a bank has power to purchase and again sell its own stock,[62] but an insolvent bank has no

tion between the legal and equitable title in cases of bank stock, where the charter of the bank had provided a mode of transfer, and that as between vendor and vendee the transfer, not in conformity to such provision, is good to pass the equitable title and divest the vendor of all interest in the stock.

58. Bank *v.* Craig, 33 Va. (6 Leigh) 399; Madison Bank *v.* Price, 79 Kan. 289, 100 Pac. 280.

Bank directors can not prevent the alienation of stock with the real estate securing it, by refusing the purchaser the rights of a stockholder. Byrne *v.* Union Bank (La.), 9 Rob. 433.

A bank's duty to transfer stock on its books pursuant to a transfer by the registered holder is ministerial, and it has no discretion in the matter. Madison Bank *v.* Price, 79 Kan. 289, 100 Pac. 280.

"The bank can impose upon one man no greater restriction than on another, nor, by the exertion of an arbitrary will, extend, for a particular occasion, those rules, whose validity and use consist in their generality, as laws of the corporation." Bank *v.* Craig, 33 Va. (6 Leigh) 399.

Assignment based on illegal consideration.—Under 1 Rev. St., p. 152, regulating the business of general banking, if a bank has no claim on stock at the time it is assigned, it can not refuse to transfer the stock on the ground that the assignment was based on an illegal consideration. Helm *v.* Swiggett, 12 Ind. 194.

Stock in name of guardian.—Hence, where stock belonging to an infant was sold and assigned by his guardian, and transferred by the bank to the purchaser, in accordance with its rules, it is not liable therefor, although the sale by the guardian was in fraud of his ward's rights, and with intent to appropriate the proceeds to his own use. Bank *v.* Craig, 33 Va. (6 Leigh) 399.

59. Helm *v.* Swiggett, 12 Ind. 194; Madison Bank *v.* Price, 79 Kan. 289, 100 Pac. 280; Foster *v.* Broas, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

60. Under Laws 1897, p. 98, c. 947 (Gen. St. 1901, c. 11a), it is the duty of a bank in the state to transfer stock on its books pursuant to the transfer by the registered holder, unless said holder is entitled to it on a matured debt, or unless the bank is insolvent or its capital impaired. Madison Bank *v.* Price, 79 Kan. 289, 100 Pac. 280.

61. Directors.—In re Liquidation, 118 La. 664, 43 So. 270.

62. Bank itself.—Fitzpatrick *v.* McGregor, 133 Ga. 332, 65 S. E. 859.

power to purchase its own shares of stock.[63] In England and in some of the states of this country an express grant of authority is necessary to enable a bank to purchase shares of its own stock, either for the purpose of reissuing or retiring them.[64]

§ 40 (2d) Bank Purchasing Stock in Other Bank.—A bank which purchases stock as a broker but takes it in his own name, which appears upon the books of the corporation, assumes the liability of a stockholder as between itself and the corporation.[65]

§ 40 (3) Validity, Manner and Sufficiency—§ 40 (3a) Fraud or Misrepresentation—§ 40 (3aa) Effect.—Fraud or false representation invalidates a transfer of bank stock as against the party defrauded.[66]

As Affecting Assignees.—The assignees and successors of stockhold-

63. Insolvent bank.—Fitzpatrick *v.* McGregor, 133 Ga. 332, 65 S. E. 859.

A bill by a bank and its receiver and creditors, charging that defendant stockholders sold their stock to the bank at par, knowing that the capital stock of the bank at that time was impaired, and that by surrendering their stock the bank was seriously embarrassed and afterwards became insolvent; that one of defendants was a director, and knew of the conditions, and that the bank would be rendered insolvent by buying the stock; and praying that the sale be set aside and that defendants be held liable for the purchase price of the stock surrendered by them—was properly dismissed. Bessemer Sav. Bank *v.* Learned (Miss.), 47 So. 119.

64. England and some of the states.—Fitzpatrick *v.* McGregor, 133 Ga. 332, 65 S. E. 859; German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60. See, also, Sutherland *v.* Olcott, 95 N. Y. 93; Morgan *v.* Lewis, 46 O. St. 1, 17 N. E. 558; Cartwright *v.* Dickinson, 88 Tenn. (4 Pickle) 476, 12 S. W. 1030, 7 L. R. A. 706, 17 Am. St. Rep. 910.

65. Bank purchasing stock of another bank.—McKim *v.* Glenn, 66 Md. 479, 8 Atl. 130.

66. Fraud or false representations.—Plaintiff, a director in a bank, who had been such from its organization, who usually attended the meetings, and was actually present and took part in the proceedings of the board of directors when the last dividend was declared, having purchased from the cashier of the institution twenty shares of the capital stock, sued to have such contract rescinded, and to recover back the money paid, on the ground of false representations and concealments of the cashier, as to the value of the stock and the condition of the bank at the time of the purchase. Held, that plaintiff was not estopped from setting up his actual ignorance of the condition of the bank at the time of the sale. Lefever *v.* Lefever, 30 N. Y. 27.

Evidence that the president of a bank was informed by his son and by the deputy comptroller of the currency, officially, that the bank was embarrassed, and its capital impaired, proves the falsity of statements, afterwards made by him in order to sell his stock, that the bank was doing a good business and had a large surplus. Truman *v.* Lombard, 10 App. Div. 430, 42 N. Y. S. 262.

Sale held not fraudulent.—Where G. sold to L. so many shares of stock in the First National Bank when issued under a provision that the cashier of the bank was to retain the certificates as security for G.; it was held, that there was no fraud practiced upon L. in the failure to actually detach the certificate of stock from the stub book, and give him manual possession of it. It was agreed between him and G. that the stock should be placed in the hands of the cashier to hold as collateral on the note. The cashier left the certificate of stock in the book as a matter of convenience to himself and for its preservation. It was under his dominion and control all the time until the failure of the bank. Long *v.* Gilbert (Tenn.), 59 S. W. 414.

ers and directors of a bank, are not bound by the fraud of their assignors and predecessors, if they become assignees and successors without fraud.[67]

Bona Fides of Transferrer.—Where defendant had no reason to believe that the officer of a bank was using the bank's money in purchasing defendant's stock, and it was sold in the usual course of trade, the sale was valid, and the money paid became defendant's property.[68]

§ 40 (3ab) Rescission.—Conditional Sale.—Where a contract for the sale of bank stock is subject to a parol condition that an examination by the buyer on his return from a journey shall show the bank to be prosperous, as represented by the seller, and the buyer, on his return, finds the bank insolvent, he may rescind his purchase without showing that the bank was insolvent when the contract was made.[69]

§ 40 (3b) Authority from Holder or Power of Attorney.—Necessity and Duty of Bank.—Banks stand upon the footing of trustees in relation to their stockholders for the protection of their interests. Being custodians of the primary evidence of title to the stock, they are held to the exercise of reasonable care and diligence in its preservation. Their safety, therefore, requires them, before permitting a transfer, to be satisfied of the authority of the person to make it. Hence they are entitled to require the production of satisfactory evidence of such authority, and though, generally, the possession of the legal title is sufficient evidence thereof, it is not always so, since the real equitable ownership may be in some other than the holder of the legal right.[70] An unauthorized transfer, therefore, may work a serious wrong to the equitable owner; and if the bank allow it to be made with notice of the want of authority or if put upon inquiry, without proper investigation into the authority, it becomes a party to the wrong.[71] This principal is applicable to transfers by trustees, such as administrators, executors[72] and guardians.[73]

67. **As affecting assignees.**—Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

68. **Bona fides of transferrer.**—Corn *v.* Skillern, 75 Ark. 148, 87 S. W. 142.

69. **Rescission of conditional sale.**—Truman *v.* Lombard, 10 App. Div. 430, 42 N. Y. S. 262.

70. **Authority from holder or power of attorney.**—Peck *v.* Bank, 16 R. I. 710, 19 Atl. 369, 7 L. R. A. 826.

71. Peck *v.* Bank, 16 R. I. 710, 19 Atl. 369, 7 L. R. A. 826.

72. **Transfer by executor.**—When a proposed transfer of bank stock by an executor is apparently in the ordinary course of administration, for the purpose of raising money to pay the testator's debts or legacies given by the will; the bank may safely permit a transfer of the stock by the executor without looking for his authority beyond his letters, and has no right to require any further evidence of his authority. If, however, the circumstances attending the proposed transfer show that it is not in the ordinary course of administration, it becomes the duty of the transfer officers, without permitting it, to inquire into the authority of the executor to make it. Peck *v.* Bank, 16 R. I. 710, 19 Atl. 369, 7 L. R. A. 826. And see Lowry *v.* Bank, 3 Am. L. J., N. S., 111.

Where a testator's bank stock is

73. **Guardian.**—Bank stock, standing in name of A., guardian, may be sold and transferred by the guardian, and the officers of the bank have no right to control or prevent him from transferring it on their transfer book. Bank *v.* Craig, 33 Va. (6 Leigh) 399.

Bank Must Satisfy Itself as to Genuineness.—A bank before making a transfer of its stock must satisfy itself of the genuineness of the power of attorney,[74] or the certificate, or scrip,[75] and is liable in case either is forged or otherwise void and justifiable in refusing a transfer.

Blank Indorsement by Holder.—A blank indorsement by the holder of a certificate of bank stock, with his seal and subscription of a witness, is a valid power of attorney to transfer the stock.[76]

Attestation of the signature of the holder by the cashier or other witness may be required by the by-laws of a bank in order to render a transfer of its stock valid.[77]

No authority from an original subscriber, who holds as trustee for future subscribers, for the transfer to the purchaser is necessary, as he can not refuse to transfer.[78]

§ 40 (3c) Form and Sufficiency—§ 40 (3ca) In General.—As between the parties the property in shares of bank stock passes by mere

sought to be transferred by the executrix, nine years after the testator's death, and six years after the period limited by law for the settlement of estates has elapsed, not to another person to raise money for the estate, but to herself individually, for the purpose of securing a note on which she is indorser for a third person, the circumstances are sufficient to put the bank on inquiry as to her authority. Peck *v.* Bank, 16 R. I. 710, 19 Atl. 369, 7 L. R. A. 826.

74. **Must satisfy itself as to genuineness.**—A bank may refuse to recognize a power of attorney for transfer of the stock of one of its stockholders if not satisfied of its entire genuineness, and may require the personal attendance of the party to determine such matters of fact as may give rise to dispute. Chew *v.* Bank, 14 Md. 299.

Where a bank permits a transfer of its stock to be made under a power of attorney, it takes the risk of its validity. It is liable in case of a forged power, or of one executed by a feme covert or an infant. Chew *v.* Bank, 14 Md. 299; Pollock *v.* National Bank, 7 N. Y. 274, 57 Am. Dec. 520.

Where the owner of shares assigned them to two persons, and gave a power of attorney to one of them to transfer them on the books of the bank, the power was held to be valid, whether the power authorized the transfer to be made to both assignees, or to the attorney alone; and the bank was held not to be liable for refusing to transfer the shares to a subsequent attaching creditor, who sold them on execution. Plymouth Bank *v.* Bank (Mass.), 10 Pick. 454.

75. Bank *v.* Craig, 33 Va. (6 Leigh) 399.

76. **Blank indorsement.**—Commercial Bank *v.* Kortright, 22 Wend. 348, 34 Am. Dec. 317.

77. **Attestation of signature.**—A provision in the by-laws of a bank that its "shares shall be transferable by indorsement in writing by the holder in presence of the cashier or two other witnesses" requires that the cashier or two other witnesses shall, in writing, attest the signature of the holder in order to render the transfer valid between the parties. Dane *v.* Young, 61 Me. 160.

78. **Trustee for purchasers.**—To facilitate the reorganization of a state bank as a national bank, it was agreed that certain stockholders should subscribe for all the stock, which was afterwards to be apportioned among those stockholders of the state bank who desired to take it. Subsequently one of the subscribers of the state bank subscribed for shares, and certificates were issued to him. Held that, as the original subscriber for the shares transferred to the purchaser held the stock as a trustee, it was not necessary to show, in an action against the receiver of the bank, any authority from such original subscriber for the transfer to the purchaser. Somerset Nat., etc., Receiver *v.* Adams, 24 Ky. L. Rep. 2083, 72 S. W. 1125.

delivery of the certificates.[79] A statute making promissory notes negotiable by indorsement is not applicable to the sale and transfer of certificates of bank stock.[80]

§ 40 (3cb) Certificate Containing Blank Form of Assignment.—The delivery of a bank stock certificate, with an assignment in blank with a power of attorney indorsed passes the entire title, both legal and equitable,[81] notwithstanding that by the terms of the charter or by-laws of the corporation the stock is declared to be transferable only on its books.

79. **Manner and sufficiency—Delivery.**—As between the stockholder and the pledgee, the property in the shares of stock, undoubtedly, passed to the latter without the formality of a transfer on the books of the bank. As collateral security for the payment of their notes, discounted and held by the Cecil National Bank, and with the power to sell for the purpose of payment, the title passed by the delivery of the certificate, with the accompanying power of attorney. Johnston *v.* Laflin, 103 U. S. 800, 26 L. Ed. 532; Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039.

A bank stockholder overdrew his account on the promise of the cashier to buy his stock, and afterwards, having transferred the stock to him individually, he presented his pass book showing the overdraft to the cashier, and asked him if he had given him credit for the amount. The cashier replied that he had not, but would, and instructed the teller to place the credit in his pass book, which was done, but no entry was made in the bank's books showing the transaction, and the cashier never paid the bank, and the seller remained on the books charged with the overdraft. The stock was found by the receiver in an envelope indorsed with the seller's name. Held, that the sale was complete, and the seller was not bound to see that the cashier actually paid the price to the bank. Foster *v.* Broas, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696.

A wife, who is the administratrix of her husband, can not be surcharged with the value of bank stock, where she shows that she had a separate estate; that her husband borrowed money from her on notes; that he indorsed the bank stock over to her, without having it transferred on the books of the bank, but stating to a disinterested witness that it represented the amount of his debt to his wife; that he then placed the stock in a pocketbook belonging to his wife, and placed the pocketbook in a box where he and his wife kept their papers; and that after the husband's death the promissory notes were not to be found. In re Hertzler's Estate, 22 Pa. Super. Ct. 592.

80. Weyer *v.* Second Nat. Bank, 57 Ind. 198, so holding at 1 Rev. Stat. 1876, p. 635, § 1.

81. **Certificate containing blank form of assignment.**—Union Bank *v.* United States Exch. Bank, 143 App. Div. 128, 127 N. Y. S. 661. See ante, "Authority from Holder or Power of Attorney," § 40 (3b).

Where a certificate of stock contains on the back thereof a blank form of assignment and power of attorney to transfer the stock on the books of the company, such certificate makes the stockholder the agent of the bank and of all whom it represents to sell, to pledge and pass title to the certificate. Lee *v.* Citizens' Nat. Bank, 2 Cin. Rep. 298, 13 O. Dec. 913.

Where a bank stock certificate contains a form of assignment and power of attorney, an indorsement of such form in blank by the holder of the certificate is sufficient, and the purchaser who desires such stock transferred upon the books of the corporation may write above the assignor's signature the proper form of indorsement. Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339.

The holder of a certificate of bank stock indorsed it in blank, and delivered it as collateral security. The pledgee then transferred it to plaintiff, who filled up the blank transfer, by inserting his own name as assignee, and the name of another as attorney to make the transfer, the certificate reciting that it was transferable on the books by the stockholder, or his attorney, on surrender thereof. Held, that the assignment was valid. Commercial Bank *v.* Kortright, 22 Wend. 348, 34 Am. Dec. 317.

Assignment under seal.—Where a

§ 40 (3cc) Compliance with Formalities and Rules—§ 40 (3cca) In General.—Where the charter of a bank, or its legally enacted by-laws, provide for certain formalities to be observed in the transfer of stock, the legal title can not be otherwise acquired than by conformity thereto, but the equitable title may be otherwise transferred.[82]

§ 40 (3ccb) Right to Establish and Enforce—§ 40(3ccba) In General.—Where the act of incorporation of a bank authorizes the officers to establish rules conformably to which stock transfers are to be made, they may establish reasonable rules respecting the transfer of stock of the bank,[83] but all unreasonable attempts to restrain the right to transfer such shares are void, as against public policy.[84]

§ 40 (3ccbb) Particular Rules and Formalities—§ 40 (3ccbba) Consent of Directors.—A by-law which makes the sale and transfer of shares of bank stock subject to the consent of the directors, or refuses to permit the same unless the directors are satisfied, is unreasonable and void.[85]

§ 40 (3ccbbb) Production and Cancellation of Old Certificates.—When bank stock is transferred, the old certificates should be taken up and cancelled by the bank and new ones issued. Where the bank can not

certificate of bank stock contains a blank form of assignment and power of attorney printed on its back, the stockholder's signature to the blank assignment and power of attorney, though under seal, is valid. Lee *v.* Citizens' Nat. Bank, 2 Cin. Rep. 298, 13 O. Dec. 913.

82. Compliance with formalities and rules.—Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039; Union Bank *v.* Laird (U. S.), 2 Wheat. 390, 4 L. Ed. 269; Brent *v.* Bank (U. S.), 10 Pet. 596, 9 L. Ed. 547; Union Bank *v.* United States Exch. Bank, 143 App. Div. 128, 127 N. Y. S. 661.

Where by the act of incorporation of a bank the shares of any individual stockholder are transferable only on the books of the bank, according to the rules (conformable to law) established by the president and directors; and all debts due and payable to the bank, by a stockholder, must be satisfied, before the transfer shall be made, unless the president and directors should direct to the contrary, no person could acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank, under the act of incorporation, of which he is bound to take notice. Union Bank *v.* Laird (U. S.), 2 Wheat. 390, 4 L. Ed. 269. See Brent *v.* Bank (U. S.), 10 Pet. 596, 9 L. Ed. 547.

83. Right to establish and enforce.—Bank *v.* Craig, 33 Va. (6 Leigh) 399; Union Bank *v.* Laird (U. S.), 2 Wheat. 390, 4 L. Ed. 269.

84. McNulta *v.* Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203.

85. Consent of directors.—McNulta *v.* Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203.

A by-law of a bank which provides that all stock sold or transferred shall be with the express condition that it will be voted in favor of all propositions submitted by the board of directors to increase the capital stock of the bank, until its capital stock reaches $300,000, and that such provisions shall become a part of every contract for the transfer of any stock of the bank, and shall become binding on the transferee by the acceptance of the stock, is void because it attempts to limit the right to sell or transfer the corporate stock, by imposing unreasonable conditions. McNulta *v.* Corn Belt Bank, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954.

transfer shares of stock without the return of the certificate, its nonproduction is notice to the bank that someone may have acquired rights to it by transfer or pledge.[86]

§ 40 (3ccbbc) Entry on Bank's Books.—Where neither the charter nor the by-laws of a banking company make its stock transferable only on its books, a provision to that effect in its certificates of stock can not limit the unconditional right of transfer.[87]

Construction and Operation.—The fact that the shares were transferable on the bank's books does not limit the right of transfer,[88] but prescribes the manner and place of transfer.[89]

Notice of Assignment.—Where the charter of the bank provides that no assignment of stock shall be valid, as against it, unless a formal transfer of the same be made on its books, it is the right of the bank to treat a stockholder as the true owner of stock issued to him, and to deal with him accordingly, until it receives notice that the stockholder has assigned his stock to a third person; aliter, after notice is brought home to the bank, even though there has been no attempt on his part to secure a formal transfer of the stock upon its books.[90] The notice to the bank of a sale by the stockholder need not specify the name of the purchaser.[91]

86. Notice of assignment.—Where the articles of association and the by-laws of a bank provide that certificates of stock therein shall be transferable only on the books of the corporation by a return of such certificates, if a stockholder attempts to transfer his certificate to the bank without returning the same, his failure to return such certificate is notice to the bank that he may have parted with it to someone of the nature of whose rights the bank is bound to inquire before taking any action in the premises. Lee *v.* Citizens' Nat. Bank, 2 Cin. Rep. 298, 13 O. Dec. 913.

87. Entry of transfer on bank's book.—Williams *v.* Mechanics' Bank, Fed. Cas. No. 17,727, 5 Blatchf. 59.

88. Construction and operation.—The fact that the shares were transferable on the bank's books did not limit the right of transfer; the transferrer not being indebted to the bank, so as to justify its refusal, under 3 How. Ann. St., § 3208a6, to enter the transfer. Foster *v.* Broas, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

89. A certificate reciting the ownership of bank shares "which are transferable at the bank in person or by attorney" means transferable only at the bank under cognizance of its officers. Williams *v.* Mechanics' Bank, Fed. Cas. No. 17,727, 5 Blatchf. 59.

Where the articles of association of a bank and the certificate of stock provide that transfers of stock might be made on the books of the bank by the shareholder, or his attorney, duly authorized, the bank is bound to allow such transfer and issue a new certificate on application of a transferee, who has a power of attorney from the former holder. Purchase *v.* New York Exch. Bank, 26 N. Y. Super. Ct. 164.

In supplementary proceedings by a judgment creditor, a bank, in which the debtor owned stock, was enjoined from transferring it. A receiver was appointed, and authorized to sell the stock. Pending the proceedings, one holding a written assignment of the stock and power of attorney from the debtor gave notice thereof to the bank. The certificate of stock recited that the stock was transferable on the books on delivery of the certificate. Held, that the bank could not transfer the stock on the books to the purchaser from the receiver. Purchase *v.* New York Exch. Bank, 26 N. Y. Super. Ct. 164.

90. Notice of assignment.—People's Bank *v.* Exchange Bank, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144; Conant, etc., Co. *v.* Reed, 1 O. St. 298.

Notice of assignment to the cashier is notice to the bank. Conant, etc., Co. *v.* Reed, 1 O. St. 298.

91. Name of purchaser.—Lane *v.* Morris, 8 Ga. 468.

Necessity and Effect of Failure to Enter.—The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder,[92] to protect the purchaser against proceeding of the seller's creditors,[93] and against subsequent purchaser who take transfers of the stock without notice of any prior equitable assignment.[94] Where a transfer of bank stock is required to be entered upon the books of the corporation, an assignment made without such entry does not constitute the assignee a shareholder, and he can not act as such;[95] but as between the immediate parties to the transaction, the assignment is effective. It invests the assignee with an equitable title and will be recognized and enforced, at least in equity, as against all parties not showing a superior right.[96]

Transfer Officer, Authority and Duty.—A person showing a prima facie legal right to claim a transfer of shares of bank stock to himself may demand it from any principal officer left in general charge and superintendence of the bank, during the regular hours appointed by the bank for the transaction of banking business.[97] The cashier, unless the charter or by-laws of the bank forbid it, may properly make or superintend the transfer

92. Necessity, purpose and effect of failure to enter.—Johnston *v.* Laflin, 103 U. S. 800, 804, 26 L. Ed. 532; Bank *v.* Craig, 33 Va. (6 Leigh) 399.

"Purchasers and creditors, in the absence of other knowledge, are only bound to look to the books of registry of the bank. But as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or any one he may name, to transfer it on the books of the company, and the price is paid. If a subsequent transfer of the certificate be refused by the bank, it can be compelled at the instance of either of them." Johnston *v.* Laflin, 103 U. S. 800, 26 L. Ed. 532; First Nat. Bank *v.* Lanier (U. S.), 11 Wall. 369, 20 L. Ed. 172; Webster *v.* Upton, 91 U. S. 65, 23 L. Ed. 384.

93. Johnson *v.* Laflin, 103 U. S. 800, 26 L. Ed. 532.

Where shares are transferable only at the bank, the bank is not liable to a purchaser who never applied for a transfer, where it permits their attachment as the property of the person in whose name they stand on the bank books. Williams *v.* Mechanics' Bank, Fed. Cas. No. 17,727, 5 Blatchf. 59.

94. Scott *v.* Pequonnock Nat. Bank, 15 Fed. 494.

95. Effect of failure to enter.—Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643.

96. Equitable assignment.—Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643, citing Baldwin *v.* Canfield, 26 Minn. 43, 1 N. W. 261; Black *v.* Zacharie & Co., 3 How. 483, 513, 11 L. Ed. 690; Broadway Bank *v.* McElrath, 13 N. J. Eq. R. 24; and Dickinson *v.* Central Nat. Bank, 129 Mass. 279; Cushman *v.* Thayer Mfg., etc., Co., 76 N. Y. 365; Scott *v.* Pequonnock Nat. Bank, 15 Fed. 494.

Although the transfer on the books of the bank may be necessary to pass a legal title, an equitable title may be conveyed otherwise. Conant, etc., Co. *v.* Reed, 1 O. St. 298.

A transferee of bank stock may have a perfect title thereto as respects the transferrer, though no transfer has been made on the books, and the charter provides that no transfer shall be valid unless registered. Commercial Bank *v.* Kortright, 22 Wend. 348, 34 Am. Dec. 317.

97. Transfer officer.—Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695.

of shares of the capital stock.[98] In the absence of fraud and collusion, a transfer of stock directed and managed by the president and cashier who made use of the usual forms and ceremonies is binding on the bank.[99]

Neglect of Proper Officer to Enter Transfer.—While it is the duty of the stockholder, desiring to assign any of his shares, to have an entry thereof made in the books of the bank, if he attempts to do so in good faith, and exercises reasonable care, and directs the entry thereof to be made by the proper person, he can not be held liable for the neglect of the officers of the bank to obey his direction.[1]

Form and Sufficiency of Entry.—All that is necessary, when the transfer is required by law to be made upon the books of the corporation, is that the fact should be appropriately recorded in some suitable register or stock list, or otherwise formally entered upon its books. For this purpose the account in a stock ledger, showing the names of the stockholders, the number and amount of the shares belonging to each, and the sources of their title, whether by original subscription and payment or by derivation from others, is quite suitable, and fully meets the requirements of the law.[2]

The transfer is consummated when the certificate is delivered to the purchaser with the blank power of attorney indorsed, and the money is received from him. As between them, the title to the shares then passes; whether that be deemed a legal or equitable one matters not; the right to the shares then vested in the purchaser, and is not affected by the knowledge of the attorney in fact, whose name is subsequently filled in to make the transfer, of circumstances which, if known to the transferrer, would invalidate the transfer.[3]

98. **Cashier as transfer officer.**—Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695.

"Where the by-laws of a bank require that the transfer of the shares of the capital stock shall be entered in the books of the bank, the entry is usually made by the cashier, and the evidence introduced by the plaintiff tended to show that the practice of the defendant bank was in accordance with the general usage." Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695.

99. Hodges *v.* Planters' Bank (Md.), 7 Gill & J. 306.

1. **Neglect of proper officer to enter transfer.**—Hunt *v.* Seeger, 91 Minn. 264, 98 N. W. 91.

2. **Form and sufficiency of entry.**—Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039.

3. **When consummated.**—Johnston *v.* Laflin, 103 U. S. 800, 26 L. Ed. 532.

"The transferability of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies. The power of attorney indorsed on the certificate is usually written or printed, with a space in blank for the name of the attorney to be inserted, for the accommodation of the purchaser. The subsequent filling up of the blank by him with another name, instead of his own, as it may suit his convenience, does not so connect the vendor with the party named as to charge him with the latter's knowledge and thus affect the previous transaction. A different doctrine would put a speedy end to the signing of powers of attorney in blank." Johnston *v.* Laflin, 103 U. S. 800, 26 L. Ed. 532.

"The name with which the blank may be subsequently filled up by the purchaser is not, in practice, regarded as affecting the previous sale in any respect, but as a matter which concerns only the purchaser. It would be a source of disturbance in business if any other result were attached by the law to the proceeding." Johnston *v.* Laflin, 103 U. S. 800, 26 L. Ed. 532.

"The validity of the sale of stock

§ 40 (3ccc) Waiver of Compliance with By-Laws.—The bank may waive a compliance with its by-laws respecting the manner of a transfer of stock.[4]

§ 40 (3cd) Issue of New Stock Certificate.—The transfer of stock on the books of the bank passes title, though no certificate is issued to the transferee.[5]

§ 40 (3d) Pledge or Collateral Security.—If a holder of bank stock for valuable consideration, sell, pledge, or otherwise dispose of any shares of stock belonging to him, to another, and deliver to him the certificate for such shares, with power of attorney authorizing the transfer of the same

can not be made to depend upon the accident of the immediate purchaser, or of the party to whom he may transfer the certificate, in filling up the blank in the power of attorney with the name of a person, to make the formal transfer, who is acquainted with the secret interests of others in the shares purchased. The validity of a sale and its completeness must be determined by the relation which the contracting parties at the time openly bear to each other." Johnston *v.* Laflin, 103 U. S. 800, 26 L. Ed. 532.

Application of rule.—Where a stockholder in a national bank, in good faith and without intent to evade his legal liability as a stockholder, sold his stock to a broker and delivered the certificate with blank power of attorney to transfer same to purchaser, who was unknown to him, and the broker was acting for the president of the bank who represented that he was purchasing for himself or an undisclosed party and gave his individual check in payment, but who was really purchasing for the bank, and had the certificate transferred to his name as trustee and applied the funds of the bank in payment therefor, without notice to the original stockholder or the broker of these facts, it was held that the attorney who made the transfer by the direction of the president, filling in his name as attorney, who was a bookkeeper in the bank, was the agent of the bank, and his knowledge was not imputable to the original stockholder. Such stockholder's liability was terminated by this sale and transfer. Johnston *v.* Laflin, 103 U. S. 800, 26 L. Ed. 532.

Of course the whole case here would be changed if the sale had not been made in good faith, but was made merely to evade his just responsibility as a stockholder, or to work a fraud upon other stockholders or creditors of the bank. Johnston *v.* Laflin, 103 U. S. 800, 26 L. Ed. 532.

4. Waiver of compliance with by-laws.—Where, on a transfer of certain bank stock, the bank canceled the old certificate, and issued a new certificate to defendant, paid her accruing dividends on the stock, and thereafter recognized her as transferee without either of them complying with certain by-laws requiring submission of the name of a transferee to the board of directors, and approval by them, and that such transferee shall sign the by-laws, etc., the bank waived a compliance with such by-laws. Peoples' Home Sav. Bank *v.* Rickard, 139 Cal. 285, 73 Pac. 858.

5. Certificate of stock not issued.—Agricultural Bank *v.* Wilson, 24 Me. 273.

In an action by a bank on a promissory note taken in payment of stock, defendant set up want of consideration. The stock had been transferred to defendant on the books, but no certificate had been issued, and the directors had exercised control of the stock, receiving the dividends thereon, and paying the taxes. Held, that the legal title to the shares, as evidenced by the books, being in defendants, their title was not changed by the mere fact that they left such shares in the control of the directors. Agricultural Bank *v.* Burr, 24 Me. 256.

A stockholder having transferred his stock, the charging his account therewith by the bank on the stock ledger, and opening of an account with the transferee, and crediting him with the stock, is a sufficient transfer to vest the complete legal title in the latter, and entitle him to a certificate. National Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039.

on the books of the corporation, the title of the former shall vest in the latter, so far as may be necessary to effect the sale, pledge, or other disposal of the said share, not only as between the parties themselves, but also as against the creditors of, and subsequent purchasers from, the former. Such pledge can not be interfered with or contested by creditors of the pledgor to the detriment of the pledgee,[6] and is subject only to the statutory lien of the bank for any debt due it from the stockholder.[7] A delivery of stock as collateral security for a debt due the transferee by the stockholder, accompanied by a power of attorney to sell, vests in the former title to the stock, subject only to the lien of the bank for debts due it by the stockholder.[8]

Pledgee Not Owner.—A pledgee of bank stock is not a stockholder in the sense of being a member of the corporation.[9] The person in whose name shares of stock stand on the books of the corporation is deemed the

6. **Pledge or collateral security.**—A pledgee of bank stock has a lien upon such stock which may be enforced. McConville *v.* Means, 10 O. Dec. 452, 21 W. L. B. 193.

A statute incorporating a bank and prohibiting a transfer of stock for a certain period does not prevent the original subscriber from selling it as collateral security, so as to give the purchaser or transferee an equitable title thereto, and to the dividends declared thereon during such period, which title may, after the expiration of the time, be converted into a legal one. Nesmith *v.* Washington Bank (Mass.), 6 Pick. 324.

A stockholder of one bank, by written assignment, transfers his stock to another bank as collateral security for his indebtedness or liability, of any or every kind, present or future; giving such bank the right at any time of collection, to determine to which debt or liability it will apply the same. Such right of application of the collection on, or proceeds of the sale of, such pledge or collateral, exercised in good faith, can not be interfered with or contested by the creditors of the debtor to the detriment of the pledgee. Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

7. An assignment of stock transferable only on the books without such transfer, for the purpose of collateral security, is effectual as against the bank, asserting a lien for a debt of the stockholder. Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643.

8. **Transfer subject to bank's lien for debts due bank.**—Charter of bank incorporated in 1870 provided that "the bank shall have a lien prior to all others upon any stock held by a stockholder for any debt of said stockholder to said bank." The stock certificates contained no notice of this lien, but declared that they were "transferable only on the books of the bank, in person, or by attorney, on the surrender of the certificate." A stockholder, indebted to the bank, borrowed money from a third person, and gave him the certificate as collateral, with power of attorney to transfer the stock. He became bankrupt, and then lender applied to the bank to transfer the stock. Bank refused so to do, until paid its debt. Held, the act of 1870, acts, 1869-70, p. 488, incorporating this bank, superseded the general law as to chartered companies, providing for the transfer of stock, and gave the bank the prior lien for any debt due it from stockholder, on his stock, which lien was not waived by leaving the certificates outstanding. In this case the lien of the bank upon the stock, was, under its charter, paramount to that of the lender, and the bank had the right to be first satisfied before transferring the stock to the lender. If lender chose to hold the stock, he held subject to the bank's lien. Bohmer *v.* City Bank, 77 Va. 445

9. **Pledgee not owner.**—McConville *v.* Means, 10 O. Dec. 452, 21 Wkly. L. Bull. 193; Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

owner thereof, so far as the corporation is concerned.[10]

Notice to Officer of Bank.—In order to bind the bank whose stock is thus pledged as collateral, notice should be given its president, cashier or other officer at its place of business, and in the usual course of business.[11]

The stock should be transferred where the pledgee has a right to have it transferred, in which case the pledgee has a right to demand that such transfer be made.[12]

§ 40 (3e) Gifts.—The delivery of a certificate of bank stock, unendorsed, by the donor to the donee, with intent to transfer title by way of a gift, is effectual as an equitable assignment, although no legal title passes for want of an endorsement and transfer on the books of the company. A delivery which vests an equitable title only in the donee is all that is required to constitute a valid gift.[13]

§ 40 (3f) Usurious Transfers.—A sale of bank stock at whatever price is not usurious, unless the object be to borrow money at more than lawful interest, and not to purchase stock, and the price of stock be graduated as a device to effect that object; or there be a combination between the seller of the stock on credit, and a person to whom the buyer sells it for cash; in either of which cases the transaction becomes usurious.[14] A sale of bank stock at an exorbitant price, coupled with a loan of money, is usurious.[15]

§ 40 (4) Operation and Effect—§ 40 (4a) In General.—The transfer, when consummated, destroys the relation of membership between

10. Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

11. Notice to officer of bank.—Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

12. Transfer to pledgee.—Where the pledgor of bank stock executes an irrevocable power of attorney, authorizing a transfer of such shares on the books of the bank issuing the same, the pledgee has the right to demand that such transfer be made. Dayton Nat. Bank *v.* Merchants' Nat. Bank, 37 O. St. 208. But see Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339.

This right is not affected by the fact that at the time of such refusal an assignee in bankruptcy had been appointed for the pledgor. Dayton Nat. Bank *v.* Merchants' Nat. Bank, 37 O. St. 208.

13. Gifts.—First Nat. Bank *v.* Holland, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898; Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389.

The delivery of the keys to a safety deposit box containing certificates of bank stock unindorsed by the donor is sufficient to constitute a transfer to the donee of the equitable title to the stock represented by those certificates. Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389; First Nat. Bank *v.* Holland, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898.

Where a completed gift of bank stock from a husband to his wife has been clearly established, her title thereto will not be affected by the mention of the stock in a subsequent will or deed of trust of the husband, to which she was not privy, and under which she does not claim, nor by the fact that the stock continued to stand in his name, and that he collected the dividends thereon. First Nat. Bank *v.* Holland, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898.

14. Usurious transactions.—Greenhow *v.* Harris, 20 Va. (6 Munf.) 472.

15. Bank *v.* Stribling, 34 Va. (7 Leigh) 26; Stribbling *v.* Bank, 26 Va. (5 Rand.) 132, cited in Bank *v.* McVeigh, 70 Va. (29 Gratt.) 546.

the corporation and the old stockholder, with all its incidents, and creates an original relation with the new member, free from all antecedent obligations. This legal relation and proprietary interest, on which it is based, are quite independent of the certificate of ownership, which is mere evidence of title.[16]

§ 40 (4b) Rights and Liabilities of Transferrer.—Liability for Amount of Subscription.—The assignment of stocks by the owner does not discharge him from liability. Upon the subscription it becomes corporate property, impressed with a trust in favor of the bank's creditors. It is in effect an agreement by the subscriber to pay into the bank the amount subscribed by him.[17] The statute may also provide that the subscriber shall be liable notwithstanding the assignment,[18] in which case the assignees of unpaid stock are first liable, and if the amount can not be collected from them, then their assignors, who were original subscribers, are liable.[19]

Liability after Resale to Bank.—Where a stockholder in a bank purchased of the bank a large amount of its stock to increase his votes for directors, which he voted and immediately thereafter the purchase money was returned, and the stock again taken by the bank, equity will not compel the purchaser to refund the money and take back the stock in a subsequent suit by a stockholder, where the evidence showed no actual loss to the bank in the transaction.[20]

§ 40 (4c) Title, Rights and Liabilities of Transferee—§ 40 (4ca) In General.—A transfer which does not comply with the formalities lawfully required by the bank authorities conveys an equitable title.[21]

§ 40 (4cb) Liability for Unpaid Balances and Assessments—§ 40 (4cba) In Absence of Contract.—At common law a transferee

16. **Operation and effect.**—Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039.

17. **Liability for amount of subscription.**—Marr *v.* Bank, 72 Tenn. (4 Lea) 578.

18. By the general banking act of 1859-60, the original subscriber is liable for the amount of his subscription until the same is paid up, whether he retains or assigns the stock, and this applies to subscribers for stock in a bank chartered before the passage of the act, although the charter contained no such provision. Marr *v.* Bank, 72 Tenn. (4 Lea) 578.

The Act of 1859-60, providing that the original subscriber shall be liable for the amount of his subscription until paid, notwithstanding the assignment or transfer thereof, is not unconstitutional, because impairing the obligation of a contract. It does not assume to take away the power to assign stock, but simply to regulate its transfer; imposes no new obligations or restrictions, but prescribes the conditions upon which the original stockholders might assign their stock. Marr *v.* Bank, 72 Tenn. (4 Lea) 578.

19. Marr *v.* Bank, 72 Tenn. (4 Lea) 578; Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

20. **Liability after resale to bank.**—Taylor *v.* Miami Exporting Co., 6 O. 176.

21. **Title and liability of transferee.**—Johnson *v.* Laflin, 103 U. S. 800, 26 L. Ed. 532; Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039; First Nat. Bank *v.* Holland, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898; Thomas *v.* Lewis, 89 Va. 1, 15 S. E. 389. See ante, "Form and Sufficiency," § 40 (3c).

of bank stock was not liable for unpaid balances due from the original subscribers,[22] or assessments,[23] but the charter or a statute may create a lien for stockholders' indebtedness which binds the stock in the hands of an assignee.[24]

§ 40 (4cbb) Assumption by Purchaser.—Where a transferee of bank stock from an original subscriber assumes the latter's liability on his subscription as consideration for the transfer, and the bank accepts him as its debtor, releasing the original subscriber, the transaction is valid, and the bank may enforce the transferee's liability.[25]

22. Liability for unpaid balances and assessments.—A stockholder transferred, for an old debt, shares of bank stock, on which no payment had been made, although the transferee supposed the shares to have been paid up. Afterwards the original holder paid 40 per cent upon the shares as calls were made, and the transferee received dividends. The bank became insolvent, and a receiver was appointed, who sued the transferee to recover the balance of the subscription. Held, that the action could not be maintained. Wintringham *v.* Rosenthal (N. Y.), 25 Hun 580.

The Citizens' Bank of Louisiana is not liable for the unpaid balance of a stock subscription because it purchased the stock, and property mortgaged to secure the subscription, on enforcement of the lien. Succession of Thomson, 46 La. Ann. 1074, 15 So. 379.

An attachment of the shares in a bank by the bank, after notice of their assignment, is ineffectual to defeat the prior right of the assignee. Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643.

23. After failure of the London correspondents of a national bank, plaintiff sold to defendant forty shares of the stock, at $50 per share, signing the transfer on the proper book of the bank, leaving a blank for the name of the transferee. A few days afterwards, and on the next day after the bank had suspended payment, defendant sold the shares to A., at $11 per share, and, at A.'s request, transferred them on the book to A.'s negro porter, who was irresponsible, defendant's name appearing only in the margin in pencil. The bank passed into liquidation; and its receiver, disregarding the apparent transfer, sued plaintiff for 70 per cent on the shares as contribution, thereby recovering $3,579, which he was compelled to pay. Held, that this could not be recovered by plaintiff in a suit against defendant. Lesassier *v.* Kennedy, 36 La. Ann. 539.

24. Under charters and statutes.—The provisions of a banking law that the transferee of the shares of stock of a bank should succeed to all the rights and liabilities of the original stockholder, and requiring a semi-annual statement to be made specifying the amount of the capital paid in, or secured to be paid, are inconsistent with the construction that, under the provision that the certificate of the associates shall state the amount of the capital stock of such association, the requirement is implied that the capital must all be actually paid in before the certificate is filed and the bank become legally incorporated. Palmer *v.* Lawrence, 5 N. Y. Super. Ct. 161.

Under a law requiring the capital of a banking association to be paid in, or secured to be paid, when it is organized, it is secured to be paid, within the meaning of the law, by force of the subscriptions of the associates. Palmer *v.* Lawrence, 5 N. Y. Super. Ct. 161.

If a bank's charter provides that, unless a stockholder discharges his debt to the bank, his stock can not be transferred, the purchaser of stock from one indebted to the bank takes only an equitable assignment subject to the rights of the bank under its charter. Farmers' Bank *v.* Iglehart (Md.), 6 Gill 50.

25. Assumption by purchaser.—Palmer *v.* Lawrence, 5 N. Y. Super. Ct. 161.

A transferee of bank stock who, in consideration therefor, assumed the liability of the original subscriber on his subscription, can not, in order to defeat recovery by the bank, set up the want of a legal existence in the bank, or the invalidity of the shares. Palmer *v.* Lawrence, 5 N. Y. Super. Ct. 161.

Stock Mortgage.—Act April 2, 1832 (incorporating the Union Bank of Louisiana), § 29, declaring that, on application by a stockholder to transfer his stock and be discharged, the new stockholder shall furnish a mortgage to the satisfaction of a majority of the directors, applies only where a stockholder, having sold his stock, retaining the immovable mortgage to secure it, seeks to have his property released from the mortgage, on the purchaser offering other property of sufficient value to be mortgaged in lieu of it.[26]

§ 40 (5) Refusal of Bank to Allow Transfer—§ 40 (5a) Right to and Liability for Wrongful Refusal.—See post, "Right to Refuse Transfer," § 42 (2de). A bank is liable in damages for refusing to transfer upon its books shares of its stock on the demand of the person entitled to such shares, and complying with the transfer regulations,[27] and that the bank may have previously transferred to another, without requiring such compliance and proof of right, is no excuse for refusing transfer to such bona fide transferee for value, though the bank had no notice of the latter transfer.[28] But the existence of a lien in favor of the bank upon the stock is a complete defense.[29] The refusal of the transfer officer to allow the

26. Stock mortgage.—Byrne *v.* Union Bank (La.), 9 Rob. 433.

27. Bank liable for refusal of transfer to person entitled.—Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695; First Nat. Bank *v.* Lanier (U. S.), 11 Wall. 369, 20 L. Ed. 172.

A bank improperly refusing to make a transfer of stock on its books because of an alleged lien is liable to the transferee for conversion of the stock. Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643; Kortwright *v.* Buffalo Commercial Bank, (N. Y.), 20 Wend. 91; Bank *v.* McNeil (Ky.), 10 Bush 54.

28. A bank whose certificates of stock declare the stockholder entitled to so many shares of stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise, and which suffers a stockholder to transfer his stock to anybody on the books of the bank, without producing and surrendering the certificates thereof, is liable to a bona fide transferee for value, of the same stock, who produces the certificates with properly executed power of attorney to transfer; and this is so although no notice have been given to the bank of the latter transfer. First Nat. Bank *v.* Lanier (U. S.), 11 Wall. 369, 20 L. Ed. 172.

"This is a notification to all persons interested to know, that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates." First Nat. Bank *v.* Lanier, 11 Wall. 369, 378, 20 L. Ed. 172.

29. Lien as defense.—A suit at law can not be sustained for refusing to permit such transfer, where, by a clause of the charter, it is provided: "but all debts actually due and payable to the bank (days of grace for payment being past), by a stockholder requesting a transfer, must be satisfied, before such transfer shall be made, unless the president and directors shall direct to the contrary." Where the owner owed the debts now claimed by the bank, on the notes due and protested before his death, this would be a complete answer to a suit at law by his executors, for not permitting a transfer; and the same objection would be fatal to a suit in their name, for the use of the United States to enforce a lien claimed by them. The defense is a legal one; the case provided for by the charter and by law had happened; the bank had a perfect right to hold on to the stock; and a rule of the bank imposing such

transfer is the refusal of the bank,[30] and the bank may ratify the wrongful refusal of one of its officers to allow the transfer.[31]

Measure of Damages.—Where a bank unjustifiably refuses to make the proper entry of a transfer of stock on its books, the value of the stock affords the measure of the recovery.[32]

§ 40 (5b) Compelling Transfer and Action for Damages—§ 40 (5ba) Jurisdiction and Form of Action.—In some jurisdictions, it is held that a bill in equity will lie to compel a bank to open its transfer books and permit a transfer of stock thereon, as the remedy at law is not clear and perfect, and it is not a case for compensation in damages;[33] but

a restriction on the transfer of stock, is conformable to law. Brent *v.* Bank (U. S.), 10 Pet. 596, 9 L. Ed. 547; Union Bank *v.* Laird (U. S.), 2 Wheat. 390, 4 L. Ed. 269.

A bank whose charter provided that stock held by any person indebted to the bank should not be transferable while such indebtedness existed was not liable in damages for refusing to permit the transfer on its books of stock held by an indorser on a note held by the bank. McDowell *v.* Bank, 2 Del. Ch. 1.

30. Representation by cashier.—A., in order to secure the payment of his note to B., pledged to the latter certain shares of the capital stock of a national bank in Louisiana, with authority to sell them in default of such payment. Default having been made, B. sold them, and in March, 1873, applied to the cashier of the bank to have them transferred on its books. That officer refused to allow the transfer, on the ground that A. was indebted to the bank. Before the transfer could be enforced, the bank failed, and C. was appointed a receiver, against whom B., Feb. 24, 1876, brought this action to recover damages for the loss sustained by him. It does not appear that the bank ever adopted any by-law providing for a lien on the shares of a stockholder indebted to it, or that A.'s debt to it had been contracted before his stock was pledged to B. Held, that the cashier having been intrusted by the directors of the bank with the transfers of stock, his refusal to permit the transfer was the refusal of the bank. Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695.

"Instruction from the directors were obligatory upon the cashier, who in point of fact assumed no responsibility. He acted by order of the directors, who for that purpose constituted the bank, it appearing that he merely obeyed their instructions not to transfer any stock whose owner had discounted notes in the bank unpaid." Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695.

31. Ratification of wrongful refusal.—Where the president, while at the bank, refused to permit a transfer of stock to be made on the books on demand therefor by a transferee, and the bank thereafter defends a suit by the transferee for damages, it will be held to have ratified the refusal, which must be treated as its own. Commercial Bank *v.* Kortright (N. Y.), 22 Wend. 348, 34 Am. Dec. 317.

32. Measure of damages.—Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643; Kortwright *v.* Buffalo Commercial Bank (N. Y.), 20 Wend. 91; S. C., 22 Wend. 348, 34 Am. Dec. 317; Bank *v.* McNeil, 10 Bush (Ky.), 54.

A bank which has wrongfully refused to transfer stock on its books on demand of the transferee thereof is liable to the latter for the highest value of the stock since the refusal. Commercial Bank *v.* Kortright (N. Y.), 22 Wend. 348, 34 Am. Dec. 317.

General Banking Law (Laws 1838, p. 249), § 19, declares that the shares shall be transferable on the books of the association in such manner as may be agreed upon in the articles of association. Held, that a purchaser and assignee of stock which the bank refuses to transfer on its books, as provided by its articles of association, can recover its value in an action against the bank. Bank *v.* Manufacturers', etc., Bank, 20 N. Y. 501.

33. Equity jurisdiction.—Mechanics' Bank *v.* Seton (U. S.), 1 Pet. 299, 7 L. Ed. 152.

Where a bank wrongfully refuses to transfer stock on its books, the transferee has no adequate remedy at law

in others it is held that the purchaser's remedy for the wrongful refusal to enter the transfer is an action on the case or assumpsit in the form of a special action on the case for the value of the stock.[34]

Mandamus will not lie to compel the officers of a bank to transfer stock from a vendor to a purchaser, except under a judicial sale; in that case the bank official becomes a public officer pro hac vice.[35]

§ 40 (5bb) Limitations.—The claim for damages resulting from the refusal of the bank to transfer the stock is neither an offense nor a quasi offense within the meaning of a statute prescribing a limitation for an action for damages arising thereout.[36] Such claim for damages accrues on the refusal of the bank to make the transfer.[37]

§ 40 (5bc) Process.—Where, in a suit to compel a bank to transfer certain stock to plaintiff on its books, the president of the bank was a defendant, and the bill at issue as to him, it was sufficient, for the execution of the compulsory process under a decree in favor of plaintiff, that the process be directed to him.[38]

§ 40 (5bd) Parties.—Cashier.—In a suit against a bank to compel it to transfer certain stock to plaintiff on its books, or in case that can not be done to recover damage,[39] the cashier of the bank was not a necessary party.

The stockholders are not ordinarily parties to suits to compel a bank to transfer certain stock.[40]

and may sue in equity to compel it. Madison Bank *v.* Price, 79 Kan. 289, 100 Fed. 280.

34. Action on the case.—Presbyterian Congregation *v.* Carlisle Bank, 5 Pa. 345.

Where a bank refuses to deliver a certificate of ownership to a purchaser of shares of its capital stock, the purchaser's remedy is by an action on the case for damages. Hussey *v.* Manufacturers', etc., Bank (Mass.) 10 Pick. 415.

Assumpsit in the form of a special action on the case will lie against a bank for improperly refusing to make a transfer of shares of capital stock, in the name of the party injured by the refusal. Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695.

35. Mandamus.—Bank *v.* Harrison, 66 Ga. 696.

Mandamus will not lie at the instance of an assignee to the president, directors, and company of a bank, to compel them to permit the transfer on the books of the bank of certain shares of stock standing in the name of the insolvent; but the proper remedy is a special action on the case, to recover the value of the stock refused to be transferred. Shipley *v.* Mechanics' Bank (N. Y.), 10 Johns. 484.

36. Limitations.—Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695.

37. On refusal of the request of pledgee, who has the right to demand a transfer of the stock on the books of the bank, to have the stock so transferred, the right to prosecute an action for the value of the stock accrues to the pledgee. Dayton Nat. Bank *v.* Merchants' Nat. Bank, 37 O. St. 208.

38. Process.—Johnson *v.* Hume, 138 Ala. 564, 36 So. 421.

39. Cashier.—Johnson *v.* Hume, 138 Ala. 564, 36 So. 421.

40. Stockholders.—Where the plaintiff brought suit to compel a bank to execute transfer of stock and to reinstate him as a stockholder, and in case that could not be done, to recover damages for the conversion of his stock, it was held that the stockholders are not ordinarily parties to such suits as this, and exceptions to

A mere trustee in whose name bank stock stands is not a necessary party to a bill by the equitable owner to compel the bank to permit a transfer of such stock to him.[41]

§ 40 (5be) Evidence.—Burden of Proof and Presumption.—In an action of assumpsit against a bank for refusing to transfer to plaintiff certain shares of stock, for which he holds the certificate assigned in blank by the owner, he must prove his ownership of the certificate. Mere possession is not sufficient.[42]

§ 40 (5bf) Variance.—The usual rule as to what constitutes and the effect of a variance between the allegations and proof apply to actions against banks for refusal to transfer certain shares of stock.[43]

§ 40 (5bg) Judgment.—In an action by a devisee of bank stock against the bank to compel the transfer to her as directed by a judgment of the court, the court will have full power to adjudge in what way and manner and form the certificate should be issued by the bank.[44]

Judgment in favor of a pledgee is not for recovery of damages or for a conversion, but for the sale of the stock and payment of his debt and of the proceeds.[45] Judgment having been rendered for damages, the court

the petition in intervention of the stockholders should have been sustained, in the absence of allegation that the defense would not be properly conducted by the defendant. Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556.

41. Trustee holding stock.—Mechanics' Bank *v.* Seton (U. S.), 1 Pet. 299, 7 L. Ed. 152.

42. Burden of proof of ownership.—Dunn *v.* Commercial Bank (N. Y.), 11 Barb. 580.

43. Variance.—Where a wife assigned her bank stock to her husband, who sold it to another, and the latter sued the bank to compel a transfer of the stock on the books to him, and the bill alleged various facts tending to show a reduction of the stock to the possession of the husband, the mere fact that plaintiff failed to show certain of the acts relied on as showing a reduction to possession did not constitute a fatal variance between the allegations and the proof. Johnson *v.* Hume, 138 Ala. 564, 36 So. 421.

44. Judgment.—Citizens' Nat. Bank *v.* Boswell's Adm'r, 12 Ky. L. Rep. (abstract) 468.

45. Judgment for pledgee.—A pledgee of shares of the capital stock of a national bank, having an irrevocable power of attorney for the transfer of such shares to him on the books of the bank, brought suit for the value of such stock against the bank, which, after notice that the pledgor had been adjudicated a bankrupt, had refused to permit such transfer to be made. The assignee in bankruptcy of the pledgor, having been made a party by consent, filed an answer and cross petition praying for an account of the amount due the pledgee and a sale of the stock, which prayer was granted. It was held that is was error for the court to render a further judgment that, in the event the proceeds of the sale were sufficient to satisfy the pledgee's claim, the bank should pay the deficiency, not exceeding the difference between the proceeds of the sale and the value of the stock at the time of such refusal. Dayton Nat. Bank *v.* Merchants' Nat. Bank, 37 O. St. 208.

"In such posture of the case, the proper decree was, as this is, that the amount for which the stock is held as collateral security should be ascertained; that the Dayton National Bank should pay upon such indebtedness the amount of dividends received by it on the stock, with interest, less the amount of taxes it has paid on such shares; that the stock should be sold at a public sale; and that the proceeds of the sale should be applied in satisfaction of the balance due the pledgee,

below had power to order the receiver of the bank to pay the claim, or certify it to the comptroller.[46]

§ 40 (6) Restraining Transfer of Stock.—The party who would arrest a transfer of bank stock or charge the holder with a trust must assert his remedy in the courts, by asking a restraining order.[47] The transfer of bank stock on bank's books may be arrested by a restraining order or injunction, made by a court of competent jurisdiction, at the instance of a party interested.[48]

§ 40½. Liability of Stock for Debts of Stockholders—§ 40½ (1) In General.—A judgment creditor of a stockholder in a bank is entitled to subject his stock to the satisfaction of his judgment,[49] and the court will compel the bank to make the necessary transfer of the stock on its books.

§ 40½ (2) Attachment, Execution, Judicial and Tax Sales.—Bank stock may be sold under attachment,[50] execution,[51] or judicial decree,[52] and for taxes.[53]

and costs and expenses, and, if a surplus remained, that it should be paid to the assignee. But the decree should not direct, as this does, that if the stock sells for less than its value at the time the request for transfer was refused, and the proceeds of the sale are insufficient to satisfy the sum due the pledgee, and costs and expenses, then the Dayton National Bank shall pay the pledgee the deficiency, not exceeding the difference between the amount realized from such sale and the sum the stock was worth at the time of such refusal. In such equitable action, the pledgee can only look to the stock and dividends for the satisfaction of its claims. The proposition that it may go further in such action, and recover damages, in any amount, as for a conversion, is supported by no just principle." Dayton Nat. Bank *v.* Merchants' Nat. Bank, 37 O. St. 208.

46. Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695.

47. **Arresting transfer of stock.**—Bank *v.* Craig, 33 Va. (6 Leigh) 399.

Notice to stop transfer of stock.—If one desires to arrest the transfer of stock, he must go to the transfer clerk and not to the bookkeeper. Bank *v.* Craig, 33 Va. (6 Leigh) 399.

48. Bank *v.* Craig, 33 Va. (6 Leigh) 399.

49. **Liability of stock for debts of stockholder.**—Brightwell *v.* Mallory, 18 Tenn. (10 Yerg.) 196.

50. **Attachment, execution, and judicial sales.**—Where bank stock has been wrongfully attached and sold under execution, the fact that the stock was sold without appraisement at a time when it was not considered necessary, though subsequently adjudged to be so, does not subject the bank to liability to the owner for having permitted a transfer to the judicial purchaser, the bank being guilty of no neglect, and justified in believing that the public officer discharged his duty. Chapman *v.* New Orleans, etc., Banking Co., 4 La. Ann. 153.

Where bank stock which has been wrongfully attached, and sold under execution, is afterwards, on a devolutive appeal, decreed to belong to an intervener, he can not recover against the bank for having refused a transfer to him, and permitted it to the judicial purchaser. Chapman *v.* New Orleans, etc., Banking Co., 4 La. Ann. 153.

51. *Ohio.*—Bank stock can not be levied on and sold under execution. Lee *v.* Citizens' Nat. Bank, 2 Cin. Rep. 298, 13 O. Dec. 913.

A sale of bank stock under an execution in favor of a pledgee thereof against the pledgor is void, unless the levy and sale were assented to by the pledgor. Lee *v.* Citizens' Bank, 5 O. Dec. 21.

52. A purchaser, at a sheriff's sale, of bank stock, can compel a transfer

53. **Sale for taxes.**—Where bank

§ 41. Profits and Dividends.—Dividends on deposits in savings bank, see post, "Interest and Dividends on Deposits," § 303. Criminal responsibility for declaration of dividends, see post, "Criminal Responsibility," § 60. Transfer of stock, see ante, "Transfer of Stock," § 40.

§ 41 (1) Power and Discretion of Directors—§ 41 (1a) In General.—The board of directors may from time to time declare dividends of so much of the net profits as they may deem it prudent to divide,[54] but they are not compelled to declare any dividends.[55] The declaration of dividends rests in the discretion of the directors or other governing body of the corporation, and such discretion will not, in the absence of fraud, be controlled by the courts.[56]

of the shares on the books of the bank, although the seised debtor may owe the bank at the time an amount above the amount of the stock purchased, evidenced by his notes held by the bank, notwithstanding a clause in the by-laws of the bank, adopted by the board of directors, subsequently to the issuing of the stock, that "no transfer of stock shall be made when the party is indebted to the bank as principal, indorser, or security on any obligation that is due, as long as it remains unpaid." Such a by-law is not binding on the judgment creditors of the stockholders. Bryon *v.* Carter, 22 La. Ann. 98.

A judgment creditor of the stockholder is, entitled to subject the stock to the satisfaction of his judgment by bill, under 1832, 11, 1 and 2 (Code, § 4282, et seq.), although the stockholder may be indebted to the bank to the amount of such stock. Brightwell *v.* Mallory, 18 Tenn. (10 Yerg.) 196.

If, upon bill filed by a judgment creditor against the stockholder and a bank to reach the stock of the debtor in the bank, alleging the existence of the judgment and execution, the debtor make no contest, but allow the bill to be taken for confessed against him, the bank, having no interest in the question, has no right to resist the decree or call in question the validity of the judgment, even, it seems, if the judgment produced is void. Brightwell *v.* Mallory, 18 Tenn. (10 Yerg.) 196.

shares are seized and sold by a collector of taxes, in the manner provided by Act 1846, c. 195, on a warrant from assessors having jurisdiction of the subject-matter, and prima facie a lawful authority to issue such warrant, and there is nothing on the face of the proceedings to indicate any want of jurisdiction, or any error or defect therein, the cashier of the bank is authorized (if not required) to issue a new certificate of such shares to the purchaser, who will thereupon become entitled to accruing dividends, whether the tax for the payment of which the shares are sold be rightly assessed or not. Smith *v.* Northampton Bank, 58 Mass. (4 Cush.) 1.

54. Power and discretion of directors.—Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

Idaho Rev. Codes, § 2732, governing the distribution of dividends by corporations, does not apply to banking corporations. McTamany *v.* Day (Idaho), 128 Pac. 563.

55. Where the charter of a bank authorized dividends to be declared, of so much of the interest and profits as should be deemed expedient by the directors, the directors are not compelled to declare any dividend if they reasonably deem it inexpedient to do so. Ely *v.* Sprague (N. Y.), Clarke Ch. 351.

The accumulated earnings or surplus funds of a bank constitute a part of its assets, and belong to the corporation and not to the stockholders, until they have been declared and set apart as dividends. Bryan *v.* Sturgis Nat. Bank, 40 Tex. Civ. App. 307, 90 S. W. 704, affirmed in 101 Tex. 630, no op.

The profits that the stockholders may receive are incidental, but are not the primary object in passing the charter. Williams *v.* Union Bank, 21 Tenn. (2 Humph.) 339.

56. Bryan *v.* Sturgis Nat. Bank, 40 Tex. Civ. App. 307, 90 S. W. 704, affirmed in 101 Tex. 630, no op.

§ 41 (1b) Insolvent Banks.—The assets of a bank are held by it in trust for the payment of its indebtedness and for the distribution among the stockholders of the surplus only, if any, remaining.[57] There can be no voluntary withdrawal of any portion of the assets of a bank where the effect of such withdrawal will be to impair the capital stock, or endanger the security of its creditors.[58] Thus where dividends are paid a stockholder in an insolvent bank in disobedience of the banking law, the liability to repay is owed to the corporation and enforceable by it.[59] Though such liability is owed to the corporation, a creditor thereof may proceed in equity to compel restoration on the corporation's failure to do so.[60]

If the board of directors has declared and paid illegal dividends, the amount paid, if recovered, would be a part of the assets of the bank.[60a]

§ 41 (1c) Tax Dividends.—The directors of a bank may declare a tax dividend.[61]

§ 41 (2) Accumulation of Surplus Fund.—A bank has a right to accumulate a surplus before declaring dividends on its stock.[62] The accumulation of a surplus fund before payment of dividends may be required by statute, which may prescribe the amount to be set apart each time a dividend is declared,[63] and may also provide a method of computing the surplus profits[64] and assets of the bank.[65]

57. Insolvent bank.—McCann *v.* First Nat. Bank, 131 Ind. 95, 30 N. E. 893.

58. McCann *v.* First Nat. Bank, 131 Ind. 95, 30 N. E. 893.

59. Gager *v.* Paul, 111 Wis. 638, 87 N. W. 875.

60. Gager *v.* Paul, 111 Wis. 638, 87 N. W. 875.

60a. McTamany *v.* Day (Idaho), 128 Pac. 563.

61. Tax dividend.—Where the directors of a bank adopted a resolution "that the bank shall pay the taxes on the bank stock, commencing with the taxes of 1895," and at the time the value of the stock of a majority of the directors was set off by debts, the resolution should be regarded as one for the declaration of a tax dividend payable equally to all stockholders. Redhead *v.* Iowa Nat. Bank, 127 Iowa 572, 103 N. W. 796.

62. Accumulation of surplus fund.—Reynolds *v.* Bank, 6 App. Div. 62, 39 N. Y. S. 623; Reynolds *v.* Bank, 158 N. Y. 740, 53 N. E. 1131.

The primary purpose of a bank surplus is the accumulation of a sum against which bad debts may be charged, so that at all times the capital may be kept unimpaired. Pullen *v.* Corporation Commission, 15 N. C. 548, 68 S. E. 155.

63. Rev. St. 1899, § 1293, providing that the board of directors of any bank, when it shall declare a dividend, shall first set apart to the surplus fund ten per cent of the net profits for the period covered by the dividend till they shall amount to twenty per cent of its capital stock, is mandatory, and a dividend declared in disregard thereof is void. Lapsley *v.* Merchants' Bank, 105 Mo. App. 98, 78 S. W. 1095; Edwards *v.* Merchants' Bank (Kan.), 78 S. W. 1132.

64. Where notes indorsed by K., and discounted by a bank in 1888 for his benefit, were, within one year prior to June 28, 1892, surrendered to one H., who paid them with the proceeds of other notes indorsed by him and discounted by said bank, the new notes were a part of the bank's resources on June 28, 1892, and were not debts owing to the bank, which had remained

65. Notes given to a bank by its directors under an agreement reciting that the purpose of the notes was to remove any doubts as to the solvency of the bank, and to make it unquestionably solvent, constitute an asset of the bank from the time of delivery. Dykman *v.* Keeney, 16 App. Div. 131, 45 N. Y. S. 137.

§ 41 (3) Payment of Dividends—§ 41 (3a) Duty to Pay.—A dividend which has been declared can not be retained by the directors to constitute a surplus fund.[66]

§ 41 (3b) To Whom Payable.—Where a person holds a full and perfect equitable title to stock, of which the bank has notice, he is entitled in equity to the dividends thereafter accruing upon it.[67]

A state which is a stockholder in a state bank has a right to receive and dispose of its share of the profits on its stock in the bank, unless the right has been expressly or by necessary implication relinquished by some provision of the charter or law creating the bank.[68]

"due without prosecution" for more than one year, within Laws 1893, c. 696 (Banking Law) § 26, which provides that such debts shall be classed as losses, and deducted from the actual profits, for the purpose of ascertaining the surplus profits. Judgment (1896) 42 N. Y. S. 488, 10 App. Div. 610, affirmed. Dykman *v.* Keeney, 160 N. Y. 677, 54 N. E. 1090.

A bank, which held several notes indorsed by and discounted for one K., discounted for one H. notes aggregating the amount of the K. notes, made by the same persons, and indorsed by H., but without the indorsement of K. H. then gave his check to the bank for the amount of the K. notes, and took them up, and the account of K. was marked on the books of the bank as paid. Held, that the K. notes were paid, and therefore were not to be deducted from the resources of the bank as losses (Laws 1893, c. 696, § 26), because they had remained "due without prosecution" for more than one year. Dykman *v.* Keeney, 16 App. Div. 131, 45 N. Y. S. 137.

66. Payment.—Seeley *v.* New York Nat. Exch. Bank (N. Y.), 4 Abb. N. C. 61, 8 Daly 400, affirmed in 78 N. Y. 608.

67. To whom payable.—Conant, etc., Co. *v.* Reed, 1 O. St. 298.

68. State a stockholder.—State *v.* Union Bank, 17 Tenn. (9 Yerg.) 119.

The act incorporating the Union Bank reserved to the state the right to subscribe for a certain amount of its stock. Stock to the amount of $500,000 was accordingly taken in the name of the state. By the seventh section of the charter, it is provided "that the profits which may arise from the stock owned by the state, after the bonds of the state shall have been paid, and also the bonus agreed to be paid by the bank to the state for the privileges conferred by the charter, and also the interest which may from time to time accrue upon the deposits of public money by the treasurer of the state, shall be, and they are hereby, appropriated to the use of public schools." Held, that this section did not, by necessary implication, create a trust in favor of the bank, and authorize it to retain the bonus and dividends until the state bonds were paid. State *v.* Union Bank, 17 Tenn. (9 Yerg.) 119.

The governor subscribed for one-half the capital stock of the Central Turnpike Company, and issued state bonds bearing interest in payment of the subscription, in accordance with Act 1838, c. 107. That act established a bank, and declared that its capital should be $5,000,000, and that the faith and credit of the state should be pledged for its support, to supply any deficiency in the fund specifically pledged for its establishment, and to give indemnity for all losses arising from such deficiency; and, further, that the bank should pay the interest on bonds issued to internal improvement companies, after the payment of specific sums to common schools and academies; and, in the event there should be a deficiency in the dividends of the bank, and in the dividends of the internal improvement companies, to pay such interest, then the individual stockholders should be liable to pay such interest. Held, that a further declaration of the act that, if the dividends of the bank and the contingent fund should be insufficient to pay the interest on the bonds, the deficiency should be made up out of any uninvested dividends from works of internal improvement, did not amount to a positive pledge to apply the dividends on works of internal improvement to the payment of interest on state bonds; hence the law requiring those dividends to be paid into the state treasury, instead of the bank, vio-

§ 41 (3c) Medium.—A dividend of the cash profits of a bank payable according to the resolution of its directors "in New York state currency" is payable in par funds; and the bank can not pay such dividends in uncurrent country bank notes at a discount in New York, though the banks on which such notes were drawn were solvent when the dividends was payable.[69]

§ 41 (3d) Application to Debt of Stockholders.—If any stockholder be indebted to the corporation, his dividend, or so much thereof as may be necessary, may be applied to the payment of the debt, if the same be then due and payable.[70] Dividends accruing after a transfer of bank stock, as provided by the certificates, are not subject to set-off on account of indebtedness of the assignor incurred after the transfer.[71]

§ 41 (3e) Interest.—A charter which entitles any creditor to interest, on any obligation of the bank, from the time it refuses payment, does not apply to claims for dividends. It was intended to provide for the public dealing with the bank, and not for the stockholders inter se.[72]

§ 41 (4) Actions to Recover or to Enjoin Misapplication.—In an action to enjoin the misapplication of dividends or to recover dividends or a share of the surplus from banks, the usual rules as to adequate remedy at law,[73] as to parties,[74] pleading, issues, defenses, proof, variance,[75]

lated no contract with the stockholders. State *v.* Central Turnpike Co., 29 Tenn. (10 Humph.) 388.

69. Medium.—Ehle *v.* Chittenang Bank, 24 N. Y. 548.

70. Application to debts of stockholder.—Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

71. The owner of stock in the defendant bank assigned and delivered the certificate to plaintiff as collateral security for a loan. After assignment to plaintiff the assignor became indebted to defendant, and the dividends on the stock, which had never been transferred on the books of the defendant, as provided by the certificate, were claimed by the defendant. Held, that the rights of the plaintiff became fixed and vested before the assignor became indebted to the defendant, and the distributive share of the dividends paid by defendant in liquidation belonged to plaintiff, and were not subject to any set-off on account of the indebtedness of the assignor to the defendant. Union Bank *v.* United States Exch. Bank, 143 App. Div. 128, 127 N. Y. S. 661.

72. Interest.—Bank *v.* Fowler (La.), 10 Rob. 196.

73. Injunction against misapplication of dividends.—Where an accommodation indorsee takes the note and mortgage of the maker of the original note, to secure such indorsee, and thereafter transfers the note and mortgage to the bank which discounted the original note, either as collateral security for such note or under an agreement for the cancellation thereof, and thereafter the maker of the original note becomes the agent to wind up the affairs of the bank, and threatens to cancel the mortgage and to apply the accommodation indorsee's dividends, as a stockholder, upon his indebtedness as indorsee, equity can not either enjoin the release of the mortgage or the application of the money, the indorsee having his adequate remedies at law in each case. Moore *v.* Lima Nat. Bank, 8 O. C. C. 287, 4 O. C. D. 529.

74. Parties.—In an action by an alleged stockholder for a part of the surplus of Bank C, which had consolidated with Bank B, it was held, that all stockholders must be parties in order to justify a decree. Long *v.* Gilbert (Tenn.), 59 S. W. 414.

75. Issues and proof.—In an action by a stockholder in a bank for a dividend on his stock, where the petition alleges that the board of directors had competent authority to declare a divi-

and stay of execution[76] are applied, for instances of which see the notes.

§ 42. Lien of Bank on Stock and Dividends—§ 42 (1) Creation and Existence—§ 42 (1a) At Common Law.—At common law a bank had no lien on its stock to secure a stockholder's indebtedness to it.[77]

§ 42 (1b) Under Charter or Statute—§ 42 (1ba) In General.—Banks other than national may have a lien upon the shares of their stock in the hands of the stockholders, for indebtedness due the bank, where such lien is given by general law, or by the charter, or legally enacted by-laws.[78]

dend, an answer containing a general denial, and alleging that the dividend was illegally declared, is sufficient to allow the defense that ten per cent of the net profits of the bank had not been set off for the surplus fund before declaring the dividend as required by the statute. Lapsley *v.* Merchants' Bank, 105 Mo. App. 98, 78 S. W. 1095; Edwards *v.* Merchants' Bank (Kan.), 78 S. W. 1132.

Variance.—In an action by the trustees of a dissolved banking corporation against a stockholder to recover a dividend that should have been applied to a creditor's demand, where the petition fails to allege that defendant was a trustee, and affirmatively shows he sustained no such relation, his liability can not be predicated on his breach of duty as a trustee. Daugherty *v.* Poundstone, 120 Mo. App. 300, 96 S. W. 728.

76. Stay of execution.—A motion to stay execution on a judgment against a bank for the amount of dividends due on stock can not be granted on the mere suggestion of other stockholders. State *v.* Bank, 45 Mo. 528.

77. Creation and existence.—Union Bank *v.* United States Exch. Bank, 143 App. Div. 128, 127 N. Y. 661; Stafford *v.* Produce Exch. Banking Co., 16 O. C. C. 50, 8 O. C. D. 483; Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339; Lee *v.* Citizens' Bank, 2 Cin. Rep. 298, 13 O. Dec. 913; Bullard *v.* Bank, 18 Wall. 589; Bank *v.* Lanier, 11 Wall. 369, 20 L. Ed. 173.

A bank has no lien on stock for debts due it by the stockholders. Dana *v.* Brown (Ky.), 1 J. J. Marsh. 304.

A private unincorporated banking association has no lien on the shares of its members for debts due by the latter to the association. Neale *v.* Janney, Fed. Cas. No. 10,069, 2 Cranch C. C. 188.

78. Lien of banks generally.—Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039; Brent *v.* Bank (U. S.), 10 Pet. 596, 9 L. Ed. 547; Mechanics' Bank *v.* Seton (U. S.), 1 Pet. 299, 7 L. Ed. 152; Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339. See, also, Conant, etc., Co. *v.* Reed, 1 O. St. 298.

Validity of statutes conferring lien.—Statutory provisions giving banks a lien upon their stock for debts due them by their stockholders have uniformly been held valid. Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339. See also, Conant, etc., Co. *v.* Reed, 1 O. St. 298.

Lien created by charter or special act.—Leggett *v.* Bank, 24 N. Y. 283; Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039; Brent *v.* Bank (U. S.), 10 Pet. 596, 9 L. Ed. 547.

Such a provision, restraining transfer while stockholder is indebted to the bank, is intended to give the bank additional security for debts due it from stockholders. Mechanics' Bank *v.* Seton (U. S.), 1 Pet. 299, 7 L. Ed. 152.

Every stockholder of a bank, who makes or indorses a note, to procure a loan from the bank, is bound to know the terms of the charter; his signature to the note is an inchoate pledge of his stock for security, if so provided in the charter; his stock gives credit to his name, and the bank grants the loan on its faith. Brent *v.* Bank (U. S.), 10 Pet. 596, 9 L. Ed. 547.

Same—Instances.—Under the charter of a bank providing that the stock shall be transferred according to the rules of the corporation, and that all debts due the corporation by a stockholder must be first satisfied, an assignee of a stockholder takes the stock subject to any lien the bank may have under its charter. Reese *v.* Bank, 14 Md. 271, 74 Am. Dec. 536.

Where the articles of association of a bank provide that no shares shall be

§ 42 (1bb) Retroactive Effect of Statutes.—General statutes giving corporations organized thereunder a lien of the stock of its shareholder, do not apply to banks chartered by or under previous statutes or special acts.[79]

§ 42 (1bc) Reservation by a By-Law.—Where no lien on stock is expressly given by a general law or the charter of a bank, the bank has an implied right to reserve such a lien, the lien may be reserved by a

transferable on which any call for installment of capital or any interest on such installment shall remain unpaid, or "in" which any shareholder is indebted to the bank, unless the directors consent thereto, no shareholder who has failed to respond to a call, or who is indebted to the bank as drawer or indorser, or as security for any sum due the bank, can transfer his stock without permission, and the bank has a lien on the stock. Judgment 80 N. Y. S. 901, 81 App. Div. 367, affirmed. Lyman *v.* State Bank, 179 N. Y. 577, 72 N. E. 1145.

A bank was incorporated under Laws 1838, c. 260, which provides (§ 19) that its shares of stock shall be transferable on the books in such manner as may be agreed on in the articles of association. The articles of association providing for the transfer of shares declared that they should be deemed pledged and held in security by the bank for the payment of the owner's debt to it. Held, that the bank, on making a loan to a shareholder, acquired a vested right in his shares. Mohawk Nat. Bank *v.* Schenectady Bank, 78 Hun 90, 28 N. Y. S. 1100, 60 N. Y. St. Rep. 510.

Where the charter of a bank makes the stock transferable only on the books of the bank, in such manner as the directors shall prescribe, and provides that "no stockholder indebted to the bank for any debt, or demand due and payable, shall transfer until such debt is paid, or collateral security is given for the payment, to the satisfaction of the directors, and said bank shall have the first lien in law, on all stock owned by its debtors," the bank is invested with a lien on the stock of a debtor, to secure the payment of any sum for which he is liable to the bank. Downer *v.* Zanesville Bank (O.), Wright 477; Conant, etc., Co. *v.* Reed, 1 O. St. 298; Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339.

Acts 1869-70, p. 488, incorporating the City Bank of Richmond, superseded the general law as to chartered companies, providing for the transfer of stock, and gave the bank the prior lien for any debt due it from a stockholder on his stock. Cash for all loans or discounts to him. Bohmer *v.* City Bank, 77 Va. 445. See also, Petersburg Sav., etc., Co. *v.* Lumsden, 75 Va. 327.

Failure to organize within time provided in charter.—Failure of a bank to organize within two years after it is chartered, which failure Code, § 688, provides shall forfeit the charter, can not be urged against the validity of a lien by the bank on shares of a stockholder given by the charter, but can only be raised by the state in a direct proceeding. Boyd *v.* Redd, 120 N. C. 335, 58 Am. St. Rep. 792, 27 S. E. 35.

79. Retroactive effect of statutes.—Though Act Oct. 21, 1891, § 1, declares that all banking companies hereafter chartered in this state shall have the powers hereinafter specified, the word "hereafter" should not be construed as rendering the fourth section, as amended December 20, 1893, whereby liens are created in favor of banking companies for debts due to them by stockholders on stock held by the latter, operative as to stock already issued by a banking company chartered under the provisions of the first act, prior to its amendment. Southern Banking, etc., Co. *v.* Fidelity Banking, etc., Co., 105 Ga. 487, 33 S. E. 639.

A banking corporation chartered by the state of North Carolina by special act purchased a note given by one of its stockholders to a third party, and secured by a pledge of his stock as collateral. Subsequently the corporation purchased the stock from pledgor at an agreed valuation. Held, that Pub. Laws N. C. 1903, p. 469, c. 275, giving corporations organized thereunder a lien upon their stock for the indebtedness of a stockholder, did not apply to such corporation, and that it had no lien on the proceeds of the pledged stock in excess of that re-

by-law.[80] Where the board of directors of a bank is authorized to prescribe the mode of transacting, managing and conducting the affairs and business of the bank, the bank has an implied right to reserve a lien on its stock owned by its debtors.[81]

Compliance with Charter Requirements.—The requirements of the charter respecting the enactment of such by-law and notice thereof in the certificates of stock must be complied with.[82]

Validity between Corporators.—A by-law which asserts a lien on the stock of members of a banking corporation for debts due the bank, is as between the corporators themselves, valid and binding.[83]

Validity against Creditors, Assignors and Pledgors of Holders.—See post, "Assignee and Purchasers," § 42 (2db); "Pledgee," § 47 (8d); "Creditors and Purchasers at Judicial Sales."

§ 42 (1bd) Contract or Stipulation in Certificate.—A lien to secure the indebtedness of its shareholders may be reserved by contract between a bank and its stockholders.[84] A banking corporation may, by an express stipulation in the certificate of stock by it issued, reserve a valid lien upon the stock to secure the debts of the holder to it.[85] And where

quired to pay the secured note for other indebtedness on which the stockholder was bound as indorser. In re Mills Co. (D. C.), 162 Fed. 42.

80. Reservation by a by-law.—Bellevue Bank *v.* Higbee, 4 O. C. C. 222, 2 O. C. D. 512, affirmed in 28 Wkly. L. Bull. 336; Stafford *v.* Produce Exch. Banking Co., 16 O. C. C. 50, 8 O. C. D. 483; Brent *v.* Bank (U. S.), 10 Pet. 596, 9 L. Ed. 547.

81. Stafford *v.* Produce Exch. Banking Co., 61 O. St. 160, 55 N. E. 162, 76 Am. St. Rep. 371, affirming 16 O. C. C. 50, 8 O. C. D. 483; Bellevue *v.* Higbee, 4 O. C. C. 222, 2 O. C. D. 512, affirmed in 28 Wkly. L. Bull. 336.

A bank in Ohio, chartered and known as a savings and loan association, has power to create a lien in its own favor upon its stock at the time it issues the same. Stafford *v.* Produce Exch. Banking Co., 16 O. C. C. 50, 8 O. C. D. 483.

82. Compliance with charter requirements.—A by-law authorized by a bank charter that "the stock of the company shall be assignable only, on the books of the company, and no transfer of stock shall be made by any stockholder who shall be indebted to the company; and certificates of stock shall contain upon them notice of this provision"—will not render an assignment of stock by a stockholder as collateral security liable to the debt due the bank by the stockholder, where the certificate of stock only contained a notice that it was transferable at the office of the company in person or by attorney, and the transferee had no knowledge of such by-law. Bank *v.* Pinson, 58 Miss. 421, 38 Am. Rep. 330.

83. Validity between corporators.—Tuttle *v.* Walton, 1 Ga. 43.

84. Reservation by contract or stipulation in certificate.—Stafford *v.* Produce Exch. Banking Co., 61 O. St. 160, 55 N. E. 162, 76 Am. St. Rep. 371, affirming 16 O. C. C. 50, 8 O. C. D. 483.

85. Stipulation in stock certificate.—Stafford *v.* Produce Exch. Banking Co., 61 O. St. 160, 76 Am. St. Rep. 371, 55 N. E. 162.

A provision in certificates of stock of a bank that the stock shall not be transferred without the consent of the directors by any stockholder who shall be indebted to the bank is not injurious to the corporation, and hence a stockholder can not sue on behalf of himself and the other stockholders to compel the bank to strike that provision from the certificates. Judgment (1896) 39 N. Y. S. 623, 6 App. Div. 62, affirmed. Reynolds *v.* Bank, 158 N. Y. 740, 53 N. E. 1131.

Ohio.—The notice "not transferable by any stockholder liable to this company as principal debtor or otherwise, without consent of the board of directors," printed on the back of a certificate of bank stock, is sufficient notice

such stipulation is unauthorized, it may be ratified by the shareholder.[86]

§ 42 (1c) Stock on Its Face Transferable.—Where a corporation issues a certificate of its stock, stating on its face that it is transferable, it has no lien thereon for debts due the bank.[87]

§ 42 (1d) Stock Held in Trust.—Where the stock is held in trust, to the knowledge of the bank through its directors, there can be no lien unless given by the clear and positive provisions of the charter.[88] The "holder" against whom such lien is given, is not necessarily restricted to the nominal, but may be, and as a rule, is the beneficial holder.[89]

of the lien. Stafford *v.* Produce Exch. Banking Co., 16 O. C. C. 50, 8 O. C. D. 483, affirmed in 61 O. St. 160, 55 N. E. 162.

86. Ratification.—The unauthorized act of the directors of a bank in inserting in the certificates of stock a clause that it shall not be transferred without the consent of the directors, by any stockholder who shall be indebted to the bank, is ratified by a stockholder who, at various times during several years, purchased stock, and received such certificates without objection. Judgment 39 N. Y. S. 623, 6 App. Div. 62, affirmed. Reynolds *v.* Bank, 158 N. Y. 740, 53 N. E. 1131.

87. Stock on its face transferable.—Fitzhugh *v.* Bank (Ky.), 3 T. R. Mon. 126, 16 Am. Dec. 90.

88. Stock held in trust.—Mechanics' Bank *v.* Seton (U. S.), 1 Pet. 299, 7 L. Ed. 152.

Notice to the board of a bank, when stock was transferred to a person, that he held it as trustee only, was notice to the bank; and no subsequent change of directors could require a new notice of this fact. So that, if the bank has sustained any injury, by reason of a subsequent board not knowing that such person held the stock in trust, it would result from the negligence of its own agents, and could not be visited upon the complainants. Mechanics' Bank *v.* Seton (U. S.), 1 Pet. 299, 7 L. Ed. 152.

If the bank was chargeable with the knowledge that a holder of stock was a mere trustee, it could acquire no title from him, discharged of the trust; and if necessary, might itself be compelled to execute the trust. Nor has the bank any title to such stock, under a transfer made by its cashier by virtue of a power of attorney given by the trustee. Mechanics' Bank *v.* Seton (U. S.), 1 Pet. 299, 7 L. Ed. 152.

89. The act incorporating the Mechanics' Bank of Alexandria (section 3), after providing for the opening of the subscription books, and pointing out the manner in which the excess shall be reduced in case the subscription for shares shall exceed the number of shares allowed, provides that "all the subscriptions and shares obtained in consequence thereof shall be deemed and held to be for the sole and exclusive use of the persons * * * subscribing." Section 21 provides that shares shall not be transferable while the holder thereof is indebted to the bank. Held, that the third section applies only to the first subscription to stock, and was intended to prevent one person from subscribing for stock in the name of another for his own benefit; and that, therefore, where stock is held in trust, the fact of the trust being known to the bank, it will have no lien on the stock for his debt. Mechanics' Bank *v.* Seton (U. S.), 1 Pet. 299, 7 L. Ed. 152, distinguishing Union Bank *v.* Laird, 2 Wheat. 390, 4 L. Ed. 269, as being a case where the debtor was the real as well as nominal owner of the shares.

It is not a correct construction of the 3d and 21st sections of the act of congress, incorporating the Mechanics' Bank of Alexandria, that the stock of the bank shall be deemed to belong to the persons in whose names it stands upon the books of the bank, and that the bank is not bound to recognize the interests of any cestui que trust, and may refuse to permit the stock to be transferred, whilst the nominal holder is indebted to the bank. Mechanics' Bank *v.* Seton (U. S.), 1 Pet. 299, 7 L. Ed. 152.

The third section applies to the first subscription for the stock, and was intended to prevent one person subscribing for stock in the name of another, for his own benefit. Mechanics' Bank *v.* Seton (U. S.), 1 Pet. 299, 7 L. Ed. 152.

§ 42 (1e) Shares Pledged to the Bank.—Where a bank has a general lien upon the shares of its stockholders for debts due the bank, the bank has such general lien on shares pledged to it to secure the payment of a particular debt or note,[90] aliter where the bank has no general lien.[91]

Certificate for Amount of Canceled Stock.—See post, "Assignees and Purchasers," § 42 (2db).

§ 42 (1f) Bank Prohibited from Dealing in Its Own Stock.—A by-law inconsistent with a statute prohibiting a bank from dealing in its own stock is void.[92] A bank's lien given by a statute or its charter is not inconsistent with or defeated by a prohibition against dealing in its own stock,[93] unless such prohibition is by general statute enacted after the adoption of a by-law creating such lien.[94]

§ 42 (1g) Death of Stockholder.—The death of a stockholder neither creates[95] nor divests[96] a lien upon his stock for his indebtedness to the bank.

90. Shares pledged to the bank.—It was so held where the shares were pledge with other securities. In re Peebles, Fed. Cas., No. 10,902, 2 Hughes 394.

91. Where a private banking association, having no general lien on the shares of its members, receives from one of the latter his stock to secure a particular liability, the bank has no lien on the stock for other claims. Neale *v.* Janney, 2 Cranch, C. C. 188, Fed. Cas. No. 10,069.

92. Bank prohibited from dealing in its own stock.—A testatrix held five shares of stock in the defendant bank, incorporated under the laws of the state, which her executor assigned to plaintiffs, who applied to defendant to issue to them a certificate for the shares which had stood in the name of the testatrix. The defendant refused to do so, claiming a lien on the stock by reason of a debt of testatrix arising from a loan made to a certain person with testatrix as surety, which loan the principal debtor had not paid, and the insolvency of the estate of testatrix. The bank had adopted a by-law that no transfer of stock should be made while the holder was indebted to the bank, to the prejudice of the lien held by the bank to secure the debt. Section 581, Ky. St. (Russell's St. § 2170), provides that no bank shall take as security for any loan or discount a lien upon any part of its capital stock. Held, that the by-law was inconsistent with the statute and invalid. Corydon Deposit Bank *v.* McClure, 141 Ky. 481, 133 S. W. 201.

93. Lien not defeated by prohibition against dealing in own stock.—Where a statute or charter giving a bank a lien or the right to reserve a lien on its stock owned by its debtors, a provision prohibiting the bank from dealing in its own stock or taking such stock as security for a loan is not inconsistent with the provision respecting the lien. Stafford *v.* Produce Exch. Banking Co., 16 O. C. C. 50, 8 O. C. D. 483, affirmed in 61 O. St. 160, 55 N. E. 162; Conant, etc., Co. *v.* Reed, 1 O. St. 298.

94. The Act of 1881 (Laws 1881, c. 77), prohibiting banks organized under the laws of the state from making loans or discounts on the security of the shares of their capital stock, is effectual to prevent a bank from having a lien on the shares of a stockholder for a debt thus created after that enactment, though a by-law before adopted had provided for such a lien. Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85, 35 N. W. 577, 8 Am. St. Rep. 643.

95. Where bank has no general lien.—A stockholder of a bank which was not a bank of issue, and whose charter did not provide for its having a lien upon stock for debts due from stockholders, died owing the bank. Held, that the stock passed to the administrator of deceased, free from any lien in favor of the bank. Merchants' Bank *v.* Shouse (Pa.), 14 Wkly. Notes Cas. 133.

96. In re Henry's Estate (Pa.), 33 Pittsb. Leg. J. 241, 16 Pittsb. Leg. J., N. S., 241.

§ 42 (2) Nature, Operation and Effect—§ 42 (2a) In General.—The lien of a bank on the stock of its debtor to secure his debt is a lien created by law,[97] on personal property,[98] and is only entitled to a preference similar to that allowed partnership over individual creditors.[99]

§ 42 (2b) As Extending to Dividends.—The bank's lien extends to dividends as well as to shares, though only shares of stock be specifically named.[1] The bank's lien does not extend to dividends declared after the bank has received notice of an assignment of the stock.[2]

§ 42 (2c) Debts Secured.—General Indebtedness.—The bank's lien on the shares of its stock is to secure the general indebtedness of a stockholder,[3] as principal debtor[4] and contingent liabilities,[5] as drawer,[6] indorser,[7]

97. **Nature, operation and effect.**—It was so held as to a charter lien. German Security Bank *v.* Jefferson (Ky.), 10 Bush 326.

98. Since the law makes bank stock personal property, and it is to be dealt with as personal property, any lien upon it must accomplish the same objects and the same purposes that a lien upon personal property accomplishes. Stafford *v.* Produce Exch. Banking Co., 16 O. C. C. 50, 8 O. C. D. 483.

99. German Security Bank *v.* Jefferson (Ky.), 10 Bush 326.

1. **Lien on dividends.**—Bank *v.* Bank, 5 O. Dec. 339.

A bank has the right to hold a cash dividend on stock as pledged for the indebtedness of the stockholder to the bank. Hagar *v.* Union Nat. Bank, 63 Me. 509.

The Bank of Washington has no specific lien upon the dividends of its stockholder, in consequence of its right to prevent a transfer of the stock, until his debt to the bank should be paid. Brent *v.* Bank, Fed. Cas. No. 1,834, 2 Cranch C. C. 517.

A bank's right to apply the dividends accruing upon the shares of a stockholder against indebtedness of a stockholder to the bank, for the dividend is a simple debt, owing from the corporation to the stockholder. First Nat. Bank *v.* De Morse (Civ. App.), 26 S. W. 417, citing Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802.

2. Though a by-law of a bank subjected to a lien the stock of any member who owed the bank anything, where a stockholder assigned his stock so as to give the assignee an equitable interest therein, the bank has no lien thereon, so as to hold the dividends in satisfaction of a loan made to the original subscriber after it had knowledge of the assignment of the stock. Nesmith *v.* Washington Bank (Mass.), 6 Pick. 324.

3. **General indebtedness.**—In re Morrison, Fed. Cas. No. 9,839; Citizens' State Bank *v.* Kalamazoo County Bank, 111 Mich. 313, 69 N. W. 663.

Act March 21, 1814, § 7, providing that a stockholder indebted to a bank shall not transfer his stock or receive a dividend until his debt has been discharged, does not apply solely to debts contracted on account of original stock subscriptions, but applies to all debts of stockholder to the bank. Rogers *v.* Huntington Bank (Pa.), 12 Serg. & R. 77.

4. **Unpaid notes.**—The Bank of Potomac has a lien upon its stock in the hands of a stockholder whose notes are lying over, unpaid. Burford *v.* Crandell, Fed. Cas. No. 2,150, 2 Cranch, C. C. 86.

Indorsed note.—A bank has a lien on its stock for indebtedness of the stockholder on a note executed by him to the bank, notwithstanding that there is an indorser on the note. In re Morrison, Fed. Cas. No. 9,839.

5. Leggett *v.* Bank, 24 N. Y. 283.

6. Lyman *v.* State Bank, 179 N. Y. 577, 72 N. E. 1145.

7. **Indorser.**—Where a bank's charter prohibited a transfer of its shares by a stockholder indebted to the bank until his liability was paid, such provision creates a valid lien on the stock of a shareholder under a contingent liability to it as indorser, as against an assignee of the stock with notice, who gave the bank no notice of his claim until the indorser's liability has

surety,[8] or otherwise, or if due and unpaid,[9] and in some cases to become due at a future time.[10] The statute may require the note, etc., to be protested before the lien attaches.[11]

Stock Debts and Notes.—Stock debts or stock notes are secured by the bank's lien.[12]

Overdrafts.—Balances due for overdrafts are secured by the bank's lien.[13]

Partnership or Firm Debts.—The lien of a bank on a stock certificate for a debt of the registered holder extends to the holder's liability to the bank on a debt of a copartnership of which he is or has been a member.[14]

become fixed. Leggett *v.* Bank, 24 N. Y. 283.

Though a debt due a bank was a note on which the debtor was an indorser merely, and his liability did not become absolute in his lifetime, the indorsement of the note gave the bank an inchoate right to his stock, under the provisions of its charter giving a lien on its stock held by the debtor, though the pledge of it to the bank, did not become absolute until the debt became payable. Brent *v.* Bank, (U. S.), 10 Pet. 596, 9 L. Ed. 547.

Within the charter giving to a bank a lien on the shares of any stockholder "who may be indebted to it," a stockholder is indebted to the bank, though only an indorser of the note on which the bank has not proceeded against the maker. Bank *v.* Bonnie, 102 Ky. 343, 19 Ky. L. Rep. 1372, 43 S. W. 407.

8. Citizens' State Bank *v.* Kalamazoo County Bank, 111 Mich. 313, 69 N. W. 663.

9. National Bank *v.* Watsontown Bank, 105 U. S. 217, 221, 26 L. Ed. 1039.

10. A provision in the articles of association of a bank that no share should be transferred unless the holder should pay all debts due the bank by him includes those payable at a future time. Leggett *v.* Bank, 24 N. Y. 283, affirming 25 Barb. 326.

Ohio.—Downer *v.* Zanesville Bank (O.), Wright 477.

Under Act March 21, 1914, art. 11, § 7, providing that no stockholder indebted to a bank can transfer his stock or receive a dividend until the debt is discharged, the bank may refuse to permit a stockholder who is the maker of a note discounted to the bank to transfer his stock if he and the indorser are insolvent, though the note is not due when the transfer is requested. Grant *v.* Mechanics' Bank (Pa.), 15 Serg. & R. 140.

11. Brent *v.* Bank (U. S.), 10 Pet. 596, 9 L. Ed. 547.

12. **Stock debts and notes.**—The stock held by the stockholders of the Real-Estate Bank is a security for their stock debt, and may be sold to satisfy such debt. Duncan *v.* Biscoe, 7 Ark. 175.

A bank, under a by-law prohibiting a transfer of stock by one indebted thereto, has a lien on stock to secure stock notes of a stockholder. In re Morrison, Fed. Cas. No. 9,839.

13. **Overdrafts.**—Under a charter of a bank providing that the stock shall be liable for all debts due the corporation by a stockholder, the lien attaches for balances due the bank for overdrafts, but not on notes on which the stockholder may be a maker or indorser which are not due at the time the transfer is made. Reese *v.* Bank, 14 Md. 271, 74 Am. Dec. 536.

14. A purchaser of registered bank stock can not compel a transfer of the stock on the books of the bank, where the former owners are members of a firm which is indebted to the bank, as 3 How. Ann. St., § 3208a8, provides that no transfer of stock shall be valid against a bank so long as the registered holder thereof is indebted to the bank. Citizens' State Bank *v.* Kalamazoo County Bank, 111 Mich. 313, 69 N. W. 663.

The debt of a firm to a bank organized under 49 Laws, p. 41 (1 Swan & C. St. p. 168), is a debt of a member of the firm, who is a stockholder of the bank, within § 11, giving such a bank a lien on the stock of its debtors. Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339.

Under Act March 25, 1820, art. 11, providing that no stockholder indebted to the bank shall be authorized to make a transfer until the debt be discharged, the bank has a lien on the individual stock of a shareholder, for

Debts Purchased by Bank.—The lien given by a bank charter on the shares of its stockholders to secure any indebtedness by them to the bank extends only to indebtedness directly incurred to the bank, not to indebtedness to third persons acquired by it.[15]

Where colegatees own the bequeathed shares in severalty the shares of one are not liable for the debts of the other.[16]

Indebtedness of Equitable Assignee.—The indebtedness of a mere equitable assignee is not covered by the bank's lien on its stock.[17]

Debts of Second Assignee.—Where a party takes an assignment of bank stock with notice of a prior assignment to another person, and has such stock transferred to him on the books of the bank, the bank, also having notice of the prior assignment, can not assert a lien against the stock for debts due from the second assignee.[18]

§ 42 (2d) Priorities and Rights against Persons Dealing with Stockholders—§ 42 (2da) General Rule as to Notice of Lien.—All persons dealing with the stockholders of a bank which has a charter lien upon its stock to secure the shareholder's indebtedness to it, must take

the debts of his firm. Mechanics' Bank *v.* Earp (Pa.), 4 Rawle 384.

The Act of March 25, 1820, provides that stockholders of a bank indebted to it for a debt actually due and unpaid shall not be authorized to make a transfer until such debt be discharged or security given, etc. Held, that a bank has a right to refuse a transfer of the stock of a member of a firm by reason of a debt due to it from the partnership, as his separate property was liable for the debts of the firm. Mechanics' Bank *v.* Earp (Pa.), 4 Rawle 384.

Death of partner.—Under Act May 13, 1876, relating to the incorporation of banks, a bank has a lien upon the stock of a deceased shareholder for the amount of unpaid notes held by it, and made by a firm of which said shareholder was a member, and maturing after his death. In re Henry's Estate, 33 Pittsb. Leg. J. 241, 16 Pittsb. Leg. J., N. S., 241.

15. The lien is not extended to notes of a shareholder to a third person, taken by the bank as collateral from such person, merely by the fact that the stockholder was then president of the bank. Boyd *v.* Redd, 120 N. C. 335, 27 S. E. 35, 58 Am. St. Rep. 792.

16. **Debt of colegatee.**—A testator bequeathed 40 shares of bank stock to be divided equally between his four sons. During the minority of one of the sons, the bank, with notice of the will, permitted a transfer of the shares of the other three, who were then indebted to it, but refused to allow a transfer of the remaining shares of the minor son on his arriving at majority, on the ground that two of the other legatees were indebted to it. Held, that the shares were not owned by the legatees in common, but in severalty, and that the Act of 1824, authorizing banks to refuse to transfer its stock so long as the stockholder was indebted to it, did not authorize the defendant bank to refuse to transfer the stock of the younger legatee not indebted to it because of the indebtedness of the others. Presbyterian Congregation *v.* Carlisle Bank, 5 Pa. 345.

17. **Indebtedness of assignee.**—The owner of a certificate of bank stock, transferable only on the books of the bank, in person or by attorney, on surrender of the certificate, made an assignment thereof, accompanied by a power of attorney to a person named. The assignee then transferred the same, and his assignee called upon the attorney to transfer it on the books, which the bank refused to allow, claiming a lien thereon for the debt of the intermediate assignee. Held, that the intermediate assignee was not a stockholder, and therefore the bank had no lien. Helm *v.* Swiggett, 12 Ind. 194.

18. **Debts of second assignee.**—Creed *v.* Lancaster Bank, 1 O. St. 1.

notice of and are bound by such provision of the charter.[19]

§ 42 (2db) Assignees and Purchasers—§ 42 (2dba) In General.—A bank's lien on its stock for the indebtedness of a shareholder can not be divested by a subsequent assignment thereof by such shareholder.[20] The title acquired by the delivery of the stock is subject to the lien of the bank.[21] The transferee of bank stock is not entitled to priority as a bona fide purchaser over a statutory lien existing in favor of the bank.[22]

§ 42 (2dbb) Indebtedness Incurred before Notice of Transfer.—The lien of the bank upon its stock is superior to the claim of one to whom such stock has been equitably assigned by the stockholder, as to all indebtedness of such stockholder to the bank incurred before the bank received notice of such assignment,[23] although such indebtedness was

19. Priorities and rights against persons dealing with stockholders.—Bohmer *v.* Bank, 77 Va. 445.

20. Assignees and purchasers.—Mohawk Nat. Bank *v.* Schenectady Bank, 78 Hun 90, 28 N. Y. S. 1100, 60 N. Y. St. Rep. 510; Bellevue Bank *v.* Higbee, 4 O. C. C. 222, 2 O. C. D. 512; Reese *v.* Bank, 14 Md. 271, 74 Am. Dec. 536.

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21. Oakland County Sav. Bank v. State Bank, 113 Mich. 284, 71 N. W. 453, 67 Am. St. Rep. 463; Mohawk Nat. Bank *v.* Schenectady Bank, 78 Hun. 90, 28 N. Y. S. 1100, 60 N. Y. St. Rep. 510; Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039, a case of a charter lien.

The lien of a bank on a stock certificate issued by it for a debt of the registered holder which is due and unpaid at the time of a demand by a purchaser of such certificate for a transfer thereof on the books of the bank, is superior to the right of the purchaser, under 3 How. St., § 3208a8, providing that no transfer of stock shall be valid against a bank, nor shall any transfer be made upon its books, so long as the registered holder shall be liable to the bank for a debt which is due and unpaid. Citizens' State Bank *v.* Kalamazoo County Bank, 111 Mich. 313, 69 N. W. 663.

Donee or assignee without consideration.—Where the by-laws of a bank authorize its directors to withhold dividends from a stockholder who is indebted to the bank until his indebtedness is paid, and the directors have ordered the dividends of a stockholder to be withheld, a mere donee of such dividends, to whom they were assigned without consideration by such stockholder, can not recover them from the bank until such indebtedness is paid, since such assignee had no better claim to such dividends against the bank than did his assignor, although such by-law be adopted after the issue of the stock and unknown to the stockholder. Bellevue Bank *v.* Higbee, 4 O. C. C. 222, 2 O. C. D. 512.

22. Transferee not bona fide purchaser.—Oakland County Sav. Bank *v.* State Bank, 113 Mich. 284, 71 N. W. 453, 67 Am. St. Rep. 463.

23. Indebtedness incurred before transfer.—Union Bank *v.* Laird (U. S.), 2 Wheat. 390, 4 L. Ed. 269. See, also, National Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039; Peoples' Bank *v.* Exchange Bank, 116 Ga. 820, 43 S. W. 269, 94 Am. St. Rep. 144; Leggett *v.* Bank, 24 N. Y. 283; Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339; Stafford *v.* Produce Exch. Banking Co., 61 O. St. 160, 55 N. E. 162, 76 Am. St. Rep. 371, affirming 16 O. C.

incurred after the assignment.[24]

§ 42 (2dbc) Debts Contracted after Notice of Assignment.—Debts contracted by the assignor after notice to the bank of an equitable assignment of his stock are not, as against the assignee, liens upon such stock.[25]

What Constitutes Notice.—Knowledge of an agent of a bank of an assignment of shares of its stock officially acquired is to be deemed knowledge of the bank.[26] Notice to the cashier of a bank of an assignment of stock is notice to the bank,[27] but the knowledge of the president when dealing with stock owned by him individually, is not notice to the bank.[28]

§ 42 (2dbd) Loan to Stockholder Larger than Authorized.—While a bank which has violated its charter by allowing a stockholder to borrow a sum of money larger than that which it was authorized to loan him, can not, as against an assignee of such stockholder, assert a lien for a greater amount than that provided for in its charter;[29] yet it is not the right of the assignee, if unwilling to himself pay the amount necessary to discharge the lien, to demand a transfer of the stock on the books of his bank until his assignor has fully paid all of his indebtedness to the bank which was contracted prior to the date it received notice that he had assigned his stock.[30] In an accounting to determine whether such indebtedness has been fully paid off, the sole inquiry should be whether or not the bank has applied payments made by the assignor as he directed, or, in the absence of any direction on his part, in the manner prescribed by law.[31] The assignee has no right to insist that payments shall be applied other-

C. 50, 8 O. C. D. 483; Bellevue Bank *v.* Higbee, 4 O. C. C. 222, 2 O. C. D. 512; Lee *v.* Citizens' Nat. Bank, 5 O. Dec. 21; S. C., 2 Cin. Rep. 298, 13 O. Dec. 913.

A bank organized under 49 Laws, p. 41 (1 Swan & C. St. p. 168), has a lien on the stock of its stockholder to secure his indebtedness to it incurred before notice of the assignment of the stock by him, as section 11 gives such bank "a lien upon all stock of its debtors." Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339.

24. A bank's lien on its stock reserved by a stipulation in the stock certificates may be asserted against a transferee who receives the stock before, but does not present it for transfer on the stock book of the company until after, the original holder becomes indebted to the corporation. Stafford *v.* Produce Exch. Banking Co., 61 O. St. 160, 76 Am. St. Rep. 371, 55 N. E. 162.

25. Debts contracted after notice of assignment.—People's Bank *v.* Exchange Bank, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144; Conant, etc., Co. *v.* Reed, 1 O. St. 298.

26. What constitutes notice.—Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339.

27. Cashier.—Conant, etc., Co. *v.* Reed, 1 O. St. 298.

28. The knowledge of the president of a bank in assigning shares of stock owned by him individually is not knowledge to the bank, so as to deprive it of a lien thereon, under 49 Laws, p. 41 (1 Swan & C. St. p. 168), for an indebtedness of the president to the bank incurred subsequent to such assignment. Franklin Bank *v.* Commercial Bank, 5 O. Dec. Rep. 339.

29. Loan to stockholder larger than authorized.—People's Bank *v.* Exchange Bank, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144.

30. People's Bank *v.* Exchange Bank, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144.

31. People's Bank *v.* Exchange Bank, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144.

wise than as the assignor directed, or that a credit voluntarily given to him by the bank to which he was not entitled shall go to the extinguishment of a debt arising before it received notice that he had assigned his stock, rather than to the discharge of an indebtedness thereafter contracted by him.[32]

§ 42 (2dbe) Certificate for Repayment of Cancelled Stock.—The bank's lien does not apply to a certificate for the repayment of the amount of certain cancelled stock, after an assignment of such certificate, although no notice of the transfer had been given.[33]

§ 42 (2dc) Pledgees.—A pledgee of bank stock as collateral security, is chargeable with notice of and takes subject to the bank's lien,[34] for an assessment,[35] for an indebtedness existing when the pledge was made,[36]

32. People's Bank *v.* Exchange Bank, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144.

33. Certificate for repayment of cancelled stock.—A bank issued a certificate for the repayment to a stockholder of the amount of certain stock canceled, which certificate was transferred by the holder for value. Afterwards the bank made a loan to the stockholder, on the supposition that he still held the certificate. Held, that the bank had no lien on the certificate as against the assignee, though no notice of the transfer had been given it. Callanan *v.* Edwards, 32 N. Y. 483.

34. Pledgee.—A bank charter provided that "the bank shall have a lien prior to all others upon any stock held by a stockholder for any debt of said stockholder to said bank." Held, that a party to whom a stockholder pledged his stock was affected with notice of this provision of the charter. Bohmer *v.* City Bank, 77 Va. 445.

The charter of the bank provided that the bank should have a lien prior to all others on any stock held by a stockholder for any debt of the stockholder to the bank. The stock certificates contained no notice of the lien, but declared that they were transferable only on the books of the bank on the surrender of the certificate. A stockholder indebted to the bank borrowed money from a third person, and gave him the certificate as collateral, with power to transfer the stock. The stockholder became bankrupt, and the lender applied to the bank to transfer the stock. Held, that the lien of the bank on the stock was paramount to that of the lender, and the bank had the right to be first satisfied before transferring the stock to the lender, and if the lender chose to hold the stock, he held subject to the bank's lien. Bohmer *v.* City Bank, 7 Va. 445.

Lien for levy to make good impairment of capital stock.—Under Ky. St., § 586 (Russell's St., § 2175, authorizing the secretary of state to require a bank whose capital stock is impaired to make good the impairment by an assessment on the stockholders, and § 580 (§ 2169), authorizing the directors, on the failure of a stockholder to pay any installment on the stock when requested, to sell sufficient stock to pay the amount due, or to collect the amount due by action, or to forfeit the amount paid and sell or cancel the stock, a bank making an assessment to make good an impairment of capital stock may assert a lien on the stock to secure the payment of the assessment, and the lien may be enforced against a pledgee of the stock receiving it without notice of the condition of the bank and advancing money under the belief that he is fully protected by the stock. Corbin Banking Co. *v.* Mitchell, 141 Ky. 172, 132 S. W. 426.

35. Directors levying assessment where capital stock impaired.—Where the secretary of state, as authorized by Ky. St. § 586 (Russell's St., § 2175), ordered a bank whose capital stock was impaired to have the impairment made good by assessment on the stockholders, the board of directors levying an assessment could adopt a by-law giving the bank a lien on shares of stock on the non-payment of the assessment and enforce it against a pledgee of stock; the action of the

36. Corbin Banking Co. *v.* Mitchell, 141 Ky. 172, 132 S. W. 426; Curtice *v.* Crawford County Bank, 110 Fed. 830.

or incurred subsequent to the pledge but before the bank had notice of it;[37] but the lien of a pledgee of bank stock as collateral security, acquired before the stockholder becomes indebted to the bank, will prevail over a lien given the bank to secure its debt, where the bank before or at the time its debt was contracted had notice of the pledge, and the burden of proving notice is upon the pledgee.[38]

§ 42 (2dd) Creditors and Purchasers at Execution or Sheriff's Sale.—The bank's lien is superior to that of a judgment creditor who has levied upon the judgment debtor's stock,[39] or to the right of a purchaser

board being reasonable and fair to all stockholders and all not stockholders, but in possession of stock. Corbin Banking Co. *v.* Mitchell, 141 Ky. 172, 132 S. W. 426.

37. Stafford *v.* Produce Exch. Banking Co., 16 O. C. C. 50, 8 O. C. D. 483, affirmed in 61 O. St. 160, 55 N. E. 162, 76 Am. St. Rep. 371; Curtice *v.* Crawford County Bank, 56 C. C. A. 174, 118 Fed. 390.

38. Bank having notice of pledge.—Curtice *v.* Crawford County Bank, 110 Fed. 830; Curtice *v.* Crawford County Bank, 56 C. C. A. 174, 118 Fed. 390; People's Bank *v.* Exchange Bank, 116 Va. 820, 43 S. E. 269, 94 Am. St. Rep. 144.

It was so held as to a stockholder in a bank who pledged his stock as collateral security to a third person by a written assignment and delivery, notwithstanding a statute requiring transfers to be made on the books of the bank. Curtice *v.* Crawford County Bank, 110 Fed. 830.

A bank charter provided that the shares of capital stock should be personal estate, and transferable, but that the corporation should hold a lien on the shares of any stockholder "who may be indebted to it," and the stock should not be transferred until such debt was paid. A stockholder was indebted to the bank, but afterwards made a note to another creditor, and pledged the stock as collateral security. The debtor became insolvent, and, to give a third creditor the advantage of its charter lien, the bank gratuitously advised such creditor to have the notes held by him discounted by the bank, knowing of the prior hypothecation of the stock. Held that, as against the notes discounted by the bank after the hypothecation of the stock, the pledgee had a prior lien on the stock. Bank *v.* Bonnie, 102 Ky. 343, 19 Ky. L. Rep. 1372, 43 S. W. 407.

A bank stockholder gave her note to the bank, and then pledged her stock for her husband's debt to another bank. The latter bank gave the first bank notice of the pledge. The first bank claimed a lien on the stock to secure the note by virtue of a by-law and an agreement with the stockholder. The second bank had no knowledge of either agreement or by-law. Held, that the first bank could not assert a prior lien. Just *v.* State Savings Bank, 132 Mich. 600, 94 N. W. 200.

39. Judgment, execution and attachment liens.—The lien of a bank on its stock for a debt of the stockholder, under Sand. & H. Dig., § 1342, declaring that a corporation shall at all times have a lien on the stock of its members for debts due it by them, is not displaced by the lien of an execution levied thereon, though § 1356 declares that the provisions for enforcement of the corporation's lien shall not affect any other lien or right acquired by virtue of a levy of attachment or execution on the stock, since § 1356 applies only to the enforcement of the lien, and does not affect its priority. Springfield Wagon Co. *v.* Bank, 68 Ark. 234, 57 S. W. 257.

The lien acquired by a bank on its stock, under Sand. & H. Dig., § 1342, declaring that a corporation shall at all times have a lien on the stock of its members for debts due, is superior to that acquired by a subsequent judgment creditor by virtue of the levy of an execution, and a judgment creditor buying bank stock at its execution sale, with notice of the bank's claim of a lien thereon for an indebtedness greater than the stock's value, can not compel a transfer thereof. Springfield Wagon Co. *v.* Bank, 68 Ark. 234, 57 S. W. 257.

Under Act 1814, art. 11, which provides that no stockholder indebted to the bank shall make a transfer or receive a dividend until such debt is dis-

at an execution or sheriff's sale.[40]

§ 42 (2de) Right to Refuse Transfer.—At Common Law.—At common law a banking corporation has no lien on its stock to secure indebtedness of a stockholder to the company, and could not refuse to transfer stock owned by its debtor to a purchaser from him.[41]

Where Lien Exists.—A bank which has under a statute or by reason of its charter or legally enacted by-law, a lien upon the stock of a shareholder to secure an indebtedness from him to it, may refuse a transfer of his stock to an assignee,[42] or to a pledgee of the stock as collateral security,[43] until it has been paid.

Prohibition of Transfer by Statute.—A transfer of bank stock on

charged, or security to the satisfaction of the directors given for the same, a bank has, as against a judgment creditor who has levied upon stock, a lien for a note made by the stockholder before the levy, but maturing afterwards. Sewall *v.* Lancaster Bank (Pa.), 17 Serg. & R. 285.

Reservation by law.—Whether a by-law of a bank, declaring the stock of each stockholder to be pledged for any sum which he shall owe to the bank, can, under any circumstances, create a lien on the shares against creditors of the stockholder—quære. Nesmith *v.* Washington Bank (Mass.), 6 Pick. 324. See Sargent *v.* Franklin Ins. Co. (Mass.), 8 Pick. 90, 19 Am. Dec. 306; Plymouth Bank *v.* Bank (Mass.), 10 Pick. 454.

40. A purchaser under execution at a sheriff's sale, of stock or shares of a corporator of a bank with notice of a lien of the bank upon such stock, under a by-law of the bank, for the indebtedness of such corporator to the bank (the lien created by such indebtedness under the by-law, being prior in point of time, to the lien acquired under the judgment), purchased only such title as was in the corporator, and no other; and therefore was not entitled to a transfer of the stock so purchased, under the Act of 1822, without first discharging the lien created by the corporator's indebtedness under the by-law. Tuttle *v.* Walton, 1 Ga. 43.

41. Right to refuse transfer at common law.—Stock Corporation Law (Consol. Laws, c. 59), § 51, permits a corporation to refuse to transfer stock on its books until the stockholder's debt to the company is paid, provided the certificate shows on its face that the company has that right. Held that, where a certificate of bank stock did not contain the required statement, the common-law rule obtains, by which a corporation has no lien on its stock, and the bank could not refuse to transfer stock owned by its debtor to a purchaser from him. Union Bank *v.* United States Exch. Bank, 143 App. Div. 128, 127 N. Y. S. 661.

42. Where lien exists.—Tete *v.* Farmers', etc., Bank (Pa.), 4 Brewst. 308; Bohmer *v.* City Bank, 77 Va. 445.

A bank may refuse to transfer stock of one indebted to it until his debt is paid. Downer *v.* Zanesville Bank (O.), Wright 477.

43. Pledgee.—Bank *v.* Pinson, 58 Miss. 421, 38 Am. Rep. 330.

Where no demand has been made on a bank for a transfer of stock till the stockholder's indebtedness to the bank has matured, the bank may refuse to transfer on its books the certificate of stock, which had theretofore been pledged to a third person, and for the stockholder's unpaid indebtedness may claim a superior lien, under 3 How. Ann. St., § 3208a8, which provides, among other things, that "no transfer of stock shall be valid against a bank so long as the registered holder thereof shall be liable as to the bank for any debt due and unpaid. Michigan Trust Co. *v.* Michigan, 111 Mich. 306, 69 N. W. 645.

The charter of a bank provided that the shares of stock should be transferable only on the books, but that all debts due and payable to the bank by the stockholder would first have to be paid, unless the president and directors should otherwise direct. Held, that one taking an assignment of stock as collateral security did so subject to an indebtedness due the bank by the stockholder, which would have to be liquidated before the bank could be compelled to transfer the stock. Union Bank *v.* Laird (U. S.), 2 Wheat. 390, 4 L. Ed. 269.

the bank's books where the shareholder is indebted to the bank, may be prohibited by a general statute which may make exceptions to such prohibition.[44]

Charter Prohibition.—The charter may contain the prohibition respecting the transfer of the stock of a shareholder who is indebted to the bank,[45] or it may authorize the bank to adopt by-laws in respect thereto, etc., but any by-law inconsistent with the charter or general statute is void.[46]

Unpaid Calls on Stock.—A general statute or the charter of the bank may prohibit the transfer of an interest in bank stock before payment of the first installment,[47] or until the whole amount has been paid.[48] Where stock has been paid for so far as calls have been made, the bank can not refuse a transfer.[49]

44. Prohibition by statute.—Sess. Laws 1897, p. 118, c. 47, § 52, forbid a transfer of shares of stock on books of a bank without consent of the board of directors, when the registered holder is indebted to the bank on unpaid obligations, and a transfer under such circumstances may be refused by the bank, though the party demanding the transfer acquired the shares from the registered holder at a time when he was not indebted to the bank. Faulkner *v.* Bank, 77 Kan. 385, 94 Pac. 153.

Persons benefited.—The Act of April 16, 1850, which prohibits the transfer of bank stock or the receipt of dividends thereon by any stockholder who may at the time be indebted to the bank, though intended mainly for the security of the bank, operates also incidentally in favor of the indorsers of such debtors. Klopp *v.* Lebanon Bank, 46 Pa. 88.

45. Charter provision.—Leggett *v.* Bank, 24 N. Y. 283, affirming 25 Barb. 326.

46. Corydon Deposit Bank *v.* McClure, 141 Ky. 481, 133 S. W. 201; Mohawk Nat. Bank *v.* Schenectady Bank, 78 Hun 90, 28 N. Y. S. 1100, 60 N. Y. St. Rep. 510, affirmed in 151 N. Y. 665, 46 N. E. 1149.

A stockholder borrowing money from his bank is charged with notice of a by-law prohibiting transfers of stock by debtors to the bank. Tete *v.* Farmers', etc., Bank (Pa.), 4 Brewst. 308.

The general banking law provides that holders of bank shares may transfer them unconditionally, unless otherwise agreed by the articles of association. Held, that the bank directors could not by a by-law create a lien upon the shares to secure the payment of debts due from the share owner to the bank. Bank *v.* Manufacturers', etc., Bank, 20 N. Y. 501.

47. Payment of installment.—Under Rev. St. 1838, pp. 107, 108, subjecting subscribers in the state bank to a forfeiture of all rights acquired by the subscription on failure to pay the first installment due for stock, no right in the stock can be transferred before payment of the installment. Coleman *v.* Spencer (Ind.), 5 Blackf. 197.

Where, under the statute, no interest in bank stocks could be transferred when the first installment had not been paid, and the statute provided that no transfer could be made except on the books, an assignee of the stock took no interest therein, where the transfer was not made on the books, though he had himself paid the first installment. Coleman *v.* Spencer (Ind.), 5 Blackf. 197.

48. Where the charter of a bank provides that no part of her capital stock shall be sold or transferred, except in certain cases, until the whole amount has been paid in, a contract for the transfer of shares, not falling within the exceptions made, and to be carried into execution when but fifty per cent is paid in, is illegal and void. Merrill *v.* Call, 15 Me. 428.

49. All calls paid.—In a by-law of a bank, "No transfer of stock shall be allowed or valid so long as the holder is in arrears to the bank, or in any form indebted to it," the word "arrears" refers to unpaid calls, and the words "in any form indebted," to indebtedness outside of the stock subscription; and the bank can not refuse to make a transfer to a transferee from a stockholder on the ground that

Part of Stock Sufficient to Satisfy Debt.—The bank may refuse to transfer part of the stock though the remainder is more than sufficient to satisfy the debt of the shareholder.[50]

When Right Becomes Absolute.—The right of a bank to prevent a transfer of stock by one indebted to it becomes absolute as soon as any debt becomes due and payable, and the legal title to the stock remains in the bank for its own security until payment, and for the benefit of the sureties of a debtor, if there are any, afterwards.[51]

§ 42 (3) Discharge, Estoppel, Forfeiture, Release or Waiver —§ 42 (3a) Waiver or Discharge—§ 42 (3aa) Authority.—A bank's lien on its stock may be waived by the bank or a duly-authorized officer, such as the cashier,[52] where he is not prohibited by law,[53] or by

only certain percentage of the stock has been paid in, where it has been paid for so far as calls have been made. Kahn *v.* Bank, 70 Mo. 262.

50. Part of stock sufficient to satisfy debt.—Under a bank charter providing that all debts due the bank by a stockholder must be paid before a transfer shall be made on the books, the bank may refuse to transfer a part of the stock, though what remains is more than sufficient to satisfy the debt of the stockholder. Pierson *v.* Bank, Fed. Cas. No. 11,155, 3 Cranch, C. C. 363.

51. When right becomes absolute.—Klopp *v.* Lebanon Bank, 46 Pa. 88.

When a maker of a note which was held by the bank assigned his stock in the bank on the last day of grace upon his note, and on the following day the assignment was presented to the bank, that a transfer of the stock might be made upon its books, it was held that the bank had a right to refuse to transfer, the note being unpaid. Klopp *v.* Lebanon Bank, 46 Pa. 88.

52. Waiver.—A complete transfer of the title to the stock upon the books of the bank, it is not doubted, would have the effect to vest it in the transferee, free from any claim or lien of the bank. The consent of the bank, made necessary to such transfer, is the waiver of its right, as its refusal would be the assertion of it. Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039.

"The clause which denies to the stockholder the privilege of making a transfer of his stock, while a debtor, until his debt is discharged or secured to the satisfaction of the directors, does not forbid the bank to waive its rights, or prevent cashier from acting for the directors, by virtue of an express or implied authority. In this, as in other matters of ordinary business, within the general scope of his official duty, he is their appropriate representative." Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039, citing Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695.

Bank stock which had been pledged as collateral by owner, with A. with power of sale on default in debt secured, was sent by A. to the cashier of the bank with instructions to sell and power of attorney to transfer same. The cashier received the certificate, telling A. there was no need to forward him a new one as he intended to sell, to which A. assented, and made the proper entries in the stock book showing the transfer to A. When the cashier of the bank received from A. the certificate, with the authority for its transfer to him duly executed by owner and, in pursuance of the request to make the transfer, charged it in the account against the former owner, and gave to A. the corresponding credit, the latter became a stockholder in the bank, invested with the legal title to the stock, and with all the rights, powers, and privileges belonging to that character. Nothing more remained to be done to make the conveyance of title complete and absolute, and, so far as the bank was concerned, it was irrevocable. It had consented to the transfer, and the transfer had been made. Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039.

On the supposition that not the legal title, but only an equity, based on an executory contract for a transfer,

53. Oakland County Sav. Bank *v.* State Bank, 113 Mich. 284, 71 N. W. 453, 67 Am. St. Rep. 463.

the directors.[54]

§ 42 (3ab) What Constitutes.—The terms of the certificate respecting a transfer may operate a waiver of the bank's lien.[55]

Transferring the stock on its books is a waiver of the bank's lien.[56]

A bank's effecting a sale of the stock for a pledgee, who took the same as collateral security, is a waiver of its lien on such stock.[57]

Taking Collateral or Additional Security.—Taking collateral security for the debts of a stockholder discharges or releases the bank's lien in some jurisdictions.[58] In others it does not.[59] But it is not waived where

passed to A., by virtue of the transaction with the cashier of the bank, his right to the relief prayed for is not less clear. Aside from the recognition of the title, as complete, by accepting and acting upon the power of attorney to sell and transfer it as his stock, and the sale was made to purchasers under it, whose title is not denied, and yet can not be better than that of their vendor, which is disputed, the subsequent conduct of the bank raises an equity against it, which is superior to its legal right to insist upon a lien on account of this debt. Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039.

54. Directors.—A lien having in view the safety of the bank and the public, is not to be relinquished unless by the special action of the directors' dispensing with it, or receiving other satisfactory security, collateral to the obligation evidencing the debt. Downer *v.* Zanesville Bank (O.), Wright 477; Conant, etc., Co. *v.* Reed, 1 O. St. 298; Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339.

The waiver of the bank's lien can be made only by a majority of the directors. Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339.

55. Term of certificate a waiver.—The charter of a bank provided that its shares of stock "shall be transferable on the books of the corporation only according to such rules as shall be established by the president and directors, but all debts actually due and payable to the corporation by a stockholder requesting a transfer must be satisfied before such transfer shall be made, unless the president and directors shall direct to the contrary. Held, that this lien on the stock is not waived by the form of a certificate for stock declaring that the stockholder "is entitled" to ——— shares of stock, "transferable only at said bank, personally or by attorney, on surrender of this certificate." Reese *v.* Bank, 14 Md. 271, 74 Am. Dec. 536.

56. Transferring the stock on the books.—A bank may waive the lien it has under its charter on stock for payment of debts due it by the stockholder by transferring the stock on its books. National Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039.

Where A., owning shares in a bank, transfers them to B., and the bank issues a new certificate to B., the terms of the certificate making the shares "transferable after the holder pays all his liabilities to said bank," this is a waiver of the lien of the bank upon such shares, for payments due from A. Hill *v.* Pine River Bank, 45 N. H. 300.

By the provisions of the "act to incorporate the State Bank of Ohio and other banking companies" (43 O. L. 24), a bank holds a lien on the shares of its stockholder for the amount of its indebtedness to it, which can not be defeated by a transfer made without the consent of a majority of the directors, nor will such consent authorize a transfer if the debt is overdue and unpaid. Conant, etc., Co. *v.* Reed, 1 O. St. 298.

57. Bank's effecting sale for pledgee.—Where a bank, on being informed of a transfer of stock by a stockholder, as collateral to secure a debt, makes no claim to a lien thereon for a debt due it by the stockholder, but offers to negotiate a sale of the stock for the transferee, and does effect a sale of part thereof, it is estopped to set up its lien as against the transferee. National Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039.

58. Bank's taking collateral security.—Collateral security given by a debtor of a bank, who is also a stockholder, discharges the charter lien of the bank on the stock. McLean *v.* Lafayette Bank, Fed. Cas. No. 8,888, 3 McLean 587.

59. When the charter of a bank provides that no stockholder indebted to the bank shall transfer his stock until

the bank, holding a note accepted by one of its stockholders, takes additional security for the acceptance from the indorser thereon, as it has a perfect right to do.[60]

Application of Money Raised on Stock to Bank's Debt.—The fact that a pledgor of bank stock applied the money he raised by the pledge on his debts to the bank does not discharge the bank's lien on such stock in the hands of the pledgee.[61]

Option to Bank to Purchase.—A by-law providing that shareholders desiring to sell shall give the bank an option to purchase is not a waiver of the bank's lien.[62]

Tender of Amount Admitted to Be Due.—Under a bank charter requiring all debts due the bank by a stockholder to be paid before a transfer of the stock on the books can be allowed, where the bank demands more than is due the stockholder must tender at least what he admits to be due, in order to be entitled to a transfer.[63]

Stockholder Having Deposit Sufficient to Pay the Debt.—Under an act providing that no stockholder indebted to the bank shall be authorized to transfer his stock until the debt be discharged or security given therefor, the fact that the stockholder has a deposit sufficient to pay the debt does not release the bank's lien on the stock.[64]

Release for a Specified Time.—A bank may release its lien for a specified time.[65]

§ 42 (3b) Estoppel.—Although the bank cashier has no power to

the debt is paid, or collateral security given, to the satisfaction of the board of directors, the mere fact that there is security for a debt due from a stockholder does not release the bank's lien. Downer *v.* Zanesville Bank (O.), Wright 477.

60. Union Bank *v.* Laird (U. S.), 2 Wheat. 390, 4 L. Ed. 269. See, also, Mechanics' Bank *v.* Seton (U. S.), 1 Pet. 299, 7 L. Ed. 152.

61. **Application of money raised on stock to bank's debt.**—A bank organized under 49 Laws, p. 41 (1 Swan & C. St. p. 168), retains its lien, under section 11, on shares of stock to secure debts due from a stockholder to the bank, though the stock was pledged to secure a loan to the stockholder, who applied the amount of the loan on his debts to the bank, where the bank had nothing to do with the pledging of the stock, and had no knowledge thereof. Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339.

62. **Option to bank to purchase.**—The lien in favor of a bank on the stock of registered holders to the extent of any debt due from such holders (3 How. Ann. St., § 3208a8) is not waived by the by-law of a bank which provides that holders of stock desiring to sell shall give the bank an option to purchase; that if it fails to do so "at the expiration of ten days' time, the stockholders may sell at pleasure." Citizens' State Bank *v.* Kalamazoo County Bank, 111 Mich. 313, 69 N. W. 663.

63. **Tender of amount admitted to be due.**—Pierson *v.* Bank, Fed. Cas. No. 11,155, 3 Cranch. C. C. 363.

64. **Stockholder having deposit sufficient to pay the debt.**—Mechanics Bank *v.* Earp (Pa.), 4 Rawle 384.

65. **Release for a specified time.**—Where a bank releases for a specified time its right to its charter lien on stock for debts due it from the stockholder, and within that time the stock is pledged for a debt, the right of the bank, after the expiration of the time to acquire its charter lien, is subordinate to the right of the pledgee until the debt is paid, or the pledge is released. Bank *v.* McNeil (Ky.), 10 Bush 54.

waive expressly the bank's lien on the stock of a shareholder indebted to the bank, he may, by his declarations that a shareholder is not indebted, in reply to an inquiry from a prospective purchaser, estop the bank from subsequently asserting the facts to be otherwise.[66]

§ 42 (3c) Forfeiture.—The fact that a bank has loaned a stockholder a sum in excess of that which it was authorized to permit him to borrow does not operate a forfeiture of a statutory lien on his stock for any indebtedness by him to the bank.[67]

§ 42 (4) Enforcement and Settlement—§ 42 (4a) Manner.—In some jurisdictions the bank's lien may be enforced by sale of the stock by the bank,[68] while in others the bank has no power to make a sale of the stock but may forbid a sale by the shareholder.[69] It may also be enforced by refusal to transfer.[70] Where a bank holding stock of a deceased stockholder for his indebtedness to the bank refuses to sell the stock, the court, in a suit by an administrator of the stockholder, will order the stock to be sold, and the proceeds applied to the satisfaction of the debt.[71]

66. Estoppel.—Oakland County Sav. Bank *v.* State Bank, 113 Mich. 284, 71 N. W. 453, 67 Am. St. Rep. 463.

Where the transferee of bank stock without knowledge of any indebtedness against such stock writes the bank in relation thereto, the response of the cashier that there was none will estop the bank from subsequently asserting the facts to be otherwise, though under 3 How. Ann. St. § 3208a8, stock, where the owner is indebted, can be transferred only with the consent of the directors. Oakland County Sav. Bank *v.* State Bank, 113 Mich. 284, 71 N. W. 453, 67 Am. St. Rep. 463.

67. Forfeiture.—Citing Gold-Mining Co. *v.* National Bank, 96 U. S. 640, 24 L. Ed. 648; National Bank *v.* Matthews, 98 U. S. 621, 25 L. Ed. 188; O'Hare *v.* Second Nat. Bank, 77 Pa. 96; Corcoran *v.* Batchelder, 147 Mass. 541; Smith *v.* National Bank, 45 Neb. 444; Ferguson *v.* Oxford Mercantile Co., 78 Miss. 65, 27 So. 877.

A bank, the charter of which provides that the total liability to it of any person "for borrowed money * * * shall at no time exceed one-tenth part of the capital stock of said bank paid in," and also that the stock of any stockholder in such bank "shall be held bound to the bank for any dues or other indebtedness by said stockholder to the bank," and it shall have a lien "upon the same superior to all other liens," has, by virtue of its charter, a lien of the highest dignity upon the stock of a stockholder to an amount not exceeding ten per cent of the capital stock of the bank actually paid in, notwithstanding it may have violated the terms of its charter by loaning to such stockholder a sum largely in excess of that which it was thereby authorized to permit him to borrow. People's Bank *v.* Exchange Bank, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144.

68. Sale.—Owens *v.* Atlanta Trust, etc., Co., 119 Ga. 924, 47 S. W. 215.

The incorporating act of a bank declared that all debts due to a bank by its stockholders should be discharged before a transfer of stock could be made. Held, that the act gave to the bank a mortgage or pledge of the stock, which it could enforce by a sale, as the act did not prohibit such a transfer by the bank. In re Farmers' Bank (Md.), 2 Bland 394.

69. That a bank has a lien upon the shares of a stockholder for an indebtedness due from him to the bank does not entitle them to make a sale of the stock for payment of the debt. Tete *v.* Farmers', etc., Bank (Pa.), 4 Brewst. 308.

70. Refusal to transfer.—Owens *v.* Atlanta Trust, etc., Co., 119 Ga. 924, 47 S. W. 215.

71. In re Farmers' Bank (Md.), 2 Bland 394.

§ 42 (4b) Form of Action.—The bank may enforce its lien on the stock of a shareholder who is indebted to it by an action to foreclose.[72]

§ 42 (4c) Jurisdiction.—A bank's lien on stock may be enforced by a bill in equity for an accounting,[73] or in a suit by a purchaser to compel a transfer.[74]

§ 42 (4d) Process.—A bank's lien can not be foreclosed without making the indebted shareholder a party by proper process.[75]

§ 42 (4e) Limitations.—A bank's lien continues, though all other remedies for the debt be barred by the statute of limitations.[76]

§ 42 (4f) Pleading.—A bill to enforce a lien on bank stock for debts of a stockholder should particularly describe the debt or liability secured by the lien, and should aver that it was necessary, for the payment of such debt or satisfaction of such liability, to sell the shares of stock on which the complainant held the lien, and also a personal demand of payment or satisfaction before foreclosure proceedings, where these are the facts which the statute requires to exist before there can be a foreclosure.[77]

§ 42 (4g) Redemption.—In an action by a bank to enforce its lien against the stock of a shareholder for the payment of his debt, the court is under no obligation, when decreeing a sale thereof, to appoint a day within which the defendant may redeem.[78]

72. Form of action.—See post, "Jurisdiction," § 42 (4c).

73. See Reese *v.* Bank, 14 Md. 271, 74 Am. Dec. 536.

A bill for accounting, brought by a bank against the administrator of its deceased cashier, contains equity in so far as it seeks, as incidental thereto, to declare and enforce a lien against the stock of respondent's intestate under Code 1907, § 3476, conferring the lien without designating or naming any court or tribunal in which it shall be enforced, but providing for foreclosure without suit or action. Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

74. In a suit by the purchaser of bank stock to compel the transfer of the stock on the books of the bank, the court has jurisdiction to award foreclosure of the lien claimed by the bank for a debt of the registered holder which is due and unpaid, though such holder is not a party to the suit; no personal decree being sought. Citizens' State Bank *v.* Kalamazoo County Bank, 111 Mich. 313, 69 N. W. 663.

75. Where a bank has a lien on the stock of a nonresident in the bank, under its charter and by-laws, because of a debt due to the bank, such lien can not be foreclosed by judicial proceedings, unless the debtor is duly served. Owens *v.* Atlanta Trust, etc., Co., 119 Ga. 924, 47 S. E. 215.

Where the stock of defendant in plaintiff bank was attached by it for a debt, and the defendant was not personally served, the only lien foreclosed was that created by the attachment, which was inferior to a title asserted by one who had purchased the stock from the debtor, and the lien of the bank on the stock given by its charter was not affected by the proceeding. Owens *v.* Atlanta Trust, etc., Co., 119 Ga. 924, 47 S. E. 215.

76. Limitation.—First Nat. Bank *v.* Merchants' Nat. Bank, 5 O. Dec. 150, 7 N. P. 381.

Although the legal remedy is barred, the debt remains as an unextinguished right, the bank, when called into a court of equity, may hold to any equitable lien, or other means in their hands, till it is discharged. Brent *v.* Bank (U. S.), 10 Pet. 596, 9 L. Ed. 547.

77. Pleading.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

78. Redemption.—Reese *v.* Bank, 14 Md. 271, 74 Am. Dec. 536.

§ 42½. Voting Power of Stock.—When the directors and legally constituted agents of a banking corporation have, for many years, acquiesced in a subscription to stock, made by a person in the names of his children or others, who have exercised acts of ownership over the stock, and voted upon it, without objection, as their own, the corporation will not afterwards be allowed to treat the subscription as if it were a fraudulent use, by the original subscriber, of mere names, to secure a greater number of votes than he would be entitled to, under the by-laws, if the stock had stood in his own name.[79] If one purchase of the bank a large amount of stock to multiply his votes for a board of directors, vote upon such stock, and immediately after the board direct that the purchase money of the stock be returned, and the stock again taken by the bank, equity will not compel the purchaser to refund the money and take back the stock, where the proofs show no actual loss attendant upon the transaction.[80]

A pledgee of bank stock who receives it as collateral security is not such a stockholder as to be entitled to vote.[81]

79. **Voting power of stock.**—Creed *v.* Lancaster Bank, 1 O. St. 1.

80. Taylor *v.* Miami Exporting Co., 6 O. 176.

81. **Pledgee.**—McConville *v.* Means, 10 O. Dec. 452, 21 Wkly. L. Bull. 193.

CHAPTER IV.

C. Stockholders.

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C. STOCKHOLDERS.[1]

§ 42¼. Persons Who May Be Stockholders.—Married Women.—The capacity of married women to subscribe for or take by assignment shares of stock in national banks, is governed by the state laws.[2] A mar-

1. Of loan, trust and investment companies, see post, "Stockholders," § 313.

Of national banks, see post, "Liability of Stockholders for Debts of Bank," § 247; "Nature and Extent," § 248; "Effect of Transfer of Stock," § 249; "Actions and Proceedings to Enforce," § 250.

Of savings banks, see post, "Corporators and Stockholders," § 293.

2. **Capacity governed by state law.**—Under § 4194 of the digest of the statutes of Arkansas, published in

ried woman is not incapacitated by the laws in force in the district of Columbia from becoming the owner of bank stock.[3]

State.—A state may own, in part or entirely, the stock of a bank.[4] The state, by becoming interested with others in a banking corporation, does not impart to that corporation any of her privileges or prerogatives, so far as it respects the transactions of the corporation.[5]

Stockholders in Other Corporations.—No principle of law prevents the stockholders in an insurance company or other corporations from becoming at the same time stockholders in a bank, even where the same stockholders own all the stock in the two corporations.[6]

§ 43. Rights and Liabilities as to Bank—§ 43 (1) Right to Inspect Books.—The weight of American authority recognizes the common-law right of the shareholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of a banking corporation of which he is a member.[7]

Enforcement.—Stockholders of a bank may force it to submit to an examination of its affairs.[7a] But in enforcing this right of inspection, the courts will exercise a sound discretion and only grant it with proper safe-

1874, ch. 93, p. 756, if it was in force at the time of the transaction, it would seem that a married woman might lawfully have either subscribed for or taken an assignment of the shares, they being shares of a national bank in Arkansas, and the transaction being, therefore, governed by the statutes of Arkansas, unless under special circumstances, a different rule ought to govern. Bundy *v.* Cocke, 128 U. S. 185, 32 L. Ed. 396, 9 S. Ct. 242.

3. District of Columbia.—Keyser *v.* Hitz, 133 U. S. 138, 33 L. Ed. 531, 10 S. Ct. 290.

4. State as stockholder.—Briscoe *v.* Bank (U. S.), 11 Pet. 257, 9 L. Ed. 709; Bank *v.* Planters' Bank (U. S.), 9 Wheat. 904, 6 L. Ed. 244; Bank *v.* Wistar, 3 Pet. 431, 7 L. Ed. 731; Curran *v.* Arkansas (U. S.), 15 How. 304, 14 L. Ed. 705. See the title STATE.

But by so doing it imparts none of the attributes of sovereignty to the institution, and having paid in its share of the capital stock, is treated like every other stockholder and incurs no public responsibility whatsoever. Briscoe *v.* Bank (U. S.), 11 Pet. 257, 9 L. Ed. 709; Curran *v.* Arkansas (U. S.), 15 How. 304, 14 L. Ed. 705.

Its funds and property of every description are liable for its debts and may be reached by legal or equitable process. Briscoe *v.* Bank (U. S.), 11 Pet. 257, 9 L. Ed. 709.

5. Robinson *v.* Bank, 18 Ga. 65.

6. Stockholder in other corporations.—State *v.* Butler, 86 Tenn. 614, 8 S. W. 586.

7. Right to inspect books.—Guthrie *v.* Harkness, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4; Hatch *v.* City Bank (La.), 1 Rob. 470.

"It is said to be customary for banking companies in England to insert in their constitutions a provision forbidding the inspection of customers' accounts by shareholders or creditors. Morgan's Case, L. R. 28 Ch. D. 620; Cook Corp., § 517, note. The subject appears to be now regulated by statute in England. Cook Corp., § 518." Guthrie *v.* Harkness, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4.

A stockholder in a corporation has a right of access to the proper sources of knowledge to know how the affairs of the corporation are conducted. If his rights are not restricted in that respect by their charter, or rules and by-laws passed in conformity thereto, a stockholder in a banking company has a right to the inspection of the "discount book" of the bank, within proper and reasonable hours. Cockburn *v.* Union Bank, 13 La. Ann. 289.

7a. Enforcement.—Robertson *v.* Owensboro Inv. Bank and Trust Co. (Ky.), 149 S. W. 1144.

guards to the rights of all concerned.[8] And the state courts have jurisdiction to enforce it, even in the case of a national bank.[9]

Mandamus is the proper remedy where the right to inspect books, etc., is denied.[10] Mandamus will not issue to enforce the right of stockholders to inspect the books of a bank, unless some just and useful object or purpose is to be effected and this object or purpose must be alleged and proved.[11]

§ 43 (2) Ownership of Capital Stock—§ 43 (2a) General Rule.—The capital stock of a bank is the property of the individual stockholders, and not in any sense the property of the corporation.[12] Where the directors of a bank distributed the balance of the capital stock pro rata among the subscribers who had paid up their installments, refusing to

8. Discretion of court.—Guthrie *v.* Harkness, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4.

"It does not follow that the courts will compel the inspection of the bank's books under all circumstances. In issuing the writ of mandamus, the court will exercise a sound discretion and grant the right under proper safeguards to protect the interests of all concerned. The writ should not be granted for speculative purposes or to gratify idle curiosity or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes." Guthrie *v.* Harkness, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4. See the title MANDAMUS.

9. Jurisdiction.—If the stockholders had the legal right to enforce inspection of the books of a national bank, there is no room to question the authority of the state courts to enforce the right by granting the proper relief in a judicial proceeding. Guthrie *v.* Harkness, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4; Petri *v.* Commercial Nat. Bank, 142 U. S. 644, 35 L. Ed. 1144, 12 S. Ct. 325; Continental Nat. Bank *v.* Buford, 191 U. S. 119, 48 L. Ed. 119, 24 S. Ct. 54.

"While the state has no power to enact legislation contravening the federal laws for the control of national banks, Davis *v.* Elmira Sav. Bank, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502, congress has provided that for actions against them at law or in equity they shall be deemed citizens of the state in which they are located, and that in such cases the circuit and district courts of the United States shall have such jurisdiction only as they would have in cases between individual citizens of the same state. 25 Stat. 433." Guthrie *v.* Harkness, 199 U. S. 148, 50 L. Ed. 130, 26 S. Ct. 4.

10. Mandamus.—Cockburn *v.* Union Bank, 13 La. Ann. 289.

11. Hatch *v.* City Bank (La.), 1 Rob. 470.

Though one having a legal interest in the corporate books be entitled to inspect and use them as evidence of his rights, yet where a director alleges that, for the interests of the bank and the public, he desires to examine the stock ledger, or book containing the list of stockholders, and also the transfer book; that his application for that purpose has been refused; and that all access to these and the other books is denied him—his prayer for a mandamus to assert the right will be refused when no just or useful object is alleged or proved, and it is not shown in what way the interests of the bank or the public are to be promoted. Hatch *v.* City Bank (La.), 1 Rob. 470.

12. Ownership of capital stock.—Conwell *v.* Connersville, 15 Ind. 150.

The profits on sale of bonds.—In 1824 the state became owner of capital stock in the Bank of Louisiana, for which it issued bonds, to be negotiated by the bank. These bonds were sold by the bank at a profit, to recover which profit this action was brought. Held, that it belonged exclusively to the stockholders who were such at the time of the sale, in proportion to the stock held and actually paid in by them respectively State *v.* Bank, 6 La. 745.

give a portion to one who was in arrear, the latter has a right of action against the bank itself.[13]

§ 43 (2b) Trust Fund for Benefit of Creditors—§ 43 (2ba) In General.—The capital stock of a bank is a trust fund for the benefit of depositors and creditors, and must be preserved unimpaired for the payments of its debts.[14]

§ 43 (2bb) Priority of Bank Bills.—When the capital stock of an incorporated bank is subscribed and paid in, it constitutes a trust fund for the benefit of the stockholders, but when notes are issued and circulated thereon, another and superior trust arises and the stock must be first applied to the payment of the notes of the bank.[15]

§ 43 (2bc) Following Capital Stock as Trust Fund after Distribution.—The capital of a bank being a trust fund for the payment of its debts, if it be withdrawn by a stockholder or other person it is held by him thereafter subject to the trust,[16] although there was no fraud and a

13. Reese *v.* Bank, 31 Pa. 78, 72 Am. Dec. 726.

14. **Trust fund for creditors.**—Bishop's Fund *v.* Eagle Bank, 7 Conn. 476.

While the bank is solvent, and in the full use and enjoyment of all its franchises, the entire beneficial interest in its funds and assets belongs to the stockholders. But after the insolvency of the corporation, although the legal ownership of the assets may continue as before, the beneficial interest of the stockholders clearly no longer exists. Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471; Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121; Corbin Banking Co. *v.* Mitchell, 141 Ky. 172, 132 S. W. 426; Dabney *v.* State Bank, 3 S. C. (3 Rich.) 124.

Tennessee.—The capital stock of a banking corporation, is, by every principle of law as well as common sense, not the absolute property of the individual shareholders. It has uniformly been deemed a pledge or trust fund, for the payment of the debts of the bank. Woodfork *v.* Union Bank, 43 Tenn. (3 Coldw.) 488. See, to the same effect, Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471.

"The capital stock of a bank corporation is a fund set apart by its charter for the payment of its debts, which amounts to a contract with those who shall become its creditors, that the fund shall not be withdrawn or appropriated to the use of the owner or owners of the capital stock." State *v.* Bank, 64 Tenn. (5 Baxt.) 1.

15. **Priority of bank bills.**—Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

16. **Following capital after distribution.**—Dabney *v.* State Bank (S. C.), 3 Rich. 124; Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471.

State sole stockholder.—The fact that the state is the sole stockholder does not vary the rule. Dabney *v.* State Bank (S. C.), 3 Rich. 124.

Tennessee.—When the common school fund was made a part of the capital of the Bank of Tennessee, it became assets of the bank to which creditors of the bank had a right to look, and a trust fund applicable to the payment of its debts. The act, therefore, of February 16th, 1866, appropriating the assets of the bank as school fund, impaired the obligation of the contract between the bank and its creditors and was a nullity, as was also the assignment made in pursuance of that act, so far as to give preference to the school fund. State *v.* Bank, 64 Tenn. (5 Baxt.) 1.

The State Bank of Tennessee.—Nashville *v.* Bank, 31 Tenn. (1 Swan.) 269.

Right of charitable corporation to withdraw shares.—Where a corporation for charitable purposes subscribes for shares in a bank, it becomes a stockholder, and part of the corporation, and consequently, after insolvency of the bank, is incapable of withdrawing its shares, or recovering

distribution was authorized by law;[17] and a creditor may in a court of equity follow it into the hands of stockholders or other persons receiving it with notice.[18]

Action at Law.—Where a banking corporation divided its capital stock among the stockholders, leaving the corporate notes in circulation, an individual stockholder, who had received his share of the stock so divided, is not liable in an action at law to a holder of a note of the corporation.[19]

When Liability Accrues, and Conditions Precedent.—The right of creditors of a bank to subject the capital stock in the hands of stockholders to payment of their claims does not accrue until the bank has refused payment, and is unable to discharge the debts.[20]

Stockholder as Parties.—Where the capital stock of a bank has been divided among its stockholders before the expiration of its charter, without reserving a sufficient amount to pay its bank notes, a bill in equity for the purpose of subjecting such stock, in the hands of the stockholders, to the payment of the notes, may be maintained by some of the holders of the notes against some of the stockholders, it appearing impossible to bring all parties before the court.[21] Where the shares of capital stock of a bank

the amount as a debt against the bank. Bishop's Fund *v.* Eagle Bank, 7 Conn. 476.

17. **Distribution authorized by law —Absence of fraud.**—Capital stock of a bank, which has been divided among the stockholders by the directors, is still liable for the debts of the bank, though the stockholders were not guilty of fraud, and the division was authorized by law. Wood *v.* Dummer, Fed. Cas. No. 17,944, 3 Mason, 308.

18. After the capital stock of a bank has been subscribed and paid, it becomes a trust fund in the hands of the president and directors for the benefit of the creditors of the bank, who must be paid before the stock can be withdrawn and distributed among the stockholders, and, if not so paid, and the bank becomes insolvent, the billholders, may pursue the trust into the hands of the stockholders. Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

A bank divided among its stockholders three-fourths of its capital stock before the expiration of its charter, without providing funds sufficient to pay its outstanding notes. Held that, since the capital stock was a trust fund for the payment of the bank's notes, it could be followed into the hands of the stockholders. Wood *v.* Dummer, Fed. Cas. No. 17,944, 3 Mason, 308.

"The stockholders, having incurred no personal liability for the debts of the corporation, have, in point of fact, no interest in the disposition of the assets of the bank, after its insolvency. In equity, as well as at law, the beneficial interest therein belongs to the creditors. The capital is the fund they trusted, and to which, with the after-acquired property or assets of the corporation, they can alone look for indemnity. Both stand pledged for the payment of the corporation debts (16 Mass. R., 272), and a court of equity will follow them into the hands of stockholders or other persons receiving them with notice, for the benefit of the creditors." Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471.

19. **Action at law.**—Spear *v.* Grant, 16 Mass. 9.

Action of tort.—Where the stockholders of an incorporated bank, after the expiration of their charter, made dividends of their capital stock among themselves, so there were no corporate funds left for the redemption of their outstanding notes or bills; the possessors of such bills could not maintain an action of tort against a stockholder who had received his proportion of such dividends. Vose *v.* Grant, 15 Mass. 505.

20. **When liability accrues, and conditions precedent.**—Wood *v.* Dummer, Fed. Cas. No. 17,944, 3 Mason 308.

21. **Stockholders as parties.**—Wood *v.* Dummer, Fed. Cas. No. 17,944, 3 Mason 308.

were each transferable either to residents or nonresidents, all the stockholders need not be made parties to a suit by creditors to subject the capital stock in the hands of certain stockholders to payment of the creditors' claims, it not being claimed that those stockholders joined do not represent effectually the interests adverse to the creditors, or that these not joined could aid defendants in making a more effectual defense.[22]

Bank a Necessary Party.—In a suit by creditors of a bank to subject to payment of their claims the capital stock in the hands of stockholders, the bank is a necessary party, though a new bank has been organized, provided that the old one is still in existence.[23]

Presumption That Bank Expired by Legislative Limitation.—Where a new bank was formed in place of an old one, and a bill for creditors, to subject the capital stock to payment of their debts, contains the acts of the legislature continuing the existence of the old bank for a limited time, it will be presumed that the old bank expired by the legislative limitation, so as to render it unnecessary to make it a party.[24]

Pleading.—A bill by creditors of a bank, to subject the capital stock in the hands of stockholders to payment of the creditors' claims, should allege that the stock is a trust fund, appropriated by law and the charter, to payment of debts of the bank, and that the surplus only belongs to the stockholders.[25] Where a new bank has been formed to take the place of an old one, in a suit by creditors of the latter to subject the capital stock in the hands of stockholders to payment of the debts, the bill must allege that the old corporation is defunct in order to dispense with its being made a party.[26] Where a new bank was organized in place of another and a suit brought by creditors to subject to payment of their claims the capital stock in the hands of stockholders was dismissed as to the new bank, the bill should have been amended by striking out allegations that the new bank had received large funds of the old, since, if such were true, the stock could not be subjected to liability.[27]

Decree.—Where a bank, before the expiration of its charter, divided three-fourths of its capital stock among its stockholders, without providing funds sufficient to pay its outstanding bank notes, on a bill by the holders of the notes against a part of the stockholders to compel a payment of the notes, the decree against each stockholder should be for his contributory share of the debt in the proportion which the stock held by him bears to the whole capital stock.[28]

22. Wood *v.* Dummer, Fed. Cas. No. 17,944, 3 Mason 308.

23. Bank a necessary party.—Wood *v.* Dummer, Fed. Cas. No. 17,944, 3 Mason 308.

24. Presumption that bank expired by legislative limitation.—Wood *v.* Dummer, Fed. Cas. No. 17,944, 3 Mason 308.

25. Pleading.—Wood *v.* Dummer, Fed. Cas. No. 17,944, 3 Mason 308.

26. Wood *v.* Dummer, Fed. Cas. No. 17,944, 3 Mason 308.

27. Wood *v.* Dummer, Fed. Cas. No. 17,944, 3 Mason 308.

28. Decree.—Wood *v.* Dummer, Fed. Cas. No. 17,944, 3 Mason 308.

§ 43 (2c) Payment to Enable Bank to Resume Business.—A payment made by stockholders to a suspended bank, in order to enable it to resume, is not a payment in the ordinary course of business, and does not create a debt from the bank to the stockholders.[29]

§ 43 (3) Power to Bind Corporation.—Stockholders of a bank can not create a corporate liability without special authority so to do. Confessions, admissions, or knowledge, while not engaged in the precise business intrusted to them, can not affect the corporation.[30]

§ 43 (4) Dealings with Bank—§ 43 (4a) As Principal or Surety on Note.—A stockholder may be legally bound to the bank on a note as principal or surety.[31]

§ 43 (4b) Sale of Stock to Bank.—See ante, "Bank Itself," § 40 (2c).

§ 44 Constitutional and Statutory Provisions.—See post, "Constitutional and Statutory Provisions," § 47 (2b).

§ 44½. Shareholders' Meetings.—Where the articles of association of a bank required meetings of shareholders to be called by the board of directors, or by any three shareholders, a resolution at a meeting called by the president and cashier was not a valid act of the corporation, all the shareholders not being present.[32]

§ 45. Suing or Defending on Behalf of Bank.—Enforcement of liabilities of officer, see post, "Right of Stockholders to Enforce Liability," § 54 (5).

§ 45 (1) Failure or Refusal of Bank to Sue.—Only under peculiar circumstances will a bank stockholder be permitted by courts of equity to bring a suit which the corporation has failed to bring.[33] Where a banking corporation is disabled from suing—as, where the managing agents of the corporation, its officers and directors, are themselves to be the defendants, or where the corporation wrongfully and willfully refuses to sue—then, in either case, a court of equity will entertain a suit by a shareholder, sub-

29. **Payment to enable bank to resume business.**—Brodrick *v.* Brown, 69 Fed. 497.

30. **Power to bind corporation.**—Loomis, etc., Co. *v.* Eagle Bank, 1 Disn. 285, 12 O. Dec. 625.

31. **Principal or surety on note.**—In a suit instituted by the president and directors of the bank of the commonwealth on a promissory note to the bank, a plea by one of defendants that at the time the note sued on was executed he was a director of the bank, and therefore not competent to sign said note as a surety, and that he did sign it as a surety, and not as a principal, states no defense. The contract as surety was not void, but was as binding on defendant as it would have been had he not been a director. Bank *v.* Triplett (Ky.), 6 J. J. Marsh 549.

32. **Shareholder's meetings.**—Matthews *v.* Columbia Nat. Bank, 79 Fed. 558, reversed in Columbia Nat. Bank *v.* Mathews, 85 Fed. 934, 29 C. C. A. 491.

33. **Failure of bank to sue.**—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

stituting him to the collective or corporate right of action.[34]

The mere refusal of a banking corporation to bring a suit will not authorize any stockholder dissatisfied with such decision to conduct a suit himself, for necessarily a very wide discretion as to suing is reposed in the directors of the corporation.[35]

Recovery for Benefit of Corporation, etc.—Where a court of equity entertains a suit by a bank stockholder to enforce a corporate right of action the recovery must be for the benefit of the corporation, all its creditors and shareholders, innocent and guilty, sharing proportionately in the benefits of the degree.[36]

In cases of the refusal of a trustee of an insolvent bank to sue the rule against a suit by a stockholder is not as stringent as in case of a refusal by the directors, for the reason that the trustee has not so wide a dis-

34. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

Where neither the receiver nor the proper bank officer will sue on demand of a stockholder, the latter may sue for himself and other stockholders. Where neither the bank's officers or directors, nor the receiver, nor the comptroller, would, on demand, bring suit, a stockholder's suit on behalf of himself and other stockholders of a national bank to recover judgment in the bank's favor for the alleged wrongful acts of the managing agents of the corporation, must be assumed to have been properly instituted. In re Chetwood, 165 U. S. 443, 41 L. Ed. 782, citing Whittemore *v.* Amoskeag Nat. Bank, 134 U. S. 527, 33 L. Ed. 1002, 10 S. Ct. 592.

Restraining collection of illegal tax.—Where, on demand of a stockholder to do so, the directors of a bank refused to take any steps to prevent the collection of a tax on the bank under a certain law, though admitting that the law was unconstitutional, their action is a breach of duty, and not a mere error of judgment, so that the stockholder has a right to bring suit in equity to restrain the collection of the tax. Dodge *v.* Woolsey (U. S.), 18 How. 331, 15 L. Ed. 401.

In a suit by a stockholder of a bank to restrain the collection of an illegal tax on the bank, the directors, who refused to take any action, are properly joined. Dodge *v.* Woolsey (U. S.), 18 How. 331, 15 L. Ed. 401.

Suit to set aside sale to directors.—Where directors of a bank procured the sale of mining stock held by the bank to themselves, which, in view of their office as directors, they had no right to purchase, and plaintiff, a stockholder, requested the bank to sue to set aside the sale, which the bank refused to do, and two-thirds of the stockholders, which were necessary to elect a new board of directors, were not disinterested, the plaintiff was entitled to sue on his own behalf; he having done all that could be reasonably required to induce the bank to sue, without avail. Morgan *v.* King, 27 Colo. 539, 63 Pac. 416.

35. Mere refusal to sue.—"Strangers could never know when a settlement, compromise, or adjustment was a finality if the matter was subject to be overhauled at the suit of any discontented shareholder. So a suit might appear so desperate, or be so expensive, or, for good reason, impolitic, that directors might, in the exercise of a sound discretion, deem it unwise to engage in litigation. In such case, if the refusal be in good faith, the courts will rarely suffer a shareholder to overturn such decision by entertaining his suit for the same cause of action." Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 48, 24 Am. St. Rep. 625.

"In the case of the refusal of the managers of a (banking) corporation, an appeal would lie to the general meeting of the shareholders; and if in such refusal they did not represent the will of a majority, it could be then made to appear, and a board elected who could reverse their action." Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

36. Recovering for benefit of corporation.—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

cretion as to suing as existed in the directors of a solvent and going banking corporation. Also there is no appeal from the refusal of the trustee save to a court of equity, while, in case of a refusal by the directors, an appeal to the stockholders' meeting can be had.[37]

§ 45 (2) Enjoining Illegal Acts and Practices.—A bank stockholder may maintain a suit against the bank officer to restrain illegal discounting,[38] and to restrain the payment of an illegal tax.[39]

§ 45 (3) Recovery for Fraudulent or Illegal Acts or Practices.—A bank stockholder may maintain a suit against the directors and other officers of the bank for unfaithfulness in the discharge of their official duties. Upon allegation of fraudulent practices a stockholder may maintain a bill in equity against the bank officials for an accounting and restoration of whatever may have been fraudulently withdrawn from or lost to the bank;[40] or he may sue at law for damages resulting from the illegal acts of such officials in the discharge of their duties.[41]

§ 45 (4) Quo Warranto and Proceedings in Nature Thereof—§ 45 (4a) Testing Legality of Incorporation.—Under a state statute allowing an information to be filed against any person or corporation whenever any association or number of persons shall act as a corporation without being legally incorporated, and providing that such information may be filed by any person on his own relation, whenever he claims an interest in the corporation, it is unnecessary that a stockholder in a bank should first make demand upon the officers to cease to act as a banking corporation.[42] An information filed by a stockholder in such case is sufficient without alleging that the bank has property.[43]

37. Refusal of trustee of insolvent bank to sue.—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

38. The act incorporating a bank provided that ordinary discounts may be made by the president and four directors, and that the rate of discount at which loans shall be made shall not exceed one-half of 1 per centum for thirty days. Held, that on proof of the discounting of paper by the cashier and president without four directors, and that notes had been discounted at rates greater than that allowed by charter, was sufficient ground for a temporary injunction at the suit of a stockholder to restrain such practices. Manderson *v.* Commercial Bank, 28 Pa. 379.

39. Dodge *v.* Woolsey (U. S.), 18 How. 331, 15 L. Ed. 401.

40. Recovery for fraudulent acts or practices.—A stockholder in an incorporated bank may sustain a bill in equity against the corporation, the directors, and other stockholders, upon allegations of fraudulent practices, depreciating the value of the stock, suspending banking operations, refusing cash payments, and withholding dividends; and in such bill the complainant may join individual stockholders with the corporation, may pray for an account of stock and funds, and for restoration of whatever may have been fraudulently withdrawn from the common stock. Taylor *v.* Miami Exporting Co., 5 O. 162, 22 Am. Dec. 785.

41. An action at law against the directors of a bank for the violation of the provisions of the banking laws of the state, or other unfaithfulness in the discharge of their official duties, founded on § 56, c. 84, Comp. St., may be brought by any stockholder severally. Buell *v.* Warner, 33 Vt. 570.

42. Demand.—Albert *v.* State, 65 Ind. 413.

43. Allegation that bank has property.—Albert *v.* State, 65 Ind. 413.

§ 45 (4b) Testing Validity of Election of Officers.—Though any stockholder has a right to inquire, by a quo warranto, into the election of those who assume to administer the corporation, yet, where the wrong complained of was the result of his own misconduct or neglect, or he has acquiesced or concurred in it, he will not be listened to. Where, however, one concurs in an election in ignorance of some fact making it invalid, and afterwards shows the objection, and that it has come to his knowledge since the election, he should be heard, consent, induced by error, not being binding in the eye of the law. These principles are applicable, if not to municipal, certainly to private, corporations.[44]

§ 46. Liability for Debts and Acts of Bank.—Unpaid Installments on Shares Purchased by the Bank.—See ante, "Purchase of Shares by Bank," § 39 (7cl). Stockholders of trust companies, see post, "Stockholders," § 313.

§ 47. —— Nature and Extent—§ 47 (1) In General.—The individual liability of holders of bank stock is wholly statutory,[45] and depends upon the law of the state creating it. The rule is that the relation of bank and depositor is that of debtor and creditor does not create a personal liability on the part of a stockholder.[46] The liability of stockholders of banking corporations is imposed for the benefit of creditors, and attaches by virtue of the statute to the owners of the stock.[47] The liability is upon the stockholders and not upon the stock;[48] it is not the loss of the stock but in addition thereto.[49] The liability extends only to the operations ordinarily incident to the banking business.[50]

44. Testing validity of election of officers.—Wiltz *v.* Peters, 4 La. Ann. 339.

45. Statutory.—Bromley *v.* Goodwin, 95 Ill. 118; Smathers *v.* Western Carolina Bank, 155 N. C. 283, 71 S. E. 345; Myers *v.* Knickerbocker Trust Co., 139 Fed. 111, 71 C. C. A. 199, 1 L. R. A., N. S., 1171; Brunswick Terminal Co. *v.* National Bank, 192 U. S. 386, 48 L. Ed. 491, 24 S. Ct. 314; Carrol *v.* Green, 92 U. S. 509, 23 L. Ed. 738.

46. Bromley *v.* Goodwin, 95 Ill. 118.

47. Smathers *v.* Western Carolina Bank, 155 N. C. 283, 71 S. E. 345.

48. Under Const., art. 12, § 11, providing that stockholders in banking corporations shall be liable for all contracts, debts, and engagements "accruing while they remain such stockholders," to the extent of the par value of their stock, the liability imposed is upon the stockholder, and not upon the stock; and, to entitle the receiver of an insolvent bank to recover an assessment made against a stockholder, he must allege and prove that the liabilities to pay which the assessment was made accrued while defendant was a stockholder. Shuey *v.* Holmes, 21 Wash. 223, 57 Pac. 818.

49. Const. 1868, art. 12, § 6, making stockholders of a bank liable to the amount of their stock for its debts, does not limit the liability to the loss of the stock, but makes it an addition thereto. Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

50. Under Const., art. 12, § 11, and 1 Hill's Code, § 1511, providing that each stockholder of any banking corporation shall be liable for its debts, to the amount of his stock therein, in addition to the amount invested in such shares, the liability of stockholders of a corporation organized to do banking and other business, and which fails, extends only to the obligations ordinarily incident to the banking business. Kiggins *v.* Munday, 19 Wash. 233, 52 Pac. 855.

§ 47 (1½) Stockholders' Agreements.—Where a stockholder of a state bank advances his own funds to pay the debts of the bank, in pursuance of an agreement of the stockholders that each should contribute in proportion to the number of shares of stock held by him, the advancing stockholder may maintain an action against the other stockholders for an accounting and contribution without having first exhausted the assets of the bank.[51]

Loan of Bonds to Bank.—A loaner of bonds to a bank upon an agreement of the stockholders to return the same can not maintain trover against the shareholders after the bonds had been sold and his title divested. All that was left to him was an action on his agreement.[52]

§ 47 (2) Charter and Statutory Provisions—§ 47 (2a) Special Charter Provisions.—Where there is no general law of the state declaring the individual liability of stockholders in banks, whether such liability exists and its extent depends upon the provisions of the charter in a given case.[53] And, as such provision in the charter is in derogation of the common law, it must not be extended beyond the words used.[54]

§ 47 (2b) Constitutional and Statutory Provisions—§ 47 (2ba) Constitutionality Generally.—A statute which attempts to establish a different liability from the one imposed by the constitution,[55] or to pro-

51. **Stockholders' agreements.**—Davidson *v.* Gretna State Bank, 59 Neb. 63, 80 N. W. 256.

52. **Loan of bonds to bank.**—Defendants, shareholders of a certain bank, became jointly and severally liable for the return of United States bonds to the value of $9,000 belonging to M. which he had loaned to the bank. The bank raised money on the bonds by depositing them as collateral security in another bank. Certain overdrafts of the bank being unpaid, the bank with which they were deposited sold the bonds, and placed the proceeds to the credit of the depositing bank. Held, that the depositing bank did not authorize the sale of the bonds, and hence there was no breach of trust or tortuous conversion by defendants, and the bonds having been sold, and the plaintiff's right thereto divested, he could not maintain an action of trover against the defendants as shareholders of the bank. Duffield *v.* Miller, 92 Pa. 286.

53. **Special charter provisions.**—Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626. No such law existed in Georgia prior to 1893.

The Act of 1838 (Code of 1882, § 1496) did not have the effect to impose upon the stockholders in a bank or other corporation a liability beyond the amount of the stock owned, but merely provided a method by which a stockholder who had transferred his stock might relieve himself of an existing individual liability imposed by the charter of the corporation. Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626.

Neither was such a liability imposed by the Act of 1892 (Act, 1892, p. 55), nor by the Act of 1894 (Civil Code, § 1888). These acts simply provide a different manner of discharge from liability from that prescribed in the Act of 1838. Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626.

54. Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626.

55. **Constitutionality.**—Laws 1887, p. 89, § 6, provides that "the shareholders of each association formed under this act shall be individually responsible equally and ratably, and not one for the other, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested for such shares," is in conflict with Const., art. 11, § 6, which provides that every stockholder in a banking corporation shall be individually responsible to its

vide a remedy whereby such liability can be enforced in violation of the constitution,[56] is void.

§ 47 (2bb) Applicability and Rules of Construction.—Where the constitutional provision is self-executing the statute must, if possible, be construed to make it accord therewith.[57]

Strict Construction.—Statutes imposing on stockholders in banking corporations, liability for the acts or debts of such corporations, being in derogation of the common law, should be strictly construed and can not be extended beyond the words used.[58]

Applicability.—Idaho Rev. Codes, § 2745, defining the liability of stockholders for corporate debts, does not apply to banking corporations; their organization, internal management, and supervision being controlled by chapter 13, art. 1, beginning at section 2968.[58a]

§ 47 (2bc) Retroactive Effect.—See post, "Retroactive Effect," § 47 (9a); "Retroactive Effect of Statutes," § 49 (1ab).

§ 47 (2bd) Exterritorial Operation.—Statutes imposing an individual liability upon holders of bank stock have no exterritorial operation.[59]

§ 47 (2be) Repeal.—The repeal of an act giving a right of action to enforce a bank stockholder's liability, imposed by a previous act, termi-

creditors over and above the amount of stock by him held, to an amount equal to his shares so held. Dupee *v.* Swigert, 127 Ill. 494, 21 N. E. 622.

56. Comp. St. 1895, c. 8, § 35, so far as it attempts to authorize actions by the receiver of an insolvent bank to recover unpaid stock subscriptions before the corporate debts have been judicially ascertained and the corporate property exhausted, is void, under Const., art. 11, § 4, making stockholders liable to the extent of their unpaid subscriptions only after the corporate debts have been ascertained and the corporate property exhausted. State *v.* German Sav. Bank, 50 Neb. 734, 70 N. W. 221.

57. Rules of construction.—Under Const., art. 18, § 3, providing that the stockholders of any banking corporation shall be individually liable for all debts thereof to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such stock, a stockholder of an insolvent South Dakota bank is individually liable to a creditor of the bank up to the par value of his shares, notwithstanding Civ. Code, § 864, providing that the shareholders of every banking association organized under the laws of South Dakota shall be individually responsible equally and ratably, and not one for the other, for all contracts, debts, and engagements of the association, since the constitutional provision is self-executing, and the statute must be construed to make it accord therewith. Union Nat. Bank *v.* Halley, 19 S. D. 474, 104 N. W. 213.

58. Strict construction.—Brunswick Terminal Co. *v.* National Bank, 192 U. S. 386, 48 L. Ed. 491; Carrol *v.* Green, 92 U. S. 509, 23 L. Ed. 738.

Statutes such as Pub. Laws 1897, p. 473, c. 298, imposing on stockholders in banks a double liability, are in derogation of the common law, and should be strictly construed. Smathers *v.* Western Carolina Bank, 135 N. C. 410, 47 S. E. 893.

58a. Applicability.—McTamany *v.* Day (Idaho), 128 Pac. 563.

59. Exterritorial operations.—Where an act of the legislature of another state, incorporating a bank therein, provides that, without any action against a stockholder thereof, his private property shall be bound by a judgment against the bank, and subject to execution on such judgment, it imposes no personal liability whatever on the stockholder which can be made the ground of an action against him in New York. Lowry *v.* Inman, 32 N. Y. Super. Ct. 117.

nates such right of action,[60] in the absence of a saving clause, but does not affect the enforcement of a prior final judgment.[61]

§ 47 (3) Contractual.—Bank stockholders' individual liability though statutory is contractual in its nature.[62] It is legal, and not equitable. It is based upon the contract of subscription, an implied term of that contract being the declaration of the statute that a certain contingent liability should follow the subscription.[63] A statute imposing individual liability upon holders of bank stock may make it one in tort.[64]

§ 47 (4) Primary and Secondary Liability.—By the weight of authority the individual liability of bank stockholders is not primary and total but proportional and secondary. This is the rule in the states of Arkansas,[65] Georgia,[66] New York,[67] and Washington;[68] but it is a primary liability in Illinois,[69] and South Carolina.[70]

60. Repeal.—Act March 18, 1839, gave a right of action to enforce the liability imposed by the Act of January 27, 1816, upon the stockholders of banks organized under such act, for the whole amount of the bills issued by the bank in violation of the act. Held, that the repeal of the act of March 18, 1839, terminated such right of action. Lawler *v.* Burt, 7 O. St. 340.

61. St. 1903, p. 73, c. 65, repealing the bank commission Act of 1878, as amended in 1887 and 1895, without a saving clause as to pending litigation, did not affect an action to enforce an assessment on bank corporate stock pursuant to a prior final judgment under the act decreeing the corporation insolvent, and directing the enforcement of stockholders' liability, under Civ. Code, § 331, and § 332, subd. 1, in liquidation. Union Sav. Bank *v.* Leiter, 145 Cal. 696, 79 Pac. 441.

62. Contractual.—Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301.

The liability of stockholders to creditors of a banking association under Acts Gen. Assem. Md. 1892, p. 156, c. 109, § 851, declaring that each stockholder shall be liable to depositors and creditors for double the amount of stock at par held by such stockholder, though statutory, was contractual in its nature; each stockholder voluntarily agreeing to incur the liability at the time he became such, which liability was not a corporate asset, but a debt due directly by the stockholder to creditors of the corporation who became such while the stockholder held its stock. Myers *v.* Knickerbocker Trust Co., 139 Fed. 111, 71 C. C. A. 199, 1 L. R. A., N. S., 1171.

63. Tompkins *v.* Craig, 93 Fed. 885.

64. Tort.—The liability imposed upon stockholders by § 11 of the Act of January 27, 1816, and the acts amendatory thereto, relating to unauthorized banking, passed January 27, 1816, was not a liability in contract, but one in tort. Lawler *v.* Burt, 7 O. St. 340, overruling Lawler *v.* Walker, 18 O. 151.

65. *Arkansas.*—Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896.

66. *Georgia.*—Lane *v.* Morris, 8 Ga. 468.

67. *New York.*—A bank stockholder's liability under Banking Law (Consol. Laws, c. 2), § 71, for his bank's debt, is secondary, and not primary; standing somewhat as a surety. Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. 798.

It was so held under N. Y. Banking Law, § 303. Mosler Safe Co. *v.* Guardian Trust Co., 138 N. Y. S. 298.

68. *Washington.*—Wilson *v.* Book, 13 Wash. 676, 43 Pac. 939.

69. *Illinois.*—Queenan *v.* Palmer, 117 Ill. 619, 7 N. E. 613.

Under a charter providing that "each stockholder shall be liable to double the amount of stock held or owned by him," a stockholder assumes a primary liability to creditors of the bank to an amount double his stock, and not a secondary liability. Fuller *v.* Ledden, 87 Ill. 310.

70. *South Carolina.*—Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673; contra, Smathers *v.* Western Carolina Bank, 135 N. C. 410, 47 S. E. 893.

§ 47 (5) Joint or Several.—The liability of the stockholders is not a joint one, like that of sureties, but it is a several liability of each stockholder, depending on the statutory contract arising from the ownership of the shares.[71]

§ 47 (6) As Principal or Surety.—Although a bank stockholder stands somewhat as a surety,[72] his individual liability is not that of sure-

71. Joint or several liability.—Carrol *v.* Green, 92 U. S. 509, 23 L. Ed. 738; Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944.

Kirby's Dig., § 4420, providing that joint obligations shall be construed as to have the same effect as joint and several obligations, and that recovery may be had thereon in like manner, and § 6010 providing that, when two or more persons are jointly bound by contract, an action thereon may be brought against any or all of them at the plaintiff's option, apply equally to all cases where there is a joint liability created by statute, and hence, under § 1990, providing that county treasurers may deposit funds in their custody in incorporated banks for safekeeping, and that said officers and their sureties and the bank and its stockholders shall be liable for all funds if such bank, upon demand, shall fail to pay the person entitled to receive the same, a joint liability was imposed upon a county treasurer and his bondsmen and the bank and its stockholders, and, such liability being several as well as joint, the proper party could sue any or all those that were liable at his election, especially as § 1990 fixes a primary liability for the funds deposited upon the bank and its stockholders and simply continues the liability of the county treasurer and his bondsmen therefor. Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896.

New York.—The liability under N. Y. Banking Law, § 303 is joint and several. Moslin Life Co. *v.* Guardian Trust Co., 138 N. Y. S. 298.

Tennessee.—The liability of the stockholder is not a joint one. "The stockholder stands liable for a definite sum to the company and no more. It is a severable, unequal and limited liability as to which each member stands liable to the company or corporation and through it to creditors. Hence, if he pays up his own liability to the company or is discharged therefrom, it terminates his liability as to stockholder, which can not be revived at the instance of other stockholders." Marr *v.* Bank, 72 Tenn. (4 Lea) 578.

Fact of failure.—Where a state bank charter contains a provision that, "in case of the failure of the said bank, each stockholder, copartnership, or body politic, having a share or shares in the said bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound individually for any sum not exceeding twice the amount of his, her, or their share or shares," the liability of each one of the stockholders, if liable at all, is his several liability. It is a liability depending upon the statutory contract. It depends on the fact of the failure of the bank, and on his holding shares in the bank when it failed, or within twelve months before its failure. His liability depends in every instance on facts peculiar to his own case; for, if the failure of the bank and the date of the failure may be common to all parties charged, it still remains that the ownership of shares, the number of shares, and the time when they were owned, are facts to be established against each man charged, and with which no other defendant has any connection; and in regard to which, if a prima facie case is made, each man may have a distinct defense depending on different testimony. Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944.

"The liability of the stockholder does not depend on forfeiture of the charter. It is a right given to the creditor of the bank against its stockholders whenever it fails. The duties of the bank to the state depend on other principles, and are within the subsequent control of the legislature. The right of the creditor is beyond its control altogether." Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944.

72. Principal or surety.—Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. 798.

The relation which stockholders sustain toward the banking company is that of sureties. Moultrie *v.* Smiley, 16 Ga. 289; Thornton *v.* Lane, 11 Ga. 459; Robinson *v.* Lane, 19 Ga. 337; Lane *v.* Morris, 8 Ga. 468; Belcher *v.* Willcox, 40 Ga. 391.

ties, equally bound for the same principal where even a discharge of one from liability to the common creditor would not release him from liability to his cosureties, who afterwards paid;[73] but is special and sub modo,[74] as of a partner within the limitations stated.[75]

§ 47 (7) Banks to Which Applicable—§ 47 (7a) What Constitutes a Bank.—In determining whether a corporation is a banking institution, within the meaning of the stockholders' liability laws, the court will look to the articles of incorporation, its declared objects, the character of the business transacted, and the construction which the officers place on its charter powers in the management of its affairs, if such construction was not unwarranted by the charter.[76] In order to constitute a corporation a banking institution so that stockholders in such a corporation shall be individually liable to its creditors for a certain amount, it is not necessary that the corporation exercise all the functions of banking corporations.[77]

§ 47 (7b) Specially Chartered Banks—§ 47 (7ba) In General.—Specially chartered banks as well as those organized under general law are within the stockholders' liability laws.[78]

§ 47 (7bb) Change of Name under General Law.—A bank by changing its name under a general statute substituted the stockholder's liability under it for that under the special charter.[79]

73. Marr *v.* Bank, 72 Tenn. (4 Lea) 578; Schalucky *v.* Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399.

74. Means Appeal, 85 Pa. (4 Norris) 75 followed Craig's Appeal, 92 Pa. 396.

75. As partners.—Under a bank charter that provides that, on default by the bank in the payment of any debt or liability, the stockholders shall be held individually responsible for an amount equal to the amount of stock held by them respectively, the stockholders are, in effect, partners, and are, within the limitation stated, liable as partners, and not as sureties, to the creditors of the bank. Schalucky *v.* Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399.

Under the general banking law (Rev. St., c. 71, § 18) the liability of bank stockholders, except in the statutory limitations as to its amount, is similar to that of copartners. Coleman *v.* White, 14 Wis. 700, 80 Am. Dec. 797.

76. What constitutes a bank.—Hamilton Nat. Bank *v.* American, etc., Trust Co., 66 Neb. 67, 92 N. W. 189.

77. A corporation filed articles providing that the general nature of its business would be to negotiate loans, purchase and sell notes, stocks, and bonds, borrow money, receive money on deposit, and execute trusts. It received money on deposit, paid it out on checks, and bought and sold commercial paper and exchange on other cities. Held, that it was a bank, so as to render its stockholders liable for its debts, under Const., art. 11b, § 7. Hamilton Nat. Bank *v.* American, etc., Trust Co., 66 Neb. 67, 92 N. W. 189.

78. Banks to which applicable.—A specially chartered bank, as well as one organized under the general law of 1838, is within the personal liability clause of the constitution of 1846, and of St. April 6, 1849. In re Reciprocity Bank, 22 N. Y. 9, reversing 29 Barb. 369, 17 How. Prac. 323.

79. Change of name under general law.—Where a person was the owner of stock in a banking corporation organized under special charter, which subsequently changed its name, pursuant to the Act of June 16, 1887, such person becomes relieved of any special stock liability imposed by the special charter of the corporation in which his stock was originally held, inasmuch as the provisions of such law of 1887 become substituted for such special charter. Boor *v.* Tolman, 113 Ill. App. 322.

§ 47 (7c) Banks of Issue Vel Non.—Where a state constitution prescribes the liability of stockholders in banks of issue, the legislature may extend such liability to other banks,[80] or impose other measures of liability upon them. Thus a general law reducing the liability of stockholders from a double to a single liability,[81] or a provision limiting the liability of stockholders to depositors, is constitutional.[82]

§ 47 (7d) Pre-Existing and Future Banks.—A banking law, imposing individual liability for debts of a bank upon the stockholders, is applicable to corporations theretofore organized, as well as to those thereafter to be formed;[83] where the legislature has reserved the right to

80. Banks of issue vel non.—The provision of Const., art. 9, § 13, subd. 3, making stockholders of banks of issue liable in double the amount of stock owned by them for the debts of the bank, does not restrict the power of the legislature to impose the same liability on stockholders of banks not of issue. Allen *v.* Walsh, 25 Minn. 543.

Gen. St. 1866, c. 33, § 21, which provides that the stockholders in each bank, formed pursuant to the provisions of that chapter, "shall be individually liable in an amount equal to double the amount of stock owned by them for all the debts of such bank," is not, since its amendment by Laws 1869, c. 85, confined to banks of issue, but applies to all banks organized under the provisions of that chapter. Allen *v.* Walsh, 25 Minn. 543.

New York.—Barnes *v.* Arnold, 23 Misc. Rep. 197, 51 N. Y. S. 1109.

81. Gen. Laws 1895, c. 145, being a general banking law, providing among other things for the reduction of the liability of stockholders from a double to a single liability, is not in violation of Const., art. 9, § 13, subsec. 3, providing that the banking law passed thereunder should apply only to banks issuing bank notes, whose stockholders should be individually liable in double the amount of stock owned by each of them for all the debts of such corporation or association, since Act 1895 (Gen. Laws 1895, c. 145), § 29, providing that the powers of existing banks shall be abridged or modified to meet the provisions of this act, will be deemed to have rendered banks doing business thereunder no longer banks of issue. Seymour *v.* Greve, 79 Minn. 211, 81 N. W. 1059.

82. Const., art. 15, § 3, making stockholders of every banking association issuing bank notes individually liable for "all debts," etc., to the extent of their stock, does not apply to the banking law, which is limited to banks not of issue; and hence the provision of the banking law limiting the liability of the stockholders to "depositors" is not unconstitutional. Foster *v.* Broas, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

83. Pre-existing and future banks.—Hirshfeld *v.* Bopp, 27 App. Div. 180, 50 N. Y. S. 676, reversed, Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839; In re Reciprocity Bank, 22 N. Y. 9, reversing 29 Barb. 360, 17 How. Prac. 323; Hagmayer *v.* Farley, 23 App. Div. 426, 48 N. Y. S. 336.

While § 52 of the banking law, imposing upon the stockholders individual liability for debts of a bank, created, in respect to certain classes of banks, a liability which did not exist before, yet it is not unconstitutional, being warranted, as to banks organized since 1846, by Const. 1846, and Const. 1894, art. 8, § 1, permitting the alteration of general and special acts of incorporation. Hirshfeld *v.* Bopp, 27 App. Div. 180, 50 N. Y. S. 676, reversed in Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839.

The constitutional provision (art. 8, § 7) declaring that all stockholders of banking corporations shall, after January 1, 1850, be individually responsible, applies to pre-existent as well as to future corporations. In re Reciprocity Bank, 29 Barb. 369, 17 How. Prac. 323, reversed in 22 N. Y. 9; In re Gibson, 21 N. Y. 9.

If a bank was, at a time when a given indebtedness came due, carrying on its business under Laws 1892, c. 689, its stockholders would be subject to the individual liability imposed by § 52, irrespective of the act under which it may have been originally in-

repeal or amend the charter,[84] it supersedes a charter provision for nonliability,[85] or operates as an amendment thereto which the stockholders are deemed to accept.[86] Both the bank and the stockholders are estopped

corporated. Hagmayer *v.* Farley, 23 App. Div. 426, 48 N. Y. S. 336.

Bank organized prior to law of New York of 1892.—Laws, 1882, c. 409, imposed upon stockholders of banks no personal liability for debts of a bank not issuing notes. Banking Law 1892, § 52, imposed a liability on stockholders of banks, whether incorporated before or in business after the passage of that act. This latter act repealed the Act of 1882. Statutory Construction Law, § 31, declares that the repeal of a statute shall not affect any act done or right accruing or acquired prior to the time when such repeal takes effect. Section 1 provides that the statutory construction law shall apply to every statute, unless its general object, or the context of the language construed, or other provisions of law, indicates that a different meaning or application was intended from that required to be given by this chapter. Held, that as the banking law of 1892 shows an intent to make the stockholders of every bank personally liable for its debts, whether they became such before or after that law took effect, the stockholders of a bank organized prior to the law of 1892 were not exempt from personal liability. Hagmayer *v.* Alten, 36 Misc. Rep. 59, 72 N. Y. S. 623.

84. Such a liability may be imposed, by a constitutional amendment and act to carry it into effect, upon the stockholders of banks organized previously under a general banking law which made the assumption of such liability optional with the banks, but reserved to the legislature the right to repeal any provision of it at any time. Sherman *v.* Smith (U. S.), 1 Black 587, 17 L. Ed. 163.

Defendants were stockholders in an insolvent bank organized under a general law of New York providing that stockholders should not be liable for debts of the bank unless by their own agreement, as provided in its charter, but reserving to the state the right to repeal or change the law. The charter of the bank provided for the nonliability of its stockholders, but by Act 1849, subsequently passed, stockholders of all banks continuing to issue notes within the state after a specified time were made individually liable for the debts of the bank to an amount equal to their stock. Held, that the Act of 1849 was constitutional, and binding on the bank of which defendants were stockholders, and that they were individually liable for its debts. Sherman *v.* Smith (U. S.), 1 Black 587, 17 L. Ed. 163.

The articles of association made by the stockholders at the time they organized themselves as a bank, were not a contract with the state, and there was no necessity or propriety in incorporating the law as to individual liability therein. Sherman *v.* Smith (U. S.), 1 Black 587, 17 L. Ed. 163.

The changes made by the constitution and subsequent act of the legislature were not the less constitutional and valid, as against this bank, because the stockholders, in their articles of association, had declared that they would not be individually bound for the debts of the concern. Sherman *v.* Smith (U. S.), 1 Black 587, 17 L. Ed. 163.

The saving clause in the constitution of the state of New York, which provided, that nothing contained in this constitution shall affect any grants or charters to bodies politic or corporate made by this state, or by persons acting under its authority, saved the charter of the bank in this case and all others organized under the general banking law, as well as all those created by special charters, but it saved each of them as a whole, as an entirety; the charters remained after the adoption of the constitution the same as before, with all their privileges and disabilities intact. This has no bearing on the present case. Sherman *v.* Smith (U. S.), 1 Black 587, 17 L. Ed. 163.

85. Where stockholders incorporated under the general banking law had, by their articles of association, agreed that they should not be individually liable for the debts of the corporation, but under the right of repeal reserved in the general law, both by the new constitution and by statute, it had been declared that, after a certain date, stockholders in such corporation, in case of the issuing of bank notes by them, should be personally liable, it was held that the provisions in the articles could not exonerate them from liability. In re Gibson, 21 N. Y. 9.

86. The stockholders of a bank created under the general banking law

from denying the acceptance thereof as against the claims of third persons by exercising privileges secured by it,[87] unless the statute provides that it shall apply only to banks chartered subsequent to its enactment.[88]

§ 47 (7e) Illegally or Irregularly Organized Banks.—Persons who carry on a banking business, in the name of a corporation, in violation of law, are not protected by the corporate privileges from personal liability for debts contracted by them in the transaction of such business.[89]

subsequent to the action of 1849, changing its provision so as to make a stockholder liable for its contracts, are deemed to have voluntarily assumed the provision of the amendatory act. United States Trust Co. *v.* United States Fire Ins. Co., 18 N. Y. 199, 8 App. Prac. 192.

Estoppel to deny liability by acceptance of charter.—Owen *v.* Purdy, 12 O. St. 73.

87. The fact that after the amendment of the original charter of a Banking Co. by Sp. Laws 1889, p. 543, c. 349, its stockholders allowed the corporation to continue in business and exercise the new powers provided in the amendment, and to make the contracts therein authorized, was sufficient evidence of their acceptance of the liability imposed on them by § 6, making them liable to the amount of their stock in addition to the amount invested therein. Flynn *v.* American, etc., Trust Co., 104 Me. 141, 69 Atl. 771.

The Act of 15th February, 1844, relating to the Bank of Wooster (2 Curwen, 1012), provides that upon the assent of each and all of the stockholders, by a written declaration, filed with the auditor of state, to the individual liability mentioned in the second section of the act, the bank shall enjoy all the rights originally granted, free from certain restrictive laws, which would otherwise apply. Held, that the act was to be regarded as an amendment to the charter of the Bank of Wooster, offered to the stockholders for their acceptance in a prescribed mode, and that, although this mode was not pursued, some of the stockholders not uniting in the written declaration, yet, if the bank proceeded to exercise the privileges secured by the amendment, neither it, nor such of its stockholders as were consenting thereto, could deny the acceptance of such amendment as against the claims of third persons. Owen *v.* Purdy, 12 O. St. 73.

Ohio Free Banking Act.—See Citizens' Bank *v.* Wright, 6 O. St. 318; Cowles *v.* Bartell, 2 O. Dec. 424.

Persons who carry on a banking business, in the name of such corporation, in violation of said § 44 of the Act of March 21, 1851, prohibiting the issue of notes to circulate as money, without having previously deposited certain securities with the state, were not protected by the corporate privileges from personal liability for debts contracted by them in the transaction of such unlawful business. Such liability did not attach to the stockholders of such corporation as partners, but to those only who engage in such business, and to those who authorize or sanction it. Medill *v.* Collier, 16 O. St. 599.

88. St. 1836, c. 233, entitled "Further to regulate banks and banking," does not render stockholders in a bank, who had become proprietors of their stock before the passage of that act, personally liable for the debts of the bank. Wheeler *v.* Frontier Bank, 23 Me. 308.

South Carolina.—Under Const. 1895, art. 9, § 16, providing that it shall apply only to charters under which organizations have not in good faith taken place at the adoption of the constitution, the liability of stockholders of a bank chartered prior to the adoption of that constitution is not governed thereby. Man *v.* Boykin, 79 S. C. 1, 60 S. E. 17, 128 Am. St. Rep. 830.

89. Persons carrying on unauthorized banking business.—Dickason *v.* Grafton Sav. Bank Co., 6 O. C. C., N. S., 329, 17-27 O. C. D. 357.

Though a creditor seeking to enforce the secondary liability of the stockholders of an insolvent bank may have brought his action against the individuals who actively assumed the exercise of corporate franchises without lawful authority, he also had the right to bring an action against the stockholders, as such, to enforce their subscription and liability, relying on the doctrine of estoppel. Dickason *v.* Grafton Sav. Bank Co., 6 O. C. C., N. S., 329, 17-27 O. C. C. 357.

Incorporation for other purposes than banking did not relieve the stockholders who engage in unauthorized banking from personal liability for the unauthorized circulation of such corporation. Stockholders, however, acting within the scope of the charter, and not participating in the unauthorized acts, were not liable.[90]

Where a bank is not legally created, those who were instrumental in bringing it into life—its stockholders and officers—are responsible for its issues. When such a state of things exist, the pretended corporators are regarded as partners, or joint stockholders, liable, individually, to fulfill what the corporate body would be compelled to do if it had a legal existence.[91]

Irregularities in organizing a corporation does not necessarily deprive the officers and stockholders of the protection of the charter, or subject them to private liability when sued as unauthorized bankers. Such organization, to protect them, had to be substantially in accordance with the charter.[92]

Fraud upon the charter of a corporation, and combination to defraud the public, prevents those participating in it from claiming any protection under its provisions to escape private responsibility as unauthorized bankers.[93]

§ 47 (7f) Reorganized Banks.—See post, "Requisites and Sufficiency of Subscription or Acquisition of Shares," § 47 (8bb).

§ 47 (7g) State Banks.—See post, "State," § 47 (8g).

90. Incorporation for purpose other than banking.—Kearny *v.* Buttles, 1 O. St. 362.

After the repeal of § 23 of the Act of 1824, to regulate judicial proceedings where banks and bankers are parties, the stockholders and officers of an unauthorized banking association were liable, in their individual capacity, for the bills and notes of such association issued and intended to pass as money, although issued prior to the repeal of said § 23. Johnson *v.* Bentley, 16 O. 97; Kearney *v.* Buttles, 1 O. St. 362.

The Act of the Ohio legislature of 1824, to regulate judicial proceedings where banks and bankers are parties, provided that no action should be brought upon any notes or bills hereafter issued by any bank, banker or bankers, and intended for circulation, or upon any note, bill, bond, or other security given and made payable to any such bank, banker or bankers, unless such bank, banker or bankers should be incorporated and authorized by the laws of this state to issue such bills and notes, but that all such notes, bills, bonds, and other securities, should be holden and taken in all courts as absolutely void. Johnson *v.* Bentley, 16 O. 97; Kearny *v.* Buttles, 1 O. St. 362.

This act prevented action only on notes and bills thereafter issued to circulate as money, and did not preclude an action on a certificate of deposit issued for money deposited in the bank, and not intended to circulate as money. Porter *v.* Porter, 14 O. 220; Porter *v.* Kepler, 14 O. 427.

So much of this act as declared that no action should be brought upon such bills or notes was repealed by the Act of March 23, 1840, to further amend the act of 1816. Johnson *v.* Bentley, 16 O. 97; Kearny *v.* Buttles, 1 O. St. 362. See Fulton *v.* Bates, 1 O. Dec. 59.

91. Bank not legally created.—Alexander *v.* Brown, 2 Disn. 395, 13 O. Dec. 241.

92. Irregularities in organization.—Bartholomew *v.* Bentley, 1 O. St. 37.

93. Fraud on charter.—Bartholomew *v.* Bentley, 1 O. St. 37.

§ 47 (7h) National Banks.—See post, "Liability of Stockholders for Debts of Bank," § 247.

§ 47 (8) Stockholders Who Are Liable—§ 47 (8a) Stockholders Defined.—The word "stockholders," applies not only to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock, although the stock appears on the books of the corporation in the name of another.[94]

§ 47 (8b) Subscribers and Stockholders of Record—§ 47 (8ba) General Rule.—Stockholders of record are liable under bank stockholders' personal liability laws. As a general rule, in all cases between the creditors of a bank and a person standing on the books of the bank as a shareholder, such person is estopped from denying that he is a shareholder; certainly where he held himself out to the creditors of the bank as owning it.[95]

§ 47 (8bb) Requisites and Sufficiency of Subscription or Acquisition of Shares.—Necessity for Formal Transfer.—One to whom a certificate of stock in a state bank is issued, and who receives dividends thereon for several years, can not escape the double liability imposed on stockholders by the Banking Act, on the ground that he was not an original subscriber to the stock, and that no formal transfer from such a subscriber to him appears on the bank books.[96]

Unauthorized Entry of Name on Stock Book.—An entry of the name of a person in the stock book of a bank as a shareholder, without proof of knowledge, assent, or confirmatory act on his part, is not sufficient to establish the relation and charge his estate after his death with a statutory liability as a stockholder.[97]

Issuance of Certificate to Shareholders.—The fact that a shareholder of bank has not received a certificate of stock for which he gave a note, which is unpaid, does not relieve him from individual liability for the bank's debts.[98]

94. **Stockholders defined.**—Joecken *v.* Cuyahoga Sav., etc., Co., 24 O. C. C. 605, construing Rev. Stats. of Ohio, § 3259, 2 Bates' Anno. Stats., § 3259; 2 Bates' Ann. Stat., § 3821-2; Act Jan. 27, 1816, and acts amendatory thereof; Porter *v.* Kepler, 14 O. 127; Porter *v.* Porter, 14 O. 220; Lawler *v.* Burt, 7 O. St. 340; Kearny *v.* Buttles, 1 O. St. 362; Bartholomew *v.* Bentley, 1 O. St. 37; Lawler *v.* Walker, 18 O. 151; Johnson *v.* Bentley, 16 O. 97; Alexander *v.* Brown, 2 Disn. 395, 13 O. Dec. 241.

95. **Subscribers and stockholders of record.**—Man *v.* Boykin, 79 S. C. 1, 60 S. E. 17, 127 Am. St. Rep. 830.

As against creditors of a bank, one can not allege that he was not the owner of stock therein, the certificate therefor standing in his name, and he being a director and vice president of the bank, and the certificate having been indorsed by him in his own name. O'Connor *v.* Witherly, 111 Cal. 523, 44 Pac. 227.

96. **Necessity for formal transfer.**—Bissell *v.* Heath, 98 Mich. 472, 57 N. W. 585, so holding as to the liability under the Michigan Banking Act 1887, § 46.

97. **Unauthorized entry of name on stockbook.**—Foote *v.* Anderson, 123 Fed. 659, 61 C. C. A. 5; O'Connor *v.* Witherby, 111 Cal. 523, 44 Pac. 227.

98. **Shareholder to whom no certificate issued.**—Robertson *v.* Conway, 110 C. C. A. 377, 188 Fed. 579.

Conditional Subscription or Signature.—A subscriber to the stock of a banking corporation can not defeat his personal liability to creditors by showing a conditional subscription or signature of the articles of association.[99]

Subscription or Purchase Induced by Fraud.—That a holder of bank stock was induced to become such by the fraud of officers or directors of the bank does not relieve him from individual responsibility for the bank's debts;[1] nor does the fact that he has brought suit to rescind his subscription on the ground of fraud have that effect.[2]

Stockholder under Illegal Contract.—That a holder of bank stock became such by an illegal contract does not relieve him from individual

99. Conditional signature or subscription.—Rev. St. 1898, § 2024, subsec. 47, provides that stockholders in every banking corporation organized under this act shall be individually responsible to the amount of their respective shares for all its indebtedness and liabilities of every kind. S., the promoter of a bank, secured the signature of W. R. and R. R. to the articles of incorporation, with the understanding that they were not to be liable unless the signature of M. R. should be secured, and his consent that the firm of R.'s Sons should take twenty-five shares. M. R. refused to sign the articles, and S., after being informed of such refusal, and without the knowledge of W. R. and R. R., filed the articles of incorporation with their signatures, and subsequently tendered twenty-five shares to the firm, which were refused. In all the reports of the bank to the state treasurer W. R. and R. R. were returned as stockholders. Held, that W. R. and R. R. became stockholders in the bank, and hence were individually liable under the statute, since it would be against public policy to allow them to impeach the record as against the intervening rights of creditors by showing the conditional signature of the articles. Rehbein *v.* Rahr, 109 Wis. 136, 85 N. W. 315.

Rev. St. 1898, § 2024, subsec. 18, provides that any number of persons may associate and become incorporated, and subsection 19 declares that such persons shall make a certificate stating the names of the shareholders and the amount subscribed by each, and subsection 47 imposes on stockholders an individual liability for the debts of the corporation to the amount of their shares. Held, that the fact that articles of incorporation for a bank were signed by W. R. and R. R., two of the three members of the firm of R.'s Sons, and that the stock was listed in the name of R.'s Sons, and that it was the intention of W. R. and R. R. to bind the firm, did not prevent the enforcement of the individual liability of W. R. and R. R., since as the statute required the articles to be signed by stockholders, and as W. R. and R. R. could not bind the firm, it will be presumed they intended to bind themselves, and the record can not be varied by parol evidence of an intention to bind the firm. Rehbein *v.* Rahr, 109 Wis. 136, 85 N. W. 315.

1. Subscription or purchase induced by fraud.—In re Empire City Bank (N. Y.), 6 Abb. Prac. 385.

A stockholder in a bank, who has received dividends for years, can not, after the bank has become insolvent and gone into a receiver's hands, repudiate his double liability to creditors imposed by Banking Act 1887, § 46, on the ground that he was induced to become a stockholder by the fraud of the officers of the bank. Bissell *v.* Heath, 98 Mich. 472, 57 N. W. 585.

Where a receiver of an insolvent bank is proceeding to enforce the individual liability of stockholders for the benefit of depositors, it is too late for one who has for four years allowed his name to appear as a stockholder to avoid liability because his subscription was obtained by fraud. Foster *v.* Broas, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

2. Under Ky. St., § 517 (Russell's St., § 2131), where a defendant retained his stock for two years, and until after the corporation became insolvent without objection, it is not a defense that he then brought a suit against the corporation to rescind his subscription on the ground of fraud. Robertson *v.* Conway, 110 C. C. A. 377, 188 Fed. 579.

liability for the bank's debts.[3]

Payment for Stock.—The individual liability of holders of bank stock exists without regard to the question whether or not the stock had been paid for in full to the bank.[4] The fact that a holder gave notes for the stock which are unpaid does not relieve him from such liability.[5]

Purchasers of Stock of Insolvent Bank.—As against creditors of a bank whose rights have become vested by its insolvency, purchasers of stock issued and transferred to them several months before, can not rescind the purchase because the issue was invalid where an examination of the bank's books would have disclosed that it was in fact insolvent when the stock was issued, and a large part of the corporate indebtedness has been since incurred.[6]

Holders of New Stock Issued upon Increase of Capital Stock.—Holders of new stock issued under an amendment to the articles of incorporation authorizing an increase of capital stock, but which was not properly filed and published, as to creditors who have become such on the faith of the issue thereof, are estopped to deny its validity, but as to those who became creditors prior to such issue of stock, there is no estoppel.[7] As against those who became creditors prior to an issue of such stock, the holders of the new stock, who received it from the bank in lieu of claims which they formerly held as creditors of the bank, are entitled to rescind and stand as creditors, not stockholders.[8]

Stockholders in Reorganized Bank.—Where, after insolvency of a bank, it was reorganized, and the new bank received all the property and effects of the old bank, and used them in its business, the stockholders thereof are subject to the stockholders' statutory liability.[9]

3. **Stockholder under illegal contract.**—A stockholder in an insolvent bank can not resist apportionment on the ground that he became such by an illegal contract. In re Empire City Bank (N. Y.), 6 Abb. Prac. 385.

4. **Payment for stock.**—Act April 10, 1873 (P. L. 674), incorporating the Miners' Bank of Summit Hill, which provides (§ 13) that "the stockholders of said bank shall be held individually responsible * * * for all contracts, debts, and engagements of said bank, to the extent of double the amount of the stock subscribed for or held by them," creates a liability in favor of creditors against the stockholders in twice the amount of stock held by them, respectively, without regard to the question whether or not the stock has been paid for in full to the corporation. Dreisbach *v.* Price, 133 Pa. St. 560, 19 Atl. 569.

5. Robertson *v.* Conway, 110 C. C. A. 377, 188 Fed. 579.

6. **Purchase of stock of insolvent bank.**—Olson *v.* State Bank, 67 Minn. 267, 69 N. W. 904.

7. **Subscribers for increased stock.**—Palmer *v.* Bank, 72 Minn. 266, 75 N. W. 380.

By reason of a failure to comply with certain formalities, creditors who had subscribed for new stock in payment of their debts became liable as stockholders only to those who became creditors subsequent to the attempted increase of stock. With the exception of this liability, they remained merely creditors of the bank. Held, that the amounts which the new stockholders, standing as creditors, could collect from the old stockholders on their double liability, should be applied, as far as necessary, in payment of the creditors to whom such new stockholders were liable. Palmer *v.* Bank, 72 Minn. 266, 75 N. W. 380.

8. Palmer *v.* Bank, 72 Minn. 266, 75 N. W. 380.

9. **Stockholders in reorganized bank.**—Willius *v.* Mann, 91 Minn. 494, 98 N.

The sole stockholder of a bank and possessor of its assets, if they equal a claim against it, is bound therefor.[10]

Persons Carrying on Unauthorized Banking Business and Stockholders in Illegal or Irregularly Organized Banks.—See ante, "Illegal or Irregularly Organized Banks," § 47 (7e).

§ 47 (8c) Agent or Broker.—An agent or broker buying for another to whom he delivers the stock is not subject to stockholders' personal liability.[11]

§ 47 (8d) Pledgee.—A pledgee of national bank stock is not a stockholder in such a sense as to be liable as a stockholder.[12] And a holder of state bank stock as collateral is not subject to the stockholder's personal liability under the New York banking law;[13] but in Maine persons appearing by the stock books and stock certificates to be the absolute owners of stock in a banking and trust company are subject to the statutory liability of stockholders, though they only hold the stock as security for debts due them by the real owners.[14]

§ 47 (8e) Representatives and Trustees.—Holders of state bank stock in a representative capacity are not subject to stockholder's personal liability.[15] The mere fact that on the stock books and stock certificates of a banking and trust company the word "trustee" appears after the name

W. 341, rehearing denied in 98 N. W. 867.

An insolvent bank was reorganized and its name changed, and each stockholder surrendered a specified number of shares for the purpose of aiding in restoring the impaired capital of the bank. Held, that a stockholder, by participating in the organization scheme, was estopped to deny its stockholder's liability. Hunt *v.* Hauser Malting Co., 95 Minn. 206, 103 N. W. 1032.

On insolvency of a bank, and claim of certain alleged stockholders in a reorganized bank that their liability on such stock was that of transferrers only, evidence held to fail to identify the stock of the appellants, for which they did not accept new certificates on reorganization of the bank, with the shares of stock issued to creditors in in payment of their deposits. Pope *v.* Germania Bank, 106 Minn. 446, 119 N. W. 61.

10. Sole stockholders of bank.—Robertson *v.* Conway, 5 La. Ann. 297.

11. Agent or broker.—Where a broker and member of the stock exchange holds stock indorsed in blank with instructions to sell for the best price obtainable, and offers it on the exchange and it is bid off by another broker and member, who pays for it with his own check, stating that he is buying for another, but not disclosing his principal's name, and then delivers the stock to his principal, the purchasing broker is not at any time the legal or equitable owner of such stock, nor subject to a stockholder's statutory liability thereon. Joecken *v.* Cuyahoga Sav., etc., Co., 24 O. C. C. 605.

12. Pledgee.—McConville *v.* Means, 21 Wkly. L. Bull. 193, 10 O. Dec. 452. See post, "Liability of Pledgees," § 248 (4).

13. Banking Law, 1892, § 52; Hagmayer *v.* Alten, 36 Misc. Rep. 59, 72 N. Y. S. 623.

14. Flynn *v.* American, etc., Trust Co., 104 Me. 141, 69 Atl. 771.

15. Representatives and trustees.—Pub. Laws N. C. 1893, c. 471, § 1; Smathers *v.* Western Carolina Bank, 155 N. C. 283, 71 S. E. 345; N. Y. Banking Laws, 1892, § 52; Hagmayer *v.* Alten, 36 Misc. Rep. 59, 72 N. Y. S. 623.

of the holder does not exempt him from the statutory liability of stockholders.[16]

§ 47 (8f) Beneficiaries of Stock Held in Trust.—The beneficiaries of bank stock held in trust by a trustee is subject to the stockholder's statutory liability.[17]

§ 47 (8g) State.—The state is not subject to stockholders' statutory liability.[18]

§ 47 (8h) Corporations and Other Banks.—A corporation purchasing bank stock in violation of its charter is not subject to stockholders' statutory liability.[19]

Bank Purchasing Stock in Other Banks.—A banking corporation authorized to "discount bills, notes, and other securities" has power to buy from a stockholder in another bank stock therein, and hence, having done so, is individually liable thereon as a stockholder.[20]

§ 47 (9) Creditors and Indebtedness Secured—§ 47 (9a) Retroactive Effect of Statutes.—General laws imposing or changing the statutory liability of stockholders of banks are not retroactive in effect as to nature and extent of the liability. Debts contracted prior to the enactment,[21] modification,[22] or repeal[23] of laws imposing stockholder's liability are not affected thereby.

16. Flynn *v.* American, etc., Trust Co., 104 Me. 141, 69 Atl. 771.

17. **Beneficiaries of stock held in trust.**—Pub. Laws, 1893, c. 471, § 1; Pub. Laws, 1897, c. 298; Smathers *v.* Western Carolina Bank, 155 N. C. 283, 71 S. E. 345.

18. **State a stockholder.**—Act Feb. 19, 1828, § 7, amending the charter of the Consolidated Association of the Planters of Louisiana, which makes the state a stockholder to the amount of $1,000,000 as a bonus, did not make it liable for contributions as ordinary stockholders were. Consolidated Bank *v.* State, 5 La. Ann. 44.

19. **Corporation purchasing bank stock.**—Where a corporation, in violation of Code of Laws 1902, § 1843, subd. "e," providing that no part of the capital stock of a corporation shall be used in banking operations or for any purpose inconsistent with its charter, purchased shares of stock in a bank, it is not liable to creditors of the bank, on its insolvency, on the stock subscribed and paid for by such corporation, on which it has collected dividends. White *v.* Commercial, etc., Bank, 66 S. C. 491, 97 Am. St. Rep. 803, 45 S. E. 94.

20. **Bank purchasing stock in other banks.**—Latimer *v.* Citizens' State Bank, 102 Iowa 162, 71 N. W. 225.

21. **Retroactive effect.**—Pub. Laws 1897, p. 473, c. 298, which imposes on bank stockholders an additional personal liability to the extent of the amount of their stock, and repeals all exemptions from personal liability contained in charters, should be construed to effect only a prospective charge in charters, and not so as to fix such liability on stockholders for debts contracted prior to the enactment of the statute, and, when so construed, is not constitutionally objectionable. Smathers *v.* Western Carolina Bank, 135 N. C. 410, 47 S. E. 893.

Section 55, c. 47, Laws 1897, which authorizes a receiver of an insolvent bank to institute actions for the en-

22. The Banking Act of 1895 (Gen. Laws 1895, c. 145), providing for a single instead of a double liability on the part of the stockholders of a bank to its creditors, does not reduce the liability of stockholders on any obligation created between the passage of such act and the time when, by its terms, it was to take effect. Seymour *v.* Greve, 79 Minn. 211, 81 N. W. 1059.

23. See ante, "Repeal," § 47 (2be).

Debts incurred after the enactment, etc., of a stockholder's liability law are within such laws.[24]

Renewal of Certificates of Deposit.—Where certificates of deposit are renewed after the passage of such act, the new certificates will be deemed to be new contracts.[25]

§ 47 (9b) Creditors Entitled to Enforce—§ 47 (9ba) General Creditors.—The general creditors of a bank have a right to resort to the statutory liability of stockholders to satisfy their demands.[26]

Creditors who made settlements after the bank was put into liquidation and received from the president in that settlement paper of the bank, or, as in some cases, the individual notes of the president himself, endorsed or guaranteed in the name of the bank, are not to be considered as creditors of the bank entitled to subject the stockholders to individual liability. The individual liability of the stockholders, as imposed by and expressed in the statute, is indeed for all the contracts, debts, and engagements of such association, but that must be restricted in its meaning to such contracts, debts, and engagements as have been duly contracted in the ordinary course of its business. That business ceased when the bank went into liquidation.[27]

forcement of the statutory liability of the stockholders of the bank for equal distribution among its creditors, and which suspends the creditor's right, previously given, to proceed for himself against the stockholder, for one year, to await the action of the receiver, can not be allowed to apply between those who were creditors and stockholders before the time of its taking effect. Woodworth *v.* Bowles, 61 Kan. 569, 60 Pac. 331.

24. Debts incurred after act took effect.—Gen. Laws, c. 37, § 52, provides that the stockholders of every banking corporation shall be individually responsible for all debts of such corporation, to the extent of the amount of their stock, at its par value, in addition to the amount invested in such shares. Held, that § 52 applies to stockholders of banks organized before that section took effect, as to debts incurred after that section took effect. Barnes *v.* Arnold, 23 Misc. Rep. 197, 51 N. Y. S. 1109.

25. Renewal of certificates of deposit.—Where certificates of deposit, issued before the passage of the Act of 1895 (Laws 1895, c. 145), providing for a single in place of a double liability for the stockholders of insolvent banks, are renewed after such passage, the old certificates being surrendered and new ones taken in their stead (in some cases a part of the principal being paid, and in other cases interest), the new certificates will be deemed, for the purpose of estimating the stockholders' liability, new and independent contracts. Seymour *v.* Greve, 79 Minn. 211, 81 N. W. 1059.

26. Creditors entitled to enforce.—Where the holders of notes guaranteed by a banking and trust company reassigned them to the company or its receiver, and proved their claims therefor against the company, and the receiver collected the notes, but, instead of paying the proceeds to the former holders, turned them into the general fund for creditors with the approval of the court, such holders are entitled to be regarded as general creditors with the same right to resort to the statutory liability of stockholders, notwithstanding that, if such proceeds had been paid to them, they would have been paid in full. Flynn *v.* American, etc., Trust Co., 104 Me. 141, 69 Atl. 771.

27. Creditors settling with bank after suspension.—Richmond *v.* Irons, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

Where the bank was in liquidation, and the officers were not authorized to enter into new contracts, the presumption is, in every case where the creditor accepted paper in settlement of his claim, that it was received in payment and operated as a satisfaction. If there was any other agree-

§ 47 (9bb) Bill Holder.—See post, "Liability of Stockholders or Officers," § 211.

§ 47 (9bc) Indorsers.—See post, "Debts Due or Owing from Stockholders," § 47 (9cb).

§ 47 (9c) Indebtedness Secured—§ 47 (9ca) When Payable.—Under the New York laws stockholders are not liable for any indebtedness not payable within two years after it was contracted,[28] but that law does not relieve stockholders from claims for deposits.[29]

Drafts drawn by a bank on other banks in payment of borrowed money become liabilities of the drawing bank as soon as they are protested.[30]

§ 47 (9cb) Debts Due or Owing from Stockholder.—Debts due or owing from stockholders to the bank are within the stockholders' statutory liability.[31]

ment by which that paper was received merely as collateral to the original debt and received as security and not in payment, it must be affirmatively shown. Richmond *v.* Irons, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

Such settlements can not be set aside, and the creditors, restored to the situation in which they were at the time of the suspension of the bank. The circumstances of the situation have greatly changed by the lapse of time. The creditors who entered into these settlements have no ground of complaint against the bank as a corporation or as against its stockholders; they were not misled to their hurt by any fraudulent misrepresentations or concealments of any matters of fact. Whatever mistake was made was their own, and it was a mistake consisting merely in a misapprehension of their legal rights. Richmond *v.* Irons, 121 U. S. 27, 30 L. Ed 864, 7 S. Ct. 788.

28. When payable.—Hagmayer *v.* Alten, 36 Misc. Rep. 59, 72 N. Y. S. 623; Barnes *v.* Arnold, 23 Misc. Rep. 197, 51 N. Y. S. 1109.

An agreement by one bank to liquidate another at most gave the liquidating bank right of action against the liquidated bank for any balance existing after application of the assets to the advances, defeating the stockholders' personal liability under Banking Law (Consol. Laws, c. 2), § 71, because the indebtedness was not payable within two years. Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. 798.

29. The stock corporation law (Laws 1890, c. 564, § 58) which applies to stockholders of an insolvent bank, declares that no stockholder shall be personally liable for a corporate debt not payable within two years from the time it is contracted, nor unless the corporation is sued for it within two years after it became due. Held, not to relieve stockholders of an insolvent bank from claims for deposits, since the deposits are due, within the statute, as they are legally enforceable at the option of the creditor within the statutory limit, and, conceding that they are not due unless demanded, the commencement of the action against the stockholders is equivalent to a formal demand. Barnes *v.* Trevor, 45 App. Div. 314, 61 N. Y. S. 85, affirmed. Barnes *v.* Arnold, 169 N. Y. 611, 62 N. E. 1093.

Gen. Laws, c. 36, § 55, provides that "no stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted." Held, that deposits in a bank, subject to check, become due when the bank suspends payment, whether the interest is paid on balance or not, and bringing suit against the receiver and the stockholders constitutes a demand. Barnes *v.* Arnold, 23 Misc. Rep. 197, 51 N. Y. S. 1109.

30. Drafts drawn by bank on other bank.—Barnes *v.* Arnold, 23 Misc. Rep. 197, 51 N. Y. S. 1109.

31. Debts due or owing from stockholders.—The charter of a bank provided that "the stock of each stockholder shall at all times be pledged and liable for the payment of any debt (other than an original installment) due or owing from said stockholder to the bank, and may be sold, or so many

§ 47 (9cc) Debts Incurred Prior to Purchase of Stock.—That stockholders purchased their stock at different times, some before and some after particular contracts, debts and engagements, on which the corporation defaulted, were entered into, is not a defense to this liability.[32]

§ 47 (9cd) Debts Contracted after Death of Stockholder.—The estate of a stockholder is liable for debts of the bank contracted after his death.[33]

§ 47 (9ce) Ultra Vires Undertakings—§ 47 (9cea) In General.—Banking laws making stockholders liable for a bank's obligations do not apply to ultra vires undertakings.[34]

§ 47 (9ceb) Establishment of Branch Bank.—Though the act of a state bank in establishing branch banks was ultra vires, the stockholders of the state bank who shared in the profits of the branch banks with knowledge of the relation can not escape liability to creditors, who, in good faith, dealt with the branch banks as a part of the state bank.[35]

§ 47 (9cec) Agreements for Liquidation.—See post, "Agreements for Liquidation of Bank," § 47 (9cfg).

§ 47 (9cf) Particular Obligations—§ 47 (9cfa) Bank Bills or Notes.—The stockholders in a bank are liable for the ultimate redemption of all the notes or bills issued by that bank.[36]

shares thereof as shall be necessary, at public auction, for such debt, on default of payment thereof." Held, that this provision was not adopted with the view to secure indorsers, though they might unquestionably be entitled to relief against any abuse of the power which it conferred. Cross *v.* Phenix Bank, 1 R. I. 39.

32. Debts incurred prior to purchase of stock.—It was so held under Sp. Laws 1889, p. 547, c. 349, § 6, in amendment of the original charter of the American Banking & Trust Company, making stockholders liable for all contracts, debts, and engagements of the corporation to the amount of their stock in addition to the amount invested therein. Flynn *v.* American, etc., Trust Co., 104 Me. 141, 69 Atl. 771.

33. Debts contracted after death of stockholder.—It was so held under Civ. Code of Cal., § 322, where a nonresident stockholder of a California bank died, and the bank afterwards contracts a debt. Lanigan *v.* North, 69 Ark. 62, 63 S. W. 62; Lanigan *v.* Gordon, 69 Ark. 659, 63 S. W. 1131.

34. Ultra vires undertakings.—It was so held as to Banking Laws (Consol. Laws, c. 2), § 71, of N. Y.; Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. 798.

35. Establishment of branch banks.—A state bank established branch banks without capital except as furnished by the state bank. Notes taken by the branch banks were made payable to the state bank, and all moneys deposited there were used by the state bank as its own. From the profits of the state bank and the branch banks dividends were declared. Such course of business continued for about eight years. Each depositor and borrower in the branch banks knew the relation to the state bank. The stockholders of the state bank who shared in the profits of the branch banks with knowledge of the relations were held to be liable to creditors who, in good faith, dealt with the branch banks as a part of the state bank. Kipp *v.* Miller, 47 Colo. 598, 108 Pac. 164.

36. Bank bills or notes.—Thornton *v.* Lane, 11 Ga. 459; Robinson *v.* Lane, 19 Ga. 337; Robison *v.* Beall, 26 Ga. 17; Adkins *v.* Thornton, 19 Ga. 325. See post, "Liability of Stockholders or Officers," § 211.

§ 47 (9cfb) Deposits.—Deposits are debts of a bank ordinarily protected by statutes imposing individual liability on the stockholders, but every deposit of money that might be made in the bank is not embraced by a statute imposing such liability as to all funds deposited "as savings and in trust."[37] The time when the deposits were actually made is immaterial.[38] The issuance of a certificate of deposit by one bank to another to cover overdrafts is not a deposit.[39]

Amount Unpaid.—The delivery by a bank to a depositor of drafts, in exchange for checks on his deposit, where such drafts are not paid on presentation does not constitute a pro tanto payment of such deposit and reduction of the amount for which the stockholders are liable.[40] In determining whether deposits made in a bank before the date when a stockholders' liability law took effect are still unpaid, payments by the bank will be applied first to the earliest items of indebtedness.[41]

§ 47 (9cfc) Judgments against Bank.—A judgment against the bank is a debt within the stockholder's statutory liability.[42]

§ 47 (9cfd) Fees and Costs of Creditor's Suit.—While, as between the creditors, in an action against an insolvent bank by one of its creditors on behalf of himself and the other creditors, for distribution of its assets, the fees for plaintiff's counsel are properly first paid from the fund realized for creditors, such fees are not to be considered part of the bank's debt, or to be deducted from its assets, in determining the amount of the bank's debts remaining for which its stockholders are liable.[43]

37. The provision of Act Feb. 21, 1861, chartering the Marine Company of Chicago, that the stockholders shall, as to all funds deposited "as savings, and in trust with said corporation," while they are stockholders, be individually liable to the extent of their stock, held not to embrace every deposit of money that might be made in the bank. Bromley *v.* Goodwin, 95 Ill. 118.

38. Foster *v.* Row, 120 Mich. 1, 79 N. W. 696. See ante, "When payable," § 47 (9ca).

39. A bank gave its certificate of deposit to another bank, and in consideration therefor was allowed to draw on the payee bank for the same amount. It drew in excess of this sum, and gave another certificate of deposit for the excess. Held, that the certificates were not entitled to a dividend of moneys collected by the receiver of the former bank from its stockholders, the transaction resulting in their issuance not being a deposit, within 3 How. Ann. St., § 3208e5, making bank stockholders liable to depositors to the amount of their stock. State Sav. Bank *v.* Foster, 118 Mich. 268, 76 N. W. 499, 4 Detroit Leg. N. 499, 42 L. R. A. 404.

40. Amount unpaid.—A depositor paid his bank checks on his deposit for drafts on Chicago. His bank book was then balanced, showing the amount of his deposit after deducting the checks. Two days later the bank failed, and, the drafts not being paid, and returned to the depositor, he subsequently surrendered them to the bank, and it credited their amount of his account in his pass book. Held, in an action to enforce a stockholders' liability, that the delivery of the drafts did not constitute payment pro tanto of his deposit, and that the depositor's claim at the time of the failure was the amount of the original deposit. Dingley *v.* McDonald, 124 Cal. 90, 56 Pac. 790.

41. Barnes *v.* Arnold, 23 Misc. Rep. 197, 51 N. Y. S. 1109.

42. Judgments against bank.—Lowry *v.* Parsons, 52 Ga. 356; Thornton *v.* Lane, 11 Ga. 459.

43. Fees and costs.—Buist *v.* Williams, 81 S. C. 495, 62 S. E. 859.

§ 47 (9cfe) Costs of Receivership.—The expenses of a receivership including the fees of the receiver's attorney are considered part of the bank's debt, in determining the debts for which its stockholders are liable.[44] Creditors are entitled to recover receiver's fees, in addition to their debts and statutory costs and disbursements, not exceeding the amount of the stockholders' statutory liability.[45]

§ 47 (9cff) Loss Occasioned by Receiver.—Where, in proceedings against a defaulting banking and trust company for sequestration and administration of its assets, loss of assets results from misconduct of the receiver, the loss must be borne by the stockholders, and not the creditors.[46]

§ 47 (9cfg) Agreements for Liquidation of Bank.—A law making stockholders liable for a bank's contract, etc., to the amount of their stock, does not make them liable on an agreement for liquidation of the bank. And a stockholder sought to be held liable on such contract is not estopped, by accepting payment of his deposits in the bank under it, to show that it was ultra vires.[47]

§ 47 (10) When Liability Arises and Conditions Precedent—§ 47 (10a) When Liability Arises—§ 47 (10aa) In General.—The time when the liability of a stockholder of an insolvent bank for the debt of the bank arises or becomes fixed depends upon the language of the statute creating such liability. This liability may be fixed when default in payment is made,[48] when specie payment is suspended,[49] when the bank suspends business,[50] or it may be incident to a compulsory assignment

44. Costs of receivership.—Buist *v.* Williams, 81 S. C. 495, 62 S. E. 859.

45. Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

46. Loss occasioned by receiver.—Flynn *v.* American, etc., Trust Co., 104 Me. 141, 69 Atl. 771.

47. Agreement for liquidation of bank.—It was so held under Banking Laws, of N. Y. (Consol. Laws, c. 2), § 71; Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. 798.

48. When liability arises—Default in payment.—Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896.

49. Suspension of specie payment.—A suspension and failure to pay specie on demand to bill holders, generally, is sufficient to enable the bill holder to sue. He need not prove a special demand in his case. Lane *v.* Morris, 8 Ga. 468.

Where a bank charter provides "that in case of the failure of said bank, each stockholder shall be liable and held bound, individually, for any sum not exceeding twice the amount of his share," suspension of specie payments by the bank constitutes a failure within the meaning of such provision, and the liability of a stockholder in such a case is that of simple contract, and not a statutory liability. Terry *v.* Calnan, 13 S. C. 220.

50. Suspension of business.—When an involuntary suspension of a banking corporation is caused by the bank commissioner taking possession of the bank, such corporation has suspended business, within the meaning of Gen. St. 1889, § 1200, which provides that a corporation shall be deemed to be dissolved for the purpose of enabling the creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it is shown that such corporation has suspended business for more than one year. Crocker *v.* Ball, 10 Kan. App. 364, 59 Pac. 691.

A bank suspends business, within the meaning of Gen. St. Kan. 1889, pars. 1200, 1204, providing for an action against the stockholders of a corporation where it shall have suspended business for more than one

only.[51] In some jurisdictions this liability only arises when the ratable share of the deficiency has been ascertained and liquidated,[52] and in others where the assets of the bank have been exhausted.[53]

Notes Issued before Capital Paid in.—If the charter require a certain amount of the capital stock to be paid in before notes can be issued, but the directors nevertheless proceed to issue notes, if the bank fail or become insolvent, the creditors of the bank may proceed at once against the stockholders and directors.[54]

§ 47 (10ab) Bank Bills and Notes.—See post, "Liability of Stockholders or Officers," § 211.

§ 47 (10ac) Public Funds.—Under a statute providing that the stockholders of a bank shall be liable for the public funds therein deposited, when the bank shall fail to make payment upon demand, fixes the time when such liability arises as the time when default in payment is made, so that the liability thereunder is against only those who are stockholders at the time of such default.[55]

§ 47 (10b) Demand of Payment and Protest.—A creditor of an insolvent bank need not, before suing a stockholder on his statutory liability, demand payment of his claim against the bank.[56]

Suit as a Demand.—A suit by a depositor whose deposit is subject to check against the receiver constitutes a demand.[57]

year, where it suspends payment, although a receiver is appointed, who afterwards pays dividends to creditors. Stebbins *v.* Scott, 172 Mass. 356, 52 N. E. 535.

51. Compulsory assignment.—A charter provided for forfeiture upon certain contingencies, in which case the directors should make an assignment. Section 15 provided that the stockholders should be liable to the creditors of the bank, the liability to be enforced as follows: In case the bank shall violate any act so as to forfeit its charter, and is compelled to make an assignment, the assignees are to make an appraisement of assets and a list of debts, and the stockholders shall be liable to make good any deficiency in such assets, in proportion to the amounts of stock held by them. Held, that the individual liability of the stockholders is incident to a compulsory assignment only. Gunkle's Appeal, 48 Pa. (12 Wright) 13.

52. When ratable share of deficiency ascertained.—Richards *v.* Gill, 138 App. Div. 75, 122 N. Y. Supp. 620. See post, "Creditor's Suit and Receivership," § 49 (1ca).

53. Means' Appeal, 85 Pa. (4 Norris) 75; Craig's Appeal, 92 Pa. 396.

54. Bank bills.—Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

55. Public funds.—Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896, so holding under Kirby's Dig., § 1990.

56. Demand upon bank and protest.—Parker *v.* Adams, 38 Misc. Rep. 325, 77 N. Y. S. 861. See ante, "When Payable," § 47 (9ca).

Certificates of deposit.—Where a bank charter makes its stockholders individually liable on its default, the owner of a certificate of deposit may sue a stockholder without first making demand upon the bank, where the bank fails and closes. Hodgson *v.* Cheever, 8 Mo. App. 318.

Presentation of certificates of deposit payable on return of certificates and demand is dispensed with by the failure of the bank, and the bringing of an action against the receiver of the bank and its stockholders is sufficient demand. Barnes *v.* Arnold, 23 Misc. Rep. 197, 51 N. Y. S. 1109.

57. Suit as constituting demand.—Barnes *v.* Arnold, 23 Misc. Rep. 197, 51 N. Y. S. 1109.

§ 47 (10c) Proceedings against Bank and Receivership—§ 47 (10ca) Necessity and Sufficiency Generally.—Bank stockholders' statutory liability can not be enforced by the corporate creditors independent of any action against the bank.[58] But the bank may waive conditions as to the time which must elapse after demand and refusal before applying for a distribution of the assets by a receiver.[59]

§ 47 (10cb) Filing Claim with Receiver.—While claims against an insolvent bank should be filed with the receiver in the original suit, it is no defense to an action to enforce a stockholder's personal liability that the claim sued on was not filed.[60]

§ 47 (10cc) Judicial Determination of Insolvency.—Many of the statutes require the fact of insolvency to be judicially determined before the statutory liability of bank stockholders can be enforced.[61] Stockholders of a bank are concluded by a judgment in an action in which the bank was a party, by which a receiver was appointed and the court, having found that the assets of the bank had all been disposed of and the proceeds paid out and applied in pursuance of the order of court, that there had been claims adjudicated against the bank, and that the bank was wholly insolvent and had no property, authorized the receiver to bring suits against its stockholders.[62]

58. Proceedings against bank and receivership.—Under Const., art. 12, § 11, providing that stockholders "of any banking * * * corporations * * * shall be individually and personally liable * * * for all contracts, debts or engagement of such corporations accruing while they remain stockholders, to the extent of the amount of their stock, * * * in addition to the amount invested in such shares," a stockholder's liability is secondary, and can not be enforced by the corporate creditors, independent of any action against the corporation. Wilson *v.* Book, 13 Wash. 676, 43 Pac. 939.

59. Under a statute providing for the enforcement by a creditor of the individual liability of stockholders of a bank, by issuing execution, and showing that it can not be satisfied out of the bank's property, or waiting 10 days after demand and refusal, and then applying for distribution of the assets by a receiver, and the apportionment of the unpaid debts among the stockholders, the bank may waive such conditions; so that where a creditor commenced suit, served an order to show cause, made it returnable, and obtained the appointment of a receiver on the same day, the bank's counsel appearing and not objecting, the proceeding is valid. Ex parte Bowery Bank (N. Y.), 16 How. Prac. 56, 5 Abb. Prac. 415.

60. Filing claim with receiver.—Where the court in which the settlement of the affairs of an insolvent bank was pending permitted a creditor to establish his claim in a separate suit, and, after the claimant's judgment was reported to the court, it appointed a special receiver to enforce the stockholders' liability to pay the same, it was no defense to a suit against a stockholder that the claim should have been filed with the receiver in the original suit. Covell *v.* Fowler, 144 Fed. 535.

61. Judicial determination.—Before a bill can be maintained against the stockholders of a bank under the provisions of Rev. St. 1841, c. 77, it must be judicially determined that there has been a loss occasioned in the capital stock, and that the directors are unable to make good the loss. Hewett *v.* Adams, 50 Me. 271.

By the express provisions of Rev. St. c. 47, the court must decide that the assets are insufficient to pay the claims against the bank, before the receivers can file a bill in equity against the stockholders. Hewett *v.* Adams, 54 Me. 206.

62. Francis *v.* Hazlett, 192 Mass. 137, 78 N. E. 405, 116 Am. St. Rep. 230.

§ 47 (10cd) Judicial Ascertainment of Indebtedness and Exhaustion of Assets—§ 47 (10cda) In General.—In a number of the states the indebtedness proposed to be enforced against bank stockholders must be judicially ascertained before suit can be maintained against an individual stockholder.[63] This rule applies to a suit in Wyoming by a creditor of a nonresident Utah bank against a stockholder resident in the former state.[64]

§ 47 (10cdb) Exhaustion of Assets.—It is necessary that the assets of the bank be extinguished or converted into cash and applied to the debts of the bank before the stockholder's statutory liability can be enforced under the laws of Minnesota,[65] Nebraska,[66] and Pennsylvania;[67] but the receiver need not wait until such assets are exhausted before enforcing the stockholder's statutory liability under the statutes of Iowa,[68]

63. Judicial ascertainment of indebtedness and exhaustion of assets.—Farmers' Loan, etc., Co. *v.* Funk, 49 Neb. 353, 68 N. W. 520; Hastings *v.* Barnd, 55 Neb. 93, 75 N. W. 49; Hamilton Nat. Bank *v.* American Loan, etc., Co., 66 Neb. 67, 92 N. W. 189.

Nebraska.—The requirement of Const., art. 11, § 4, that before the individual liability of stockholders can be enforced the indebtedness of the corporation must be judicially ascertained, applies to § 7, fixing the liability of stockholders in a bank for the bank's indebtedness. German Nat. Bank *v.* Farmers,' etc., Bank, 54 Neb. 593, 74 N. W. 1086; Hastings *v.* Barnd, 55 Neb. 93, 75 N. W. 49; Hamilton Nat. Bank *v.* American Loan, etc., Co., 66 Neb. 67, 92 N. W. 189.

Utah.—Under Comp. Laws Utah, § 2513, providing that shareholders in banks shall be individually responsible "ratably, and not one for another," for the debts of the bank to the extent of their stock therein, an accounting in equity must be had to establish the aggregate of the deficit which the statutory liability of the shareholders is to cover, before action can be brought against the stockholders. McLaughlin *v.* O'Neill, 7 Wyo. 187, 51 Pac. 243.

64. A suit can not be maintained in Wyoming under the statutes of Utah fixing the liability of stockholders in banking corporations, by a creditor of such a corporation, against a resident stockholder, before it is judicially determined what the amount of the deficit is which the statutory liability of stockholders is required to cover. McLaughlin *v.* O'Neill, 7 Wyo. 187, 51 Pac. 243.

Where, on insolvency of a bank of Utah, a creditors' suit was brought, wherein all the stockholders of the corporation were made parties, and a special receiver was appointed, but there had been no accounting, or determination of the debts and assets of the corporation, and no ascertainment of the amount required by the stockholders, a suit will not lie, in another state, brought by the identical creditor suing in Utah, against a stockholder, to recover for the same liability. McLaughlin *v.* O'Neill, 7 Wyo. 187, 51 Pac. 243.

65. Exhaustion of assets.—*Minnesota.*—Willius *v.* Mann, 91 Minn. 494, 98 N. W. 341, rehearing denied in 98 N. W. 867.

66. *Nebraska.*—Const., art. 11, § 4, relating to miscellaneous corporations, and providing that before the enforcement of individual liability of stockholders the assets of the corporation must be first extinguished, applies to the liability of stockholders of banking corporations or institutions as fixed by § 7. Farmers' Loan, etc., Co. *v.* Funk, 49 Neb. 353, 68 N. W. 520; Hastings *v.* Barnd, 55 Neb. 93, 75 N. W. 49; Hamilton Nat. Bank *v.* American, etc., Trust Co., 66 Neb. 67, 92 N. W. 189.

67. *Pennsylvania.*—Before resorting to the liability of the stockholders, the assets of the bank must be exhausted. Means' Appeal, 85 Pa. (4 Norris) 75.

68. *Iowa.*—Acts 18th Gen. Assem. c. 208, § 1, makes each stockholder of a banking corporation individually liable to the creditors over and above the stock held by him, to an amount equal to his shares, and provides that, should the bank become insolvent, and its assets prove insufficient, the stockhold-

Michigan,[69] North Carolina[70] and Wisconsin.[71]

§ 47 (10cdc) In New York.—Formerly, under the New York law, all the convertible assets in the hands of the receiver must be actually converted, and go into the first dividend before resorting to the personal liability of the stockholders,[72] but, under the present law, where the assets of an insolvent bank are insufficient to pay its debts, suit may be commenced for the enforcement of the stockholders' liability before the amount of the deficiency has been definitely ascertained by the conversion of the assets into cash.[73]

§ 47 (10ce) Judgment against Bank, Execution and Return.—Where the stockholders of a bank are secondarily liable for its debts, re-

ers may be compelled to pay such deficiency in proportion to the amount of stock held by each, not to exceed the extent of the additional liability. Held, that it is not necessary for the receiver to first exhaust all the assets before enforcing the stockholders' liability. State *v.* Union Stock Yards, etc., Bank, 103 Iowa 549, 70 N. W. 752; S. C., 72 N. W. 1076.

69. *Michigan.*—The receiver of an insolvent bank need not wait until the assets are exhausted before enforcing the liability of the stockholders. Foster *v.* Broas, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

70. *North Carolina.*—The double statutory liability imposed on stockholders in banks by Pub. Laws 1897, p. 473, c. 298, may be enforced by the receiver whenever it appears that the other assets of the bank will be insufficient, and he need not wait until other assets are completely exhausted. Smathers *v.* Western Carolina Bank, 135 N. C. 410, 47 S. E. 893.

71. *Wisconsin.*—The liability of a stockholder in a bank for the corporate debts, under Rev. St. 1858, c. 71, becomes fixed at the date of the judgment by which it is ascertained that the assets of the bank have been exhausted, and that the deficiency exceeds the amount of his stock. Cleveland *v.* Burnham, 64 Wis. 347, 25 N. W. 407

Laws 1852, c. 479, § 47, provides that the stockholders of a state banking corporation shall be individually responsible to the amount of their stock for its indebtedness. Rev. St. 1878, §§ 3223, 3224, provide that, when a creditor of a corporation seeks to charge the stockholders on account of any liability created by law, he may bring an action therefor, and may at his election join the corporation; that the court shall, when necessary, cause an account to be taken of the property and debts due to and from such corporation, and appoint a receiver; but if, on the filing of the answer or taking of the account, it appear that the corporation is insolvent, and has no property to satisfy such creditor, the court may proceed without appointing a receiver to ascertain the respective liabilities of such stockholders, and enforce the same by its judgment as in other cases. Held, that it is not necessary that the assets of the corporation be fully exhausted before the creditors proceed to judgment against stockholders, but it is sufficient if the liability of the stockholders will ultimately have to be exhausted in order to fully pay the debts. Booth *v.* Dear, 96 Wis. 516, 71 N. W. 816.

72. *New York.*—In re Reciprocity Bank, 22 N. Y. 9, reversing 29 Barb. 369, 17 How. Prac. 323.

73. Persons *v.* Gardner, 42 App. Div. 490, 56 N. Y. S. 822, 59 N. Y. S. 463.

A suit in equity may be maintained by the creditors of an insolvent bank against the stockholders, to enforce their statutory liability, without waiting until the receiver has converted and applied all the assets, or alleging that a deficit will remain after all the assets are applied to the payment of debts. Barnes *v.* Arnold, 23 Misc. Rep. 197, 51 N. Y. S. 1109.

A creditor's action may be maintained to collect the individual liability of stockholders of an insolvent bank, under Laws 1892, c. 689, before the receivers have finally wound up the bank's affairs, where it is shown that the deficiency will exceed the amount for which the stockholders are liable. Mahoney *v.* Bernhardt, 27 Misc. Rep. 339, 58 N. Y. S. 748; Mahoney *v.* Bernard, 45 App. Div. 199, 63 N. Y. S. 642 affirmed in 169 N. Y. 589, 62 N. E. 1097.

covery of a judgment against the bank and an execution thereon returned unsatisfied, are conditions precedent to a suit against holders of bank stock to enforce their statutory liability,[74] unless the plaintiff aver and show that no judgment could have been obtained.[75] The insolvency of a bank, the appointment of a receiver, judgment of dissolution and forfeiture, and the issuance of an injunction restraining its creditors from bringing any action against it, dispense with the above statutory conditions precedent to bringing suit against the stockholder.[76]

Where the statutory liability is primary, such return is not necessary in any event.[77]

In Action by Receiver.—A receiver of an insolvent bank need not procure executions against himself and a return of nulla bona on all claims against the bank before commencing actions to enforce stockholders' liability.[78]

Suit by Superintendent of Banks.—These conditions precedent do not apply to a suit by the superintendent of banks to enforce stockholders' statutory liability.[79]

§ 47 (10d) Dissolution of Corporation.—Dissolution of the corporation is made a condition precedent to the enforcement of bank stockholders' statutory liability by the statute of Missouri.[80]

74. Judgment against bank, execution and return.—Lane *v.* Harris, 16 Ga. 217; Barnes *v.* Arnold, 23 Misc. Rep. 197, 51 N. Y. S. 1109; Blake *v.* Hinkle, 18 Tenn. (10 Yerg.) 218.

Under Stock Corporation Law, Laws 1892, p. 1841, c. 688, § 55, providing that no action shall be brought against a stockholder for a corporate debt until judgment has been obtained against the corporation and execution returned unsatisfied, and Banking Law, Laws 1892, p. 1913, c. 689, § 162, making stockholders personally liable for debts of the corporation, no action can be maintained against a stockholder in a bank on a debt by the bank until judgment has been obtained against it. Gause *v.* Boldt, 49 Misc. Rep. 340, 99 N. Y. S. 422; S. C., 100 N. Y. S. 1117.

Bank bills and notes.—See post, "Necessity for Insolvency," § 211 (2b).

75. Blake *v.* Hinkle, 18 Tenn. (10 Yerg.) 218.

76. Barnes *v.* Arnold, 23 Misc. Rep. 197, 51 N. Y. S. 1109, so holding under N. Y. Gen. Laws, c. 36, § 55.

77. Liability primary.—Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

Under Act Dec. 24, 1885 (19 St. at Large, p. 212), § 4, making stockholders of a bank liable to the amount of five per cent of their stock in addition thereto for its debts, a return of execution nulla bona is not a condition precedent to a suit to enforce the liability, where the bank is insolvent, since execution would be a useless proceeding. Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

78. Action by receiver.—Brinkworth *v.* Hazlett, 64 Neb. 592, 90 N. W. 537.

79. Suit by superintendent of banks.—Stock Corp. Law (Consol. Laws 1909, c. 59) § 59, requiring judgments against a corporation and the return of an execution unsatisfied as a condition precedent to an action to enforce individual liability of stockholders, does not apply to a suit by the superintendent of banks under Banking Law (Consol. Laws 1909, c. 2) § 19, to enforce stockholder's individual liability to pay debts of the bank prior to dissolution; there being no authority in the superintendent to sue for and recover judgment on claims of creditors, or authority to issue execution thereon, as contemplated by section 59. Cheney *v.* Scharmann, 145 App. Div. 456, 129 N. Y. Supp. 993.

80. Dissolution of corporation.—The fact that a banking corporation had ceased to receive deposits, and had not been able to resume business, and did not intend to do so, is not sufficient to show that it was dissolved,

§ 47 (10e) Exhaustion of Other Remedies.—Where the statutory liability of stockholders is secondary creditors should exhaust their remedies against the bank or persons primarily liable for their debts,[81] and against culpable officers and sureties before resorting to such stockholders' liability,[82] aliter where the shareholders' liability is primary.[83]

Construction of Order of Court.—Order of the court that all remedies must be exhausted against stockholders primarily liable for the debts of an insolvent bank before its reorganization, before any action to collect an assessment against stockholders secondarily liable, is not to be construed as requiring the exhaustion of all remedies against stockholders primarily liable in favor of whom limitations had run.[84]

§ 47 (10f) Order of Court Directing Receiver to Enforce.—The liability of stockholders of a banking institution to its creditors is not an asset of the corporation, collectible by the officers of the corporation, or a receiver in their stead, but is wholly distinct therefrom, and a receiver can enforce such liability only at the instance of the creditors, and by direction of the court after the creditors' claims have been ascertained and the assets exhausted,[85] but in Minnesota the receiver of an insolvent bank need not obtain an order of court to maintain proceedings to enforce the individual liability of stockholders.[86]

Construction of Order as to Exhaustion of Other Remedies.—See ante, "Exhaustion of Other Remedies," 47 (10e).

§ 47 (11) Facts Relieving from Liability or Defenses—§ 47 (11a) Illegality or Irregularities in Organization—§ 47 (11aa) In General.—In a proceeding to enforce the secondary liability of the

within Rev. St., § 745, giving creditors of a dissolved corporation the right to sue the stockholders. Donnelly *v.* Hodgson, 14 Mo. App. 548. See, also, Daugherty *v.* Poundstone, 120 Mo. App. 300, 96 S. W. 728.

81. **Exhaustion of other remedies.**—Where, after insolvency of a bank it was reorganized, and the new bank received all the property and effects of the old bank, and used them in its business, the stockholders thereof are primarily liable for all the debts of the old bank, and all remedies against them should be exhausted, before resorting to stockholders of the old bank who did not become members of the new concern, and who are secondarily liable only. Willius *v.* Mann, 91 Minn. 494, 98 N. W. 341, rehearing denied 98 N. W. 867.

82. The trustees of a dissolved banking corporation can not maintain a suit against a stockholder to recover a dividend, which should have been applied to a judgment obtained against the trustees by a depositor for the amount of a deposit paid by the disbursing officers on unauthorized checks, until they have exhausted their remedy against the culpable officers and their sureties. Daugherty *v.* Poundstone, 120 Mo. App. 300, 96 S. W. 728. See 6 Cent. Dig. Banks, §§ 69, 70.

83. The liability of stockholders was to "make good all losses to depositors or others." This created a primary liability against a stockholder, and it was not necessary for the depositors first to exhaust their remedy against the corporation. Queenan *v.* Palmer, 117 Ill. 619, 7 N. E. 613.

84. **Construction of order of court.**—Pope *v.* Germania Bank, 106 Minn. 146, 119 N. W. 61.

85. **Order of court directing receiver to enforce.**—It was so held under Neb. Const., art. 11b, § 7; Hamilton Nat. Bank *v.* American, etc., Trust Co., 66 Neb. 67, 92 N. W. 189.

86. It was so held under Minn. Laws, 1895, c. 145, § 20. Ueland *v.* Haugan, 70 Minn. 349, 73 N. W. 169.

stockholders of an insolvent bank as may be deemed necessary to pay the debts incurred by its acting board of directors, mere irregularities in the organization of the bank can not be set up as a defense.[87]

§ 47 (11ab) Denial of Corporate Existence.—A holder of bank stock is estopped to deny the corporate existence of the bank in an action to enforce his individual liability for the debts of the bank.[88]

§ 47 (11b) Invalidity and Irregularity in Issue of Stock.—Invalidity of the issue of shares of stock is no defense to an action to enforce the individual liability of holders of bank stock;[89] and ex. gr. mere irregularities in the issue of bank stock will not relieve the stockholder from his individual liability to creditors.[90]

§ 47 (11c) Irregularities in Methods of Business.—Irregularities in a bank's method of doing business can not be set up as a defense to a suit to enforce the secondary liability of its shareholders for its debts.[91]

87. **Irregularities in organization.**—Dickason *v.* Grafton Sav. Bank Co., 6 O. C. C., N. S., 329, 17-27 O. C. D. 357.

Signature to resolution changing name not properly authenticated.—In an action against a stockholder in a reorganized bank on his liability on its subsequent insolvency, an objection that at a meeting of the stockholders for the purpose of organizing, where a resolution to change the name of the bank was adopted, the signature attached to such resolution was not properly authenticated, was immaterial. Hunt *v.* Hauser Malting Co., 95 Minn. 206, 103 N. W. 1032.

Directors not legally elected.—In a suit to enforce the secondary liability of stockholders of an insolvent bank, that there was no legally elected board of directors because of failure to comply with Rev. St., § 3798, can not be set up as a defense Dickason *v.* Grafton Sav. Bank Co., 6 O. C. C., N. S., 329, 17-27 O. C. D. 357.

A subscriber for such stock by the act of subscribing is estopped from setting up such irregularities as defenses to an action brought by creditors of the corporation for the collection of unpaid subscriptions to its stock. Dickason *v.* Grafton Sav. Bank Co., 6 O. C. C., N. S., 329, 17-27 O. C. D. 357.

88. **Denial of corporate existence.**—Lehman *v.* Warner, 61 Ala. 455; Palmer *v.* Lawrence, 5 N. Y. Super. Ct., 161; Dickason *v.* Grafton Sav. Bank Co., 6 O. C. C., N. S., 329, 17-27 O. C. D. 357. And, see Voorhees *v.* Bank, 19 O. 463.

Where the charter of a bank makes the stock a fund pledged for the security of depositors, a subscriber who has paid a portion of his subscription, and acquiesced in the bank's carrying on business, is estopped to withdraw his assent, to the prejudice of other depositors, or deny the corporate existence of the bank. Lehman *v.* Warner, 61 Ala. 455.

89. **Invalidity of issue.**—Palmer *v.* Lawrence, 5 N. Y. Super. Ct. 161.

90. **Irregularities in issue.**—Man *v.* Boykin, 79 S. C. 1, 60 S. E. 17, 128 Am. St. Rep. 830.

Certificate not filed with security of state.—A bank authorized by law to increase its capital stock did so, a large part of the increased stock was purchased by the original corporators, and dividends were paid on it. The certificates of stock showed the capital of the bank to be the original capital plus the increase, and for about ten years the bank held itself out as having a capital of that amount. Held, that the stockholders are estopped to deny their liability on the ground that no certificate was filed with the secretary of state. Man *v.* Boykin, 79 S. C. 1, 60 S. E. 17, 128 Am. St. Rep. 830.

91. **Irregularities in methods of business.**—Dickason *v.* Grafton Sav. Bank Co., 6 O. C. C., N. S., 329, 17-27 O. C. D. 357. See, also, Voorhees *v.* Bank, 19 O. 463.

§ 47 (11d) Insolvency of Other Stockholders.—The solvency or insolvency of other stockholders does not affect the liability of any particular holder of bank stock.[92]

§ 47 (11e) Payment, Satisfaction and Discharge—§ 47 (11ea) Payment by Stockholder and Agreements in Respect Thereto—§ 47 (11eaa) Payment to Other Creditors—§ 47 (11eaaa) Payment before Suit.—The individual liability of a holder of bank stock is extinguished by payment of the actual amount of liability to another creditor before suit.[93]

§ 47 (11eaab) Payment after Suit Commenced.—A stockholder can not, after any one depositor has commenced suit against him on his liability, defeat said suit by paying other depositors than the plaintiff, even though he pay to the full amount of his liability. Such payment, after notice of suit, is in fraud of the plaintiff's claim, and contrary to the policy of the act creating the liability, and if allowed would practically defeat the object of the legislature in imposing the obligation.[94]

§ 47 (11eaac) Payment in Other Suits.—Stockholders of an insolvent bank who have been compelled to pay in suits by depositors, where sued in subsequent actions by depositors in which other stockholders are joined, are entitled to have such prior payments considered in adjusting their liability as against the other defendants.[95]

§ 47 (11eab) Redemption of Bank's Bills and Notes by Stockholder.—See post, "Liability of Stockholders or Officers," § 211.

§ 47 (11eac) Agreements Providing Funds to Cover Bank's Liabilities.—An agreement between an insolvent bank and its stockhold-

92. **Insolvency of other stockholders.**—Each stockholder in an insolvent banking corporation under Act 1849, c. 226, making him responsible "equally and ratably" to the extent of his shares of the stock for the debts of the corporation, is subject to a liability determined by the statute without reference to the solvency of any other stockholder. In re Hollister Bank, 27 N. Y. 393, 84 Am. Dec. 292; Hollister v. Hollister Bank, 41 N. Y. (2 Keyes) 245, 2 Abb. Dec. 367.

93. **Payment to other creditors before suit instituted.**—In a suit against a stockholder of a savings bank by a depositor on his individual liability for the ultimate redemption of the deposits in proportion to the amount of stock held by him in the bank, the stockholder may defend the suit by showing that, previously to the commencement of the suit he has discharged his obligation by paying to other depositors than the plaintiff an amount equal to the full proportion his stock bears to the whole amount due the depositor. Jones v. Wiltberger, 42 Ga. 575; Marr v. Bank, 72 Tenn. (4 Leg.) 578.

Proof of payment by stockholder.—In a suit by a depositor against a stockholder, the production of the original evidence of deposit, or the certificate of the assignee of the bank of the indebtedness, with the oath of the assignee that the stockholder has surrendered to him such evidence of deposit, with the receipts thereon, to the stockholder, of the owners thereof, is evidence to go to the jury to prove the payment of the same by the stockholder. Jones v. Wiltberger, 42 Ga. 575.

94. **Payment after suit commenced.**—Jones v. Wiltberger, 42 Ga. 575.

95. **Payment in other suits.**—Wood v. Wood, 40 Ill. App. 182.

ers, binding them to give their notes to it to the amount of their holdings of stock, to be collected in case there is a shortage of assets to cover liabilities, and providing that payment thereon should pro tanto discharge the payor's statutory liability, is not void for want of consideration, since payments thereunder constitute a trust fund in the hands of the bank, in which creditors can not participate except by releasing pro tanto their rights against the stockholders under the statute.[96]

§ 47 (11ead) Dividends Paid from Bank's Assets.—A stockholder of an insolvent state bank is not relieved from his proportionate individual liability, to the extent of the amount of his stock at the par value thereof, to a depositor for interest on unpaid balances from the time of the closing of the bank down to the time of the payment of the last dividend, because of a payment made to the depositor, by various dividends of the full amount due at the time of its closing, for the deposit and contractual interest thereon.[97]

§ 47 (11eb) Prior Recovery or Payment of Judgment.—A prior recovery by the creditor bringing the suit or by another of the amount of the statutory liability of a holder of bank stock is a bar to any further recovery against him.[98]

Discharge of Judgment by Payment of Less Sum.—Where judgments have been recovered against a stockholder to the amount of his liability, and the judgments discharged by the stockholder by the payment of a sum less than the amount of the judgments, he will be regarded as having discharged his liability only to the amount which he actually paid.[99]

§ 47 (11ec) Confession of Judgment in Favor of Another Creditor.—The individual liability of a holder of bank stock is not extinguished by confession of judgment in amount of his liability in favor of another creditor after suit commenced.[1]

96. **Agreements providing funds to cover bank's liabilities.**—Thompson *v.* Gross, 106 Wis. 34, 81 N. W. 1061.

The reorganization of an insolvent bank, and the mutual agreement between its stockholders to effect that result by increasing its capital stock and canceling part of its liabilities by allowing creditors to subscribe for stock in satisfaction of their claims, is a sufficient consideration for an agreement binding the stockholders to give their notes to the bank, to be collected in case there is a deficiency of assets to cover the remaining liabilities. Thompson *v.* Gross, 106 Wis. 34, 81 N. W. 1061.

97. **Dividends paid from bank's assets.**—Parker *v.* Adams, 38 Misc. Rep. 325, 77 N. Y. S. 861.

98. **Prior recovery from stockholder.**—Lane *v.* Harris, 16 Ga. 217.

99. **Discharge of judgment by payment of less sum.**—Kunkelman *v.* Rentchler, 15 Ill. App. 271.

1. **Confession of judgment in favor of another creditor.**—Where A, a stockholder in an insolvent bank, became liable in the sum of $1,200, under a double liability law, to the creditors of the bank, and was sued for that amount by B, an admitted creditor, and A, a few days thereafter, and before judgment could be had in the ordinary course, agreed with C that, if the latter would buy up claims against the bank to the amount of his liability, he would confess judgment in his favor, and C accordingly bought up claims to that amount at a large dis-

§ 47 (11ed) Subsequent Proceedings by Another to Enforce Same Liability.—An action by a creditor of a bank against a stockholder of the corporation, brought under an act permitting such action where any company formed under the act concerning corporations has dissolved leaving debts unpaid, is not barred by the subsequent filing of a motion by a judgment creditor of the bank to enforce the same stockholder's liability.[2]

§ 47 (11ee) Former Judgment against the Bank.—A proceeding to enforce the personal liability of stockholders of an insolvent bank for the balance of its debts after its assets have been exhausted, is not barred by a previous judgment recovered in an action by a stockholder, directing its assets to be so applied, and appointing a receiver to carry out the judgment.[3]

§ 47 (11f) Bill Holders Entitled to Priority as to Suing Creditors.—That bill holders of a bank are entitled to priority of payment is not a defense to a suit brought by a general creditor to enforce a stockholder's individual liability.[4]

§ 47 (11g) Release by Bank—§ 47 (11ga) In General.—The individual liability imposed on stockholders by bank laws is an obligation to the corporation in trust for the security of its creditors; and while unpaid subscriptions on stock should be first resorted to, before enforcing the double liability, which is a secondary one, such liability can not, as against creditors or other stockholders, be released by the corporation, and in case of its insolvency it may be enforced by the receiver of the corporation for the benefit of creditors.[5]

§ 47 (11gb) Resolution of Board of Directors.—Directors can not set up a secret agreement with the bank that they should not incur any liability by reason of the issuance of stock to them, but should hold it for the benefit of the corporation.[6]

count from a stockholder in said bank, and A confessed judgment in his favor for the full amount of the claims, and paid the same, held, that such judgment and satisfaction could not be pleaded in bar to the suit brought by B. Manville *v.* Karst, 16 Fed. 644, 5 McCrary 142.

2. **Subsequent proceeding by another to enforce same liability.**—Bittner *v.* Hardy, 12 Mo. App. 566, an action brought under Rev. Stats., § 745.

3. **Former judgment against bank.**—It was so held as to a proceeding under N. Y. Laws, 1849, p. 343, where a stockholder had recovered a judgment under 2 Rev. Stats., p. 463, §§ 39-40; Diven *v.* Duncan (N. Y.), 41 Barb. 520.

4. **Bill holders entitled to priority as to suing creditor.**—Where, in a general law, under which a bank was organized, it was provided that the bill holders of the bank should be entitled to a priority of payment, it was held that that fact alone could not avail an individual stockholder, made individually liable for the debts of the bank, in a suit against him by the holder of a draft issued by the bank. Paine *v.* Stewart, 33 Conn. 516.

5. **Release by bank.**—Smathers *v.* Western Carolina Bank, 135 N. C. 440, 47 S. E. 893.

6. **Resolution of board of directors.**—Barto *v.* Nix, 15 Wash. 563, 46 Pac 1033.

§ 47 (11h) Assignment of Sufficient Assets for Payment.—The fact that under an assignment for the benefit of creditors assets sufficient to pay the creditors were turned over by the bank to the assignee, chosen and selected by itself, and over whom it had, by law, coördinate control with the creditors; does not relieve a stockholder from responsibility under an individual liability clause in the bank's charter.[7]

§ 47 (11i) Reorganization of Bank.—The reorganization of an insolvent bank does not discharge the stockholders who did not become members of the new bank from their statutory liability.[8]

§ 47 (11j) Dissolution, Expiration and Forfeiture of Charter.—Where there is no provision in the charter of a bank to the contrary the individual liability of the stockholders thereof expires with the expiration of the charter.[9] But where such provision exists, such liability survives the dissolution of the bank, and is not extinguished by the judicial forfeiture of the charter.[10]

§ 47 (11k) Discharge in Bankruptcy.—The liability of a holder of bank stock being a fixed, definite sum, is provable before a bankrupt court,

7. **Assignment of sufficient assets for payment.**—Robinson *v.* Lane, 19 Ga. 337.

8. **Reorganization of bank.**—A bank became insolvent and made a general assignment, and subsequently was reorganized under Gen. Laws 1897, p. 109, c. 89. The capital stock was reduced, and the amount thereof subscribed, and the property and assets were turned over to the officers of the new bank, who issued certificates of deposit to creditors for the amounts due them. Certain stockholders in the old bank did not become stockholders in the new. The bank again became insolvent, and a receiver was appointed, who, on an order of the court, assessed all the stockholders in both the old and the new bank 100 per cent of the amount of their holdings. Held, that the issuance by the reorganized bank of new certificates of deposit to the creditors for the amounts due them was not a payment of their claims, so as to discharge the stockholders who did not become members of the new bank from their statutory liability. Willius *v.* Mann, 91 Minn. 494, 98 N. W. 341. Rehearing denied 98 N. W. 867.

9. **Dissolution, expiration and forfeiture of charter.**—Robison *v.* Beall, 26 Ga. 17.

Since all debts incurred by a corporation are extinguished on its dissolution, in the absence of a statute to the contrary, the liability of the stockholders in the Planters' & Mechanics' Bank of Columbus expired with its charter. Robison *v.* Beall, 26 Ga. 17.

Rev. St. c. 36, § 30, provides that, if any loss or deficiency of the capital stock in any bank shall arise from the official mismanagement of the directors, the stockholders at the time of such mismanagement shall, in their individual capacity, be liable to pay the same. Held, that after the insolvency of a bank, and the forfeiture of its charter, creditors could not maintain an action against stockholders to recover their claims, as the statute was only intended to protect against a deficiency in the capital stock and insolvency during the existence of the bank, and not to provide a remedy for creditors after insolvency and forfeiture. Baker *v.* Atlas Bank (Mass.), 9 Metc. 182.

10. **When stockholders' liability not affected by dissolution.**—Thornton *v.* Lane, 11 Ga. 459; Robinson *v.* Lane, 19 Ga. 337; Hargroves *v.* Chambers, 30 Ga. 580, are cases in which it was held that the liability of the stockholder to a bill-holder for the ultimate redemption of the notes of the bank, is not extinguished by the dissolution of the bank.

and a discharge in bankruptcy will release such stockholders from liability.[11]

§ 47 (11l) Possession of Unreported Assets by Receiver.—It is no defense in an action by the receiver of an insolvent bank to enforce stockholders' liability that the receiver was in possession of unreported assets.[12]

§ 47 (11m) Waiver and Estoppel.—Formal Waiver by Depositor.—A waiver of stockholder's liability, classed as one of the by-laws of a banking corporation and printed with them in each depositor's book, and followed by a formal agreement to be signed, is of no effect unless actually signed by the depositor.[13]

By State a Co-Corporator.—A state which is a corporator of a bank can not disregard its obligation, diminish the fund provided for the protection of the other corporations and then claim a forfeiture by its co-corporators resulting in part from its wrongful act.[14]

§ 47 (12) Measure or Amount of Liability—§ 47 (12a) In General.—The measure or amount of bank stockholders' individual liability is that provided by the statute which creates it.[15] It is often an additional amount equal to the par value of the stock owned by the shareholder.[16] The statutory liability may be greater than the amount of stock

11. Discharge in bankruptcy.—Marr *v.* Bank, 72 Tenn. (4 Lea) 578.

12. Possession of unreported assets by receiver.—Brinkworth *v.* Hazlett, 64 Neb. 592, 90 N. W. 537.

13. Formal waiver by depositor.—Wells *v.* Black, 117 Cal. 157, 48 Pac. 1090, 37 L. R. A. 619, 59 Am. St. Rep. 162.

14. By state, a co-corporator.—The state, by appropriating $200,000 of the capital stock of the bank established by Act 1838, c. 107, to the improvement of certain rivers, after its subscription to the stock of several internal improvement companies, diminished the fund appropriated by the act of 1838 to the payment of interest upon state bonds, and released the individual stockholders from all liability to contribute to the payment of deficient interest. State *v.* Central Turnpike Co., 29 Tenn. (10 Humph.) 388.

15. Measure or amount of liability.—Terry *v.* Little, 101 U. S. 216, 25 L. Ed. 864.

Under Gen. St. 1889, par. 1204, a stockholder of a banking corporation, which has been dissolved having debts unpaid, is primarily liable, in an action against him, in the amount provided by statute. Sterne *v.* Atherton, 7 Kan. App. 20, 51 Pac. 791.

Ohio.—Where the insolvent corporation is a bank organized under the laws of Ohio, an allegation that a defendant stockholder is not liable for anything beyond the subscription price of his stock, does not state a good defense. Umsteatter *v.* Newark Sav. Bank Co., 4 N. P., N. S., 150, 17 O. D. N. P. 30.

16. The subscribers to the stock of the Citizens' Bank of Louisiana, in subscribing, not only subjected their property to mortgage, but incurred personal responsibility to the amount of the stock. Succession of Thomson, 46 La. Ann. 1074, 15 So. 379.

The stockholders of a bank organized under the state law, which is not a bank of issue or circulation, are liable under Const., art. 10, § 3, providing that each stockholder in any corporation shall be liable to the amount of stock held or owned by him for the debts of the corporation. Northwestern Trust Co. *v.* Bradbury, 112 Minn. 76, 127 N. W. 386.

The liability of a stockholder is not limited to the amount of capital stock which he has agreed to pay in, but extends to an amount equal to the stock held by him additional thereto. United States Trust Co. *v.* United

owned by the shareholder.[17] Some statutes fix the stockholder's liability at an amount not greater than double the amount of stock or an amount equal to their subscriptions.[18]

§ 47 (12b) Ratable Shares.—The liability of a stockholder may be for a ratable share of the deficiency to be ascertained by the following proportion: as the capital stock is to the deficiency, so is each stockholder's share to his part of the indebtedness.[19]

The value of the stock is to be estimated according to the valuation placed upon it by the charter.[20]

States Fire Ins. Co., 18 N. Y. 199, 8 Abb. Prac. 192.

In New York, the liability of a stockholder of an insolvent bank for the debts of the bank does not exceed the amount of his stock. Richards *v.* Gill, 138 App. Div. 75, 122 N. Y. S. 620.

17. Const. 1868, art. 12, § 6, provides that the general assembly shall grant no banking charter, except on condition that the stockholders shall be liable to the amount of their stock for the bank's debts; § 4 provides that dues from corporations shall be secured by such individual liability and other means as may be prescribed by law; and § 5 provides that all laws passed pursuant to it shall provide for fixing the personal liability of stockholders under proper limitations, etc. Held, that § 6 does not prohibit the legislature from imposing a greater liability than the amount of stock, since the provision is not self-executing. Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

18. Fuller *v.* Ledden, 87 Ill. 310; Smathers *v.* Western Carolina Bank, 135 N. C. 410, 47 S. E. 893; Means' Appeal, 85 Pa. (4 Norris) 75; Craig's Appeal, 92 Pa. 396.

"His liability is not limited to the par value of his stock, neither is he bound absolutely for the payment of the full amount of that. He must pay a sum which shall bear the same proportion to the whole indebtedness that his stock bears to the whole capital, and is not required to pay more." Pollard *v.* Bailey (U. S.), 20 Wall. 520, 22 L. Ed. 376.

Under 1 Mills' Ann. St., § 533, providing that stockholders in banks shall be individually responsible for debts in double the amount of the par value of the stock owned by them, the maximum liability to which such stockholders are liable to creditors, is double the amount of the par value of their stock without interest. Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642.

19. Ratable share.—Chatham Bank *v.* Brobston, 99 Ga. 801, 27 S. E. 790; Richards *v.* Gill, 138 App. Div. 75, 122 N. Y. S. 620.

The liability of stockholders being no more than a ratable share of the debts of the bank, proportional to the amount of their stock, an auditor of an account of the bank's assignee can not compel an advance contribution from them by disallowing their claims against said estate. Craig's Appeal, 92 Pa. 396.

Circulating bills.—The aggregate body of stockholders are liable, for all the bills issued by the bank; and the liability of each stockholder is ascertained and fixed by the following proportion: as the whole capital stock is to the entire outstanding circulation, so is each stockholder's share to his part to be redeemed. Robinson *v.* Lane, 19 Ga. 337; Adkins *v.* Thornton, 19 Ga. 325; Branch *v.* Baker, 53 Ga. 502.

The stockholders of the bank of Columbus are declared by the charter to be personally, individually and severally bound for the payment of the bills of the bank, to the creditors holding bills unpaid, in the proportion that the stock subscribed for by each bears to the whole stock of said bank. Under this provision of the charter the stockholders are sureties for the payment of the bills of the bank liable to be sued separately, but they are not partners with the bank, and the law governing in case of partnership is not applicable. Belcher *v.* Willcox, 40 Ga. 391.

20. Valuation of stock.—Lane *v.* Morris, 10 Ga. 162; Thornton *v.* Lane, 11 Ga. 459; Hargroves *v.* Chambers, 30 Ga. 580.

§ 47 (12c) Contingencies Which Enlarge Liability.—Failure to Keep Banking and Other Accounts Separate.—Where stockholders of a corporation doing banking and other business become liable for the obligations incident to banking, the failure to keep the banking and other accounts separate can not enlarge the liability of the stockholders.[21]

§ 47 (12d) Facts and Contingencies Reducing Liability—§ 47 (12da) Payment of Premium for Stock.—A holder of bank stock is not entitled to any reduction of his statutory liability because he paid a premium for the stock.[22]

§ 47 (12db) Reduction of Capital Stock.—An authorized reduction of the capital stock of a bank will exonerate the stockholders from individual liability beyond the reduced stock;[23] aliter as to a reduction without the consent of the legislature.[24]

§ 47 (12dc) Application of Collateral Security.—As affecting a stockholder's liability on the bank's note, the creditor had no right to apply collateral securing the note to the bank's general indebtedness.[25]

§ 47 (12e) Interest.—Liability on Debts of Bank.—As the liability of the shareholder is for the contracts, debts, and engagements of the bank, the creditor has against the shareholder the same right to recover interest which, according to the nature of the contract or debt, would exist as against the bank itself; of course, not in excess of the maximum liability as fixed by the statute.[26]

21. **Failure to keep banking and other accounts separate.**—Kiggins *v.* Munday, 19 Wash. 233, 52 Pac. 855.

22. **Payment of premium for stock.**—Robertson *v.* Conway, 110 C. C. A. 377, 188 Fed. 579.

23. **Reduction of stock.**—An act authorizing a reduction of stock to the amount paid in at a certain period, accepted by the stockholders, will exonerate them from liability beyond the reduced stock, as to subsequent creditors; otherwise if not accepted by the stockholders, or a majority of them. Hepburn *v.* Commissioners, 4 La. Ann. 87; Palfrey *v.* Paulding, 7 La. Ann. 363; Stark *v.* Burke, 9 La. Ann. 344.

24. Under 1 Rev. St., p. 601, § 2, forbidding any corporation reducing its capital stock without the consent of the legislature, if stock in a bank is held by an individual in trust for such bank, it is not thereby extinguished, but is valid in the hands of the trustee, and he is liable, as a stockholder, to be apportioned therefor, in case the bank becomes insolvent. In re Empire City Bank (N. Y.), 6 Abb. Prac. 385.

25. **Application of collateral securing bank's debt.**—It was so held under N. Y. Banking Law (Consol. Laws, c. 2), § 71; Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. 798.

26. **Interest.**—Where the assets of a Banking Co. when fully administered, only suffice for the payment of the principal of the debts of the corporation, the statutory liability of the stockholders imposed by Sp. Laws 1889, p. 547, c. 349, § 6, in amendment of its original charter, may be resorted to for such interest as would have been recoverable from the corporation had it continued solvent without receivership. Flynn *v.* American, etc., Trust Co., 104 Me. 141, 69 Atl. 771.

"**In the case of book accounts in favor of depositors,** which was the nature of the claims in this case, interest would begin to accrue as against the bank from the date of its suspension. The act of going into liquidation dispenses with the necessity of any demand on the part of the creditors, and it follows that interest should

Liability Where Stockholder in Default.—There is no general rule as to the time from which interest may be exacted on the amounts due from the stockholders of insolvent banks or whether it can increase their liability beyond the amount fixed by the law.

In Michigan, the stockholders of a bank, which has been closed by the banking commissioners, are not in default in the payment of the statutory liability until the amount of the liability is due, and until that time interest on the amount of the liability may not be exacted, and interest can only be computed from the time it was determined by the court that it was necessary to enforce the liability.[27]

In Minnesota, the stockholders' double liability is an unliquidated demand; hence, interest should be allowed on the amount of the liability only from the time of filing the decision in the trial court.[28]

In Missouri a stockholder becomes liable for interest from the commencement of a suit to enforce his liability to an individual depositor, even though such interest increases his liability beyond the amount fixed by the law.[29]

In New York stockholders were primarily liable for interest from the commencement of an action against them;[30] but under Laws 1892, c. 689, imposing a liability on stockholders of an insolvent bank equal to the par value of their stock, they are only chargeable with interest on the judgment fixing the amount of their liability, though interest may enter into the process of ascertaining the same, provided they are not made to pay more than the par value of their stock; and they can not be charged with interest from the commencement of the action.[31]

§ 48. —— Effect of Transfer of Stock—§ 48 (1) Liability of Original Holder—§ 48 (1a) In General.—Shareholders of the stock of

be computed upon the amounts then due as against the shareholders to the time of payment." Richmond *v.* Irons, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788.

When interest begins to run.—Interest on claims of creditors of an insolvent bank begins to run when the bank suspends payment. Barnes *v.* Arnold, 23 Misc. Rep. 197, 51 N. Y. S. 1109.

Bank bills.—In an action brought by a bill holder against a stockholder, under § 11 of the charter incorporating the Planter's and Mechanics' Bank of Columbus, for the ultimate redemption of the bills issued by the bank, the stockholder was only liable to pay interest on the bills from the time of demand of payment thereof, made by the bill holder on the stockholder, and not from the time of demand of payment made on the bank. Lane *v.* Morris, 10 Ga. 162.

27. *Michigan.*—Wedemeyer *v.* Hindelang, 161 Mich. 600, 126 N. W. 708.

28. *Minnesota.*—Palmer *v.* Bank, 72 Minn. 266, 75 N. W. 380.

29. *Missouri.*—Millisack *v.* Moore, 76 Mo. App. 528.

30. Gen. Laws, c. 37, § 52, provides that the stockholders of every banking corporation shall be individually responsible for all debts of such corporation, to the extent of the amount of their stock, at its par value, in addition to the amount invested in such shares. Held, that interest begins to run on the amount due from the stockholders of an insolvent bank at the date of the commencement of an action against them. Barnes *v.* Arnold, 23 Misc. Rep. 197, 51 N. Y. S. 1109.

31. Mahoney *v.* Bernhard, 169 N. Y. 589, 62 N. E. 1097, affirming 45 App. Div. 499, 63 N. Y. 642, which modified 27 Misc. Rep. 339, 58 N. Y. S. 748.

a bank generally have a right to transfer their shares, and thus disconnect themselves from the corporation and from any responsibility on account of it,[32] but the fact that a transfer of bank stock is made at a time when the bank is doing business and is able to pay its debt, and is made to a solvent person does not necessarily relieve the transferrer from charter or statutory liability. Its effect depends upon the stipulations of the charter or provisions of the statute in respect thereto.[33]

§ 48 (1b) Requisites and Sufficiency of Transfer—§ 48 (1ba) Persons Making Transfer—§ 48 (1baa) Subscribers.—An original subscriber, who transferred his stock, before paying anything thereon, to which transfer the bank consented, is not liable.[34]

§ 48 (1bab) Pledgees.—See post, "Pledgee," § 48 (2bd).

§ 48 (1bb) Persons to Whom Transfer Made.—A transfer of bank stock to exonerate the shareholder from his individual statutory liability must be to a transferree who succeeds to such liability.[35]

A transfer to the bank of its own stock does not exonerate the transferrer from the statutory liability.[36]

Nonresident.—The fact that the transfer of bank stock while the bank was insolvent was to a nonresident does not affect it, there being nothing to prevent enforcing the liability against the nonresident.[37]

Minor Children.—See post, "Intent to Avoid Liability," § 48 (1beb).

32. **Right to terminate liability by transfer.**—Germania Nat. Bank *v.* Case, 99 U. S. 628, 25 L. Ed. 448.

Where one indebted on a stock note to a bank transferred the stock to another, and the note was delivered up by the cashier of the bank upon the verbal undertaking of the purchaser to pay the amount of the subscription, and the bank subsequently ratified the transaction, and the purchaser was elected a director, held, that the original stockholder could not be made chargeable as a debtor to the bank upon a liability incurred by the bank some years thereafter. Mott *v.* Semmes, 24 Ga. 540.

Under Act 1852, c. 338, § 9, relative to the individual liability of stockholders, the stockholders are not liable for debts contracted by the company subsequent to their parting with their stock. Matthews *v.* Albert, 24 Md. 527.

33. Robison *v.* Beall, 26 Ga. 17; McDougald *v.* Bellamy, 18 Ga. 411.

34. **Subscriber who has not paid for stock.**—Laws 1838, c. 260, declares that every one becoming a stockholder by transfer shall succeed to all liabilities of the former shareholder. Laws 1849, c. 226, p. 340, provides that one who has transferred stock on the books to a resident, in good faith, previous to any default in payment of a debt of the bank, shall not be liable for such debt. Held, that an original subscriber, who transferred, in good faith, stock, before paying anything thereon, to which transfer the bank consented, was not liable. Cowles *v.* Cromwell (N. Y.), 25 Barb. 413.

35. **Persons to whom transfer made.**—In re Reciprocity Bank, 22 N. Y. 9. See, also, Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

36. **Transfer to bank.**—Laws 1849, c. 226, § 3, exonerating a stockholder of a bank upon his making a bona fide transfer of his stock to a resident of the state, is not satisfied by a transfer to the bank itself, since the transferee must be one who succeeds to a personal liability distinct from and in addition to that of the bank. In re Reciprocity Bank, 22 N. Y. 9.

37. **Nonresident.**—Foster *v.* Broas, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

§ 48 (1bc) Time of Transfer.—Time of Transfer Prior to Insolvency.—By the laws of many of the states, a transferrer of bank stock is liable as a stockholder if the insolvency of the bank occur within some prescribed time after the transfer. This time is six months in Wisconsin;[38] and one year in Maine[39] and Minnesota.[40]

In Georgia stockholders who have actually parted with their stock and transferred it on the books of the bank before suit was brought against the bank by its creditors are not liable. Those who were stockholders at the time suit was brought against the bank by its creditors are liable.[41]

In Massachusetts, those who were stockholders at the time payment was refused are liable.[42]

In Michigan, the stockholders who are liable are those who were such when the bank became insolvent, or at the time of suspension of the bank.[43]

38. Time of transfer prior to insolvency.—*Wisconsin.*—Gager *v.* Paul, 111 Wis. 638, 87 N. W. 875.

Under Wisconsin Laws, chap. 71, Rev. Stat. 1858, the stockholders at the time an action was commenced were liable. Cleveland *v.* Burnham, 55 Wis. 598, 13 N. W. 677.

39. *Maine.*—Flynn *v.* American, etc., Trust Co., 104 Me. 141, 69 Atl. 771.

40. *Minnesota.*—Hunt *v.* Roosen, 87 Minn. 68, 91 N. W. 259; Hunt *v.* Seeger, 91 Minn. 264, 98 N. W. 91; Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

Reorganization proceedings.—Under Laws 1897, c. 89, § 4, providing that stockholders of an insolvent bank who sell their stock shall be liable as stockholders for one year, stockholders, notwithstanding a sale of their stock, are liable for one year beyond the time fixed for the payment of debts in proceedings under reorganization of banks authorized by the statute. Hunt *v.* Roosen, 87 Minn. 68, 91 N. W. 259.

41. Transfer before suit.—*Georgia.*—The provision in the charter of the Bank of Americus that "the individual property of the stockholders at the time of suits shall be liable for the ultimate payment of the debts of the company in proportion to the amount of stock owned by each stockholder" renders liable only the individual property of those who are stockholders at the time that suits are brought against the company by its creditors. Stockholders who may have transferred their stock prior to the filing of suits against the company are not individually liable to the creditors of the bank. Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626, overruling Brobston *v.* Downing, 95 Ga. 505, 22 S. E. 277, and Chatham Bank *v.* Brobston, 99 Ga. 801, 27 S. E. 790, so far as they conflict with the foregoing rulings.

When a charter of a bank provides that "the individual property of the stockholders at the time of suits shall be liable for the ultimate payments of debts of the company in proportion to the amount of stock owned by each stockholder," a stockholder is not liable who has actually parted with his stock and has transferred it upon the books of the bank before any suit is brought against the bank by a creditor. Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626.

42. Transfer after payment refused.—*Massachusetts.*—An act incorporating a banking company provided that, if the corporation should refuse or neglect to pay their bills on demand, "their original stockholders, their successors, assigns, and the members of the corporation" should, in their private capacities, be liable to the holder. Held, that such only of the original stockholders, their successors, etc., as were members of the corporation at the time payment was refused, were liable. Bond *v.* Appleton, 8 Mass. 472, 5 Am. Dec. 111.

43. Stockholders at insolvency or suspension. — *Michigan.* — Foster *v.* Broas, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

Under Comp. Laws, § 6135, providing that the stockholders of every bank shall be individually liable to an amount equal to the par value of their stock, for the benefit of the depositors, the owner of stock at the time of the suspension of a bank is so liable, though he subsequently transfers his stock. May *v.* McQuillan, 129 Mich. 392, 89 N. W. 45.

In Ohio the stockholders interested in the bank at the date of the obligation or contract are liable without respect to a subsequent transfer. The liability can not be avoided by a transfer after it attaches.[44]

§ 48 (1bd) Consideration.—Colorable Transfers.—See post, "Colorable Transfers," § 48 (1bec).

"**Gift.**"—See post, "Gifts," § 48 (1bed).

§ 48 (1be) Bona Fides of Transferee and Solvency of Bank—§ 48 (1bea) In General.—By the weight of authority, the controlling consideration is the good faith of the stockholder in making the transfer and in believing the bank to be solvent, for such transfer can not be made as against creditors after the bank is known to be insolvent.[45] A few cases apparently maintain a dissenting view.[46] Insolvency of a bank does not avoid a transfer of stock, as an attempt to escape individual liability, where the transferrer is not shown to have known of the insolvency.[47]

In New York, the transfer must be made in good faith and while the bank is solvent.[48]

The mere reduction of the reserve below the standard does not constitute insolvency.[49]

§ 48 (1beb) Intent to Avoid Liability.—A transfer by a stockholder for the mere purpose of avoiding his statutory liability is fraudulent and void, and he remains still liable.[50] The intent to avoid liability, when coupled

44. Transfer after date of note or obligation. — *Ohio.* — Under Act 1816, providing that, where notes are issued by any unauthorized bank, the holder may recover against any person "interested in such bank, at the date of such note, * * * or who became interested in such bank at any time between that and the commencement of suit," after the liability attaches it can not be avoided by a transfer of interest in the bank. Kearny *v.* Buttles, 1 O. St. 362.

45. Solvency of bank and bona fides of transfer.—McDonald *v.* Dewey, 202 U. S. 510, 521, 50 L. Ed. 1128, 26 S. Ct. 731; Man *v.* Boykin, 79 S. C. 1, 60 S. E. 17, 128 Am. St. Rep. 830.

46. See Whitney *v.* Butler, 118 U. S. 655, 30 L. Ed. 266, 7 S. Ct. 61, followed by Young *v.* McKay, 50 Fed. 394.

47. Foster *v.* Broas, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

48. *New York.*—Under Const., art. 8, § 7, making stockholders of banking corporations individually responsible to the amount of their respective shares for the debts of the corporations, and Banking Law, §§ 52, 53 (Laws 1892, p. 1869, c. 689), making a stockholder of a banking corporation liable to the amount of his stock in addition to the amount invested therein, and declaring that no person, who has in good faith transferred his stock "on the books of the corporation when solvent" shall be subject to any personal liability, the transfer of bank stock to relieve the transferrer from liability for the debts of the bank must be made in good faith and while it is solvent. Persons *v.* Gardner, 188 N. Y. 571, 80 N. E. 1118; S. C., 98 N. Y. S. 807, 113 App. Div. 597.

49. Earle *v.* Carson, 188 U. S. 42, 44, 47 L. Ed. 373, 23 S. Ct. 254.

50. Transfer to avoid liability void. —Germania Nat. Bank *v.* Case, 99 U. S. 628, 25 L. Ed. 448; Rankin *v.* Fidelity Ins., etc., Co., 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553; Ohio Valley Nat. Bank *v.* Hulitt, 204 U. S. 162, 167, 51 L. Ed. 423; Stuart *v.* Hayden, 169 U. S. 1, 42 L. Ed. 639, 18 S. Ct. 274; Peters *v.* Bain, 133 U. S. 670, 33 L. Ed. 696, 10 S. Ct. 354.

If the real owner of the shares transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply

with knowledge or reasonable belief by transferrer that the bank is insolvent or failing, will avoid the attempted transfer.[51] The intent to avoid

to evade the responsibility imposed by § 5151 on shareholders of national banking associations, such owner may be treated, for the purposes of that section, as a shareholder, and liable as therein prescribed. Pauly *v.* State Loan, etc., Co., 165 U. S. 606, 619, 41 L. Ed. 844, 17 S. Ct. 465; reaffirmed in Harmon *v.* National Park Bank, 172 U. S. 644, 43 L. Ed. 1182, 19 S. Ct. 877.

It is true that the case of Matteson *v.* Dent, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419, did not involve the question here presented, but, in delivering the opinion, the prior cases of Germania Nat. Bank *v.* Case, 99 U. S. 628, 25 L. Ed. 448, and Bowden *v.* Johnson, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246, were cited in support of the proposition, treated as elementary, that "where a transfer has been fraudulently or collusively made to avoid an obligation to pay assessments, such transfer will be disregarded, and the real owner be held liable." McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

"That the transfer of stock in corporations, even when in failing circumstances, should not be unduly impeded, is essential not only to the prosperity of such corporations and the value of their stock, but to the interest of stockholders who may desire for legitimate reasons to change their investments or to raise money for debts incurred outside the business of such corporation. Bank *v.* Lanier, 11 Wall. 369, 377, 20 L. Ed. 173. At the same time the frequency with which such transfers are made for the purpose of evading the double liability imposed by the National Banking Act, has given rise to a large amount of litigation turning upon their legality. In this connection certain propositions have been laid down by so many courts and in so many cases that they may be regarded as fundamental principles of law applicable to all cases of this character." McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

Where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, with an irresponsible transferee, with the design of substituting the latter in his place, and of thus leaving no one with any liability to respond for the individual liability imposed by the statute, in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer. He will be still regarded as a shareholder quoad the creditors, although he may be able to show that there was a full or a partial consideration for the transfer as between him and the transferee. Bowden *v.* Johnson, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246.

Secret transfer in violation of promise to creditor.—Where a general banking law of a state imposed upon the stockholders of banks which should be organized under it individual liability to double the amount of their stock while they continued stockholders and one year thereafter, and a creditor of the bank made demand of a stockholder for the payment of his debt, the bank being insolvent, and the stockholder requested delay, promising not to transfer his stock, but did secretly and fraudulently transfer it, it was held, in a suit brought more than one year after such transfer, that it was inoperative as to such creditor. Paine *v.* Stewart, 33 Conn. 516.

51. Intent a material point.—Stuart *v.* Hayden, 169 U. S. 1, 42 L. Ed. 639, 1204, 18 S. Ct. 274; McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731; Bowden *v.* Johnson, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246.

One who holds national bank shares —the bank being at the time insolvent —can not escape the individual liability imposed by the statute by transferring his stock with intent simply to avoid that liability, knowing or having reason to believe, at the time of the transfer on the books of the bank, Richmond *v.* Irons, 121 U. S. 27, 58, 30 L. Ed. 864, 7 S. Ct. 788, that it is insolvent or about to fail. Stuart *v.* Hayden, 169 U. S. 1, 8, 42 L. Ed. 639, 1204, 18 S. Ct. 274.

"Cases are also to be found in the books where transfers, made by shareholders in anticipation of a bank's insolvency, to irresponsible persons, have been held to be a fraud on the statute (§ 5139, Rev. Stat., U. S.), and inefficacious to relieve the original holder from liability. Bowden *v.* Johnson, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246; Richmond *v.*

liability may be gathered from declarations, or facts and circumstances,[52] but mere insolvency of the vendee, while doubtless evidence of fraudulent

Irons, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788; Pauly *v.* State Loan, etc., Co., 165 U. S. 606, 619, 41 L. Ed. 844, 17 S. Ct. 465; Matteson *v.* Dent, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419." Robinson *v.* Southern Nat. Bank, 180 U. S. 295, 45 L. Ed. 536, 21 S. Ct. 383.

If a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors. Citing Germania Nat. Bank *v.* Case, 99 U. S. 628, 25 L. Ed. 448; Bowden *v.* Johnson, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246. It was further said to be beyond question that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder. Pauly *v.* State Loan, etc., Co., 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465, reaffirmed in Harmon *v.* National Park Bank, 172 U. S. 644, 43 L. Ed. 1182, 19 S. Ct. 877; Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479, 483, 28 L. Ed. 478, 4 S. Ct. 525.

It is proper deduction from the prior cases, and as such held to be the law, that the gist of the liability is the fraud implied in selling, with notice of the insolvency of the bank and with intent to evade the double liability imposed upon the stockholder by the National Banking Act. In short, the question of liability is largely determinable by the presence or absence of an intent to evade liability. McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

The contention that if the transfer was absolute and to persons who were at the time solvent and able to respond to an assessment upon the shares, the motive with which the transfer was made is of no consequence seems to find some support in the general language used in a few cases, but it will be found upon examination that those cases were dealt with upon the basis that the facts therein showed not only an intent upon the part of the shareholder to escape liability by transferring his stock, but that the transfer was either colorable or to a person who was financially irresponsible at the time of such transfer. There is no case in which this court has held that the intent with which the shareholder got rid of his stock was of no consequence; certainly, no case in which the intent was held to be immaterial, when coupled with knowledge or reasonable belief upon the part of the transferrer that the bank was insolvent or in a failing condition. Stuart *v.* Hayden, 169 U. S. 1, 7, 42 L. Ed. 639, 1204, 18 S. Ct. 274. And see McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731, and quoting this paragraph at p. 523.

A stockholder of a national bank, who was also an officer thereof, sold some of his stock through one who acted merely as agent but held it for vendor in his name, at a time when the bank was insolvent in reality, as was known, or should have been known, to the vendor, and the bank suspended two years afterwards, with this stock standing on the books in the name of the irresponsible agent. It was held, in a suit by the receiver of the bank to enforce against the transferrer his statutory liability to an assessment, that he was liable for his full assessment on such shares. McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

Transfer to minor children.—A transfer of his stock by a stockholder in a national bank made to his minor children, when, though perhaps not supposing the bank to be actually insolvent, he had reason to suspect its soundness, and with the intent that, if all came out well, the children should have the stock, and, if the bank failed, he would not have to pay, can not stand against the creditors of the bank. Foster *v.* Lincoln, 24 C. C. A. 470, 79 Fed. 170.

52. Evidence of intent.—The intent with which the act was done may be proved by the declarations of the party concerned, or by facts and circumstances from which the existence of the intent may be reasonably inferred. Stuart *v.* Hayden, 169 U. S. 1, 42 L. Ed. 639, 1204, 18 S. Ct. 274.

The sale and transfer of national bank stock upon the very day when the insolvency of the bank occurred, must be presumed to have been in contemplation thereof and fraudulent in law as to creditors, and the stockholder's liability is unaffected thereby. Richmond *v.* Irons, 121 U. S. 27, 58, 30 L. Ed. 864, 7 S. Ct. 788.

intent, is not sufficient to avoid a transfer without notice of the bank's insolvency.[53] The vendee's insolvency must be known to the vendor.[54] But even if such is the intent, if the transfer is to a person of proven financial responsibility, it is effectual to terminate liability, though alleging or proving the negative is not a part of the creditor's or receiver's case, and he may proceed against the transferrer without regard thereto. It is purely matter of defense and must be proved affirmatively;[55] at least if vendee

53. Insolvency of bank and knowledge thereof.—The fact that the sale was made to an insolvent buyer is doubtless additional evidence of the original fraudulent intent, but would not be in itself sufficient to constitute fraud without notice of the insolvency of the bank. The stockholder is not deprived of his right to sell his stock by the fact that the sale is made to an insolvent person, unless it be made with knowledge of the insolvency of the bank. This was practically the ruling in Earle *v.* Carson, 188 U. S. 42, 47 L. Ed. 373, 23 S. Ct. 254, in which it was held that a bona fide sale would not be void, though the vendee were insolvent, if the fact of such insolvency were at the time unknown to the seller. McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

Although the exercise of the power to transfer stock in a national bank is controlled by the rules of good faith applicable to other contracts, the qualification just stated gives no support to the proposition that where a sale of stock in a national bank is made in good faith, nevertheless the consequences of the sale are avoided if subsequently it developed that the bank was insolvent at the time of the transfer, in the sense that its assets were then unequal to the discharge of its liabilities, when such fact was unknown to the seller of the stock at the time of the sale. Earle *v.* Carson, 188 U. S. 42, 49, 47 L. Ed. 373, 23 S. Ct. 254. See quære in Stuart *v.* Hayden, 169 U. S. 1, 42 L. Ed. 639, 1204, 18 S. Ct. 274.

54. Vendee's insolvency unknown to vendor.—Where the person to whom the stock was sold in the case in question was in fact insolvent, and hence unable to respond to the double liability, the sale was not void, if the fact of such insolvency of the buyer was unknown to the seller. Earle *v.* Carson, 188 U. S. 42, 47 L. Ed. 373, 23 S. Ct. 254.

55. Transfer to responsible person.—McDonald *v.* Dewey, 202 U. S. 510, 526, 50 L. Ed. 1128, 26 S. Ct. 731, distinguishing and approving Pauly *v.* State Loan, etc., Co., 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465; Stuart *v.* Hayden, 169 U. S. 1, 42 L. Ed. 639, 1204, 18 S. Ct. 274; Matteson *v.* Dent, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419; Earle *v.* Carson, 188 U. S. 42, 47 L. Ed. 373, 23 S. Ct. 254.

Bad faith may be shown by the fact that the bank was known to vendor to be insolvent; but notwithstanding this the transfer would be valid if made to a person of known financial responsibility, since the creditors could not suffer by the substitution of one solvent stockholder in place of another. McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

The solvency of the vendee is pertinent in showing that no damage could have resulted to the creditors of the bank by the transfer. Though not a necessary part of the plaintiff's case, it may be a complete defense, if it be shown that the sale, however fraudulent, was made to a vendee who was as able to respond to the double liability as was the vendor, but, on the proposition that the vendors are not responsible because the sales were made to solvent vendees, being defensive in its character, the burden of proof was upon them. McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

The fraud was consummated by the sale of the stock of a bank known to be insolvent, with intent to evade liability, and the fraud is not less though the transferees happened to be solvent, but their solvency may be proved to rebut the presumption that injury resulted to the creditors from the transfers. McDonald *v.* Dewey, 202 U. S. 510, 527, 50 L. Ed. 1128, 26 S. Ct. 731. See, however, Stuart *v.* Hayden, 169 U. S. 1, 9, 42 L. Ed. 639, 1204, 18 S. Ct. 274, where it was said: "If the bank be solvent at the time of the transfer, that is, able to meet its existing contracts, debts and engagements, the motive with which the transfer is made is, of course, imma-

is responsible to an amount sufficient to prevent injury to creditors.[56]

terial. But if the bank be insolvent, the receiver may, at least, without suing the transferee and litigating the question of his liability, look to those shareholders who, knowing or having reason to know, at the time, that the bank was insolvent, got rid of their stock in order to escape the individual liability to which the statute subjected them."

And "A transfer with such intent and under such circumstances, is a fraud upon the creditors of the bank, and may be treated by the receiver as inoperative between the transferrer and himself and the former held liable as a shareholder without reference to the financial condition of the transferee." Stuart *v.* Hayden, 169 U. S. 1, 8, 42 L. Ed. 639, 1204, 18 S. Ct. 274.

And "The right of creditors of a national bank to look to the individual liability of shareholders, to the extent indicated by the statute, for its contracts, debts and engagements, attaches when the bank becomes insolvent, and the shareholder can not, by transferring his stock, require creditors to surrender this security as to him, and compel the receiver and creditors to look to the person to whom his stock has been transferred." Stuart *v.* Hayden, 169 U. S. 1, 42 L. Ed. 639, 1204, 18 S. Ct. 274.

It was there held that where the evidence shows that a stockholder in a national bank, with knowledge of the insolvency of the bank, or at all events with such knowledge of facts as reasonably justified the belief that insolvency existed or was impending, sold and transferred his stock with the intent to escape the individual liability which the statute imposed upon shareholders of national banks for their contracts, debts and engagements, and the bank having been, in fact, insolvent at the time of the transfer of his stock—which fact is not disputed—he remained, notwithstanding such transfer, and as between the receiver and himself, a shareholder, subject to the individual liability imposed by § 5151. Stuart *v.* Hayden, 169 U. S. 1, 42 L. Ed. 639, 1204, 18 S. Ct. 274.

It, commenting on Stuart *v.* Hayden, 169 U. S. 1, 42 L. Ed. 639, 1204, 18 S. Ct. 274, Brown, J., speaking for the majority of the court, said: "No stress was laid upon their (the transferees') financial condition, but the case was disposed of as one of bad faith * * * in transferring the shares at a time when he knew the bank to be insolvent. There is certainly nothing in this case to justify the inference that the receiver was bound in making out his case to establish the fact that the transferee was insolvent, and was known to the stockholder to be so when he transferred his stock." McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

Thus the cases are reconcilable, as is apparent from the approval, in McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731, of Stuart *v.* Hayden, 169 U. S. 1, 42 L. Ed. 639, 1204, 18 S. Ct. 274. The earlier case simply held that the receiver could proceed against the transferrer without regard to the financial responsibility of transferee, so far as making out his case is concerned, and this is expressly approved in McDonald *v.* Dewey. The insolvency of the transferee was really not a point in the case, being merely alleged by defendant, and the question whether it would have been a defense if proved was not touched. The claim that the receiver had to negative the solvency of transferee, on the ground that the motive would then be immaterial, was refuted, and this was approved by the later case. In McDonald *v.* Dewey, not only was the claim made that the transferee was solvent, but evidence thereof was introduced. The court held, following Stuart *v.* Hayden, that the receiver did not have to establish insolvency of transferee in order to make out his case, but held, as well, that such insolvency would be a defense to defendant if established by him (in which case, presumably, the receiver would be turned over to another suit against the transferee for his remedy). McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

56. Degree of responsibility.—As to whether the transferees were financially responsible to the amount of the assessment, it is not necessary to show that they were persons of responsibility equal to that of the original stockholder. It is sufficient that they were responsible to the amount called for by the necessities of the case—in other words, in an amount sufficient to indicate that the creditors of the bank were not damnified by the change of ownership. McDonald *v.*

§ 48 (1bec) Colorable Transfers.—A merely colorable transfer on the books of the bank, without a real transfer of the ownership as between the parties being intended, is ineffectual liability,[57] regardless of whether there was a full or partial consideration for such transfer or not.[58]

Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

This burden of proof is not sustained where there is no satisfactory evidence that a decree against any one of the vendees for the amount of his assessment could have been collected by ordinary process of law. McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

57. Colorable transfer.—McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731; Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479, 483, 28 L. Ed. 478, 4 S. Ct. 525; Rankin *v.* Fidelity Ins., etc., Co., 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553; Ohio Valley Nat. Bank *v.* Hulitt, 204 U. S. 162, 51 L. Ed. 423; Germania Nat. Bank *v.* Case, 99 U. S. 628, 25 L. Ed. 448; Bowden *v.* Johnson, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246; Pauly *v.* State Loan, etc., Co., 165 U. S. 606, 41 L. Ed. 844, 17 S. Ct. 465, reaffirmed in Harmon *v.* National Park Bank, 172 U. S. 644, 43 L. Ed. 1182, 19 S. Ct. 877.

"It was held by this court in Germania Nat. Bank *v.* Case, 99 U. S. 628, 25 L. Ed. 448, that a transfer on the books of the bank is not in all cases enough to extinguish liability. The court, in that case, defined as one limit of the right to transfer, that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability, and defeating the rights given by statute to creditors." Bowden *v.* Johnson, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246.

The transferee might be liable as a shareholder succeeding to the liabilities, because he has voluntarily assumed that position; but that is no reason why transferrer should not, at the election of creditors, still be treated as a shareholder, he having, to escape liability, perpetrated a fraud on the statute. Bowden *v.* Johnson, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246.

"**Under the English law** a shareholder may transfer his shares to an irresponsible party for a nominal consideration, though the sole purpose of the transfer be to escape liability, provided the transfer be out and out, and not merely colorable or collusive, with a secret trust attached. Under such circumstances the person making the transfer is released from liability, both as to corporate creditors and the other shareholders. Cook on Stockholders, § 266; 2 Morawetz on Private Corporations, § 859." McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

"**The law is quite different in this country.** At the same time the original stockholder can not be held liable, unless the bank were practically insolvent at the time the transfer was made, and its condition was known or ought to have been known to the stockholder making the transfer. If the bank were in fact solvent and able to pay its debts as they matured when the transfer was made, the creditors having ample security in the solvency of the bank, have no special interest in knowing who the stockholders are, since their only recourse to them would be in the remote contingency of the insolvency of the bank. The transferrer can only be held liable if the bank be insolvent, and such insolvency be known, or ought to have been known, to him from his relations to the bank, since the transfer is prima facie valid, and shifts to the transferee the burden of the responsibility, which can be laid upon the original stockholder only in case of bad faith, or evidence of a purpose to evade liability." McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

The real owner of national bank shares can not avoid liability by listing them in the name of another. Rankin *v.* Fidelity Ins., etc., Co., 189 U. S. 242, 47 L. Ed. 792, 23 S. Ct. 553.

58. Consideration immaterial.—"The same result follows if the stockholder, knowing, or having good reason to know, the insolvency of the bank, colludes with an irresponsible person with design to substitute the latter in his place, and thus escape individual liability, and transfers his stock to such person. It is immaterial in such case that he may be able to show a full or partial consideration for the transfer as between himself and the

§ 48 (1bed) Gifts.—A bona fide transfer by gift of bank stock before insolvency will relieve the transferrer of his statutory liability thereon.[59]

§ 48 (1bee) Transfer of Pledged or Hypothecated Stock.—In case of pledge of stock and transfer to an irresponsible person at request of pledgee, the former owners still remained the owners of the stock, though registered in the name of others, and pledged as collateral security for their debt. They consented to the transfer, not to escape liability as shareholders, but to save the pledgee from a liability he was unwilling to assume, and at the same time to perfect the security required for the credit to be given.[60]

§ 48 (1bf) Entry on Stock Book.—The transfer of bank stock not regularly entered on the stock books is ineffectual to cut off the individual liability of the stockholder;[61] unless the transferrer has done all that can be

transferee. Bowden *v.* Johnson, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246," McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

59. Gift.—Foster *v.* Broas, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

60. Pledged stock.—Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479, 28 L. Ed. 478, 4 S. Ct. 525. See post, "Pledgee," § 48 (2bd).

61. Transfer on registry books essential.—As a general rule, the legal owner of stock of a bank—that is, the one in whose name stock stands on the books of the association—remains liable for an assessment so long as the stock is allowed to stand in his name on the books, and, although the registered owner may have made a transfer to another person, unless it has been accompanied by a transfer on the books of registry of the association, such registered owner remains liable. Matteson *v.* Dent, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419; Upton *v.* Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Sanger *v.* Upton, 91 U. S. 56, 23 L. Ed. 220; Webster *v.* Upton, 91 U. S. 65, 23 L. Ed. 384; Pullman *v.* Upton, 96 U. S. 328, 24 L. Ed. 818; Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479, 28 L. Ed. 478, 4 S. Ct. 525; Richmond *v.* Irons, 121 U. S. 27, 58, 30 L. Ed. 864, 7 S. Ct. 788.

Where the stockholder died before insolvency of the bank and his estate was distributed under the state law, but no notice thereof conveyed to the bank, or any transfer made on its books, and suit was brought by the receiver under the state statute against the distributees to recover an assessment on the stock, held that as in this case the stock remained on the books in the name of the deceased owner, continued as a liability of the estate and was never transferred under the allotment, it follows that the allottees have no right to complain because the receiver has availed himself of the provisions of the state statute. The estate remained liable, and the assessment could be recovered from the distributees served in the suit to the extent that they had received the estate. Matteson *v.* Dent, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419.

Where the issue is between the receiver, representing the creditors, and the person standing on the register of the bank as a shareholder, it is said, generally, that the creditors of a national bank are entitled to know who, as shareholders, have pledged their individual liability as security for its debts, engagements, and contracts; that if a person permits his name to appear and remain in its outstanding certificates of stock, and on its register, as a shareholder, he is estopped, as between himself and the creditors of the bank, to deny that he is a shareholder; and that his individual liability continues until there is a transfer of the stock on the books of the bank, even where he has in good faith previously sold it and delivered to the buyer the certificate of stock, with a power of attorney in such form as to enable the transfer to be made. Whitney *v.* Butler, 118 U. S. 655, 30 L. Ed. 266, 7 S. Ct. 61.

South Carolina.—Under 1 Code of Laws 1902, § 1894, providing that no transfer of stock shall be valid, except as between the parties, until the same shall have been regularly entered on the corporate books, where a trans-

required of him to obtain a transfer on the books, the failure to make it being due to neglect of the officials of the bank.[62] It is not enough to rely

fer of bank stock is not so regularly entered the transferrer is liable to the creditors of the bank. Man *v.* Boykin, 79 S. C. 1, 60 S. E. 17, 128 Am. St. Rep. 830.

Where stockholders of a bank, in good faith, for value received, transferred the stock to the cashier, with instructions to enter the transfer on the books of the bank, but the cashier failed so to do, the attempted transfer was insufficient, under Code of Laws 1902, § 1894, providing that no transfer shall be valid, except as between the parties, until regularly entered on the books of the corporation, and the holders of the stock are liable to the creditors of the bank on its insolvency for the amount of the stock originally held by them. White *v.* Commercial, etc., Bank, 66 S. C. 491, 45 S. E. 94, 97 Am. St. Rep. 803.

Registry of transfer to bank after assignment for benefit of creditors.—A transfer of stock was not registered on the books of the bank until after the bank had failed and made an assignment, and it was then registered as a transfer from the stockholder to the bank. Held, that it was error to hold the assignor liable only as a transferrer on the indebtedness existing at the time of the transfer. He should have been held liable as a stockholder. Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

62. Diligence to obtain transfer.—Matteson *v.* Dent, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419; Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Whitney *v.* Butler, 118 U. S. 655, 30 L. Ed. 266, 7 S. Ct. 61; McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

The presumption of liability begotten by the presence of the name on the stock register would be rebutted if the jury found the fact to be that a bona fide sale of the stock had been made and that the transferrer had performed every duty which the law imposed on him in order to secure a transfer on the registry of the bank. Earle *v.* Carson, 188 U. S. 42, 47 L. Ed. 373, 23 S. Ct. 254; Matteson *v.* Dent, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419; Whitney *v.* Butler, 118 U. S. 655, 30 L. Ed. 266, 7 S. Ct. 61.

"Where a transfer of stock is made and delivered to officers of a bank, and such officials fail to make entry of it, the acts referred to will operate a transfer on the books, and extinguish the liability as stockholder of the transferrer. Whitney *v.* Butler, 118 U. S. 655, 30 L. Ed. 266, 7 S. Ct. 61." Matteson *v.* Dent, 176 U. S. 521, 44 L. Ed. 571, 20 S. Ct. 419.

Arkansas.—The failure of the bank officers to make the transfer on the books of the bank will not continue the seller's liability as a stockholder. Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896.

Director instructing cashier to perfect transfer of his stock.—Where a director of a bank sold his stock in good faith, and directed the cashier to do everything connected with the transfer necessary to perfect it in a legal way, and was informed that there was nothing more to be done, he was relieved from liability as a shareholder, though the transfer was not recorded on the books of the bank as expressly required by Ky. St. 1903, §§ 545, 546. Bracken *v.* Nichol, 30 Ky. L. Rep. 864, 99 S. W. 920.

Indorsing in blank and delivery of certificate to president of bank.—"In Whitney *v.* Butler, 118 U. S. 655, 30 L. Ed. 266, 7 S. Ct. 61, it was held that where stock had been sold, and the certificates, with power of attorney for transfer duly executed in blank, delivered to the president of the bank, the responsibility of the original stockholder terminated." Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

A stockholder in a national bank, having no reason to suspect insolvency, placed his certificates in the hands of brokers for sale, with power of attorney executed in blank to make transfer thereof. The brokers offered the stock for sale at auction and it was bought by E. at the request of the president of the bank, with whom C. had placed an order for stock of the bank and a special deposit to pay therefor. The stock was paid for to the brokers and the certificates and power of attorney delivered, the former owner receiving the proceeds without knowing who the purchaser was. The bank president received and held the certificates waiting until he should fill C.'s order, intending then to transfer same to him. C. never took the stock, nor was it transferred to him, and, the bank having failed, the receiver found the certificates in an envelope purporting to represent a

on the vendee to have the transfer made. The certificates must be delivered to the bank with all information necessary to transfer them,[63] and not merely to an officer acting, not in an official, but in a personal capacity.[64]

Time of Entry on Registry.—The transfer of stock in a bank must be entered on the stock transfer books of the bank more than a year be-

security for a demand loan to the president. It was held, that the former owner had done all that was required of him to terminate his liability as a stockholder and his responsibility ceased upon the delivery of the certificates to the bank with the power of attorney to effect the transfer, and for that purpose to the knowledge of the president. Whitney *v.* Butler, 118 U. S. 655, 30 L. Ed. 266, 7 S. Ct. 61.

Had anything occurred that would have justified the former owner in believing, or even in suspecting, that the transfer had not been promptly made on the books of the bank, they would, perhaps, have been wanting in due diligence had they not, by inspection of the bank's stock register, ascertained whether the proper transfer had in fact been made. Whitney *v.* Butler, 118 U. S. 655, 30 L. Ed. 266, 7 S. Ct. 61.

Delivery to cashier.—Where the stockholders of a solvent banking corporation in good faith sold their stock, indorsing the shares in blank, and delivering them to the bank's cashier, with the understanding that he would do what was necessary to effectuate a transfer on the bank's books, and the cashier failed so to do, such stockholders were not after two years and on the bank's becoming insolvent liable to its creditors under Ky. St., § 547 (Russell's St., § 2131), imposing a double liability. Weakley *v.* McClarty (Ky.), 125 S. W. 265.

Sale to cashier who is recognized by bank as a stockholder.—Title of C. to stock in a bank is devested so as to relieve him of liability for an assessment levied four years thereafter, on the bank becoming insolvent, where he employed auctioneers to sell it, and put into their hands his stock certificate, having indorsed thereon an assignment in blank, and a power of attorney in blank to transfer the stock, duly executed by him, and they knocked down the stock to S., who was cashier of the bank, and took the certificate to the banking house and delivered it to S., "as cashier" of the bank, and requested him to transfer the shares to the purchaser thereof; and this, notwithstanding a by-law of the bank that "no officer * * * shall, without permission of the directors, hold stock in the bank," the inference from the payment of semiannual dividends to S. for the four years being that the bank had accepted him as a stockholder. Earle *v.* Coyle, 38 C. C. A. 226, 97 Fed. 410.

63. Essential steps by vendor.—"Some of the cases hold that the seller is liable as a shareholder even where the buyer agreed to have the transfer made on the books of the bank, but fraudulently or negligently failed to do so. But it will be found, upon careful examination, that in no one of the cases in which these general principles have been announced, as between creditors and shareholders, does it appear that the precaution was taken, after the sale of the stock, to surrender the certificates therefor to the bank itself, accompanied (where such surrender was not by the shareholder in person) by a power of attorney, which would enable its officers to make the transfer on the register." Whitney *v.* Butler, 118 U. S. 655, 661, 30 L. Ed. 266, 7 S. Ct. 61.

"Where the seller delivers the stock certificate and power of attorney to the buyer, relying upon the promise of the latter to have the necessary transfer made, or where the certificate and power of attorney are delivered to the bank without communicating to its officers the name of the buyer, the seller may well be held liable as a shareholder until, at least, he shall have done all that he reasonably can do to effect a transfer on the stock register." Whitney *v.* Butler, 118 U. S. 655, 30 L. Ed. 266, 7 S. Ct. 61.

64. Delivery to president as vendee.—The sale of national bank stock without actual transfer on the books, will not release the individual liability within the rule laid down in Whitney *v.* Butler, 118 U. S. 655, 30 L. Ed. 266, 7 S. Ct. 61, where there is no proof, as there was in that case, of the delivery of the certificates to the bank and a power of attorney authorizing its transfer, with a request to do so made at the time of the transaction. The delivery to the president, not as president, but as vendee, is not sufficient. Richmond *v.* Irons, 121 U. S. 27, 58, 30 L. Ed. 864, 7 S. Ct. 788.

fore insolvency, in order to relieve the owner from liability on assessments ordered in a receiver's suit to liquidate the debts of the bank.[65]

Abandonment of Intention to Transfer.—A member of a banking association may abandon an inchoate transfer of his stock and waive his notice of withdrawal and remain an associate and liable as such. Whether or not he has done so is a question for the jury.[66]

§ 48 (1bg) Publication of Notice of Transfer.—Where notice of a transfer of bank stock is required to be given by publication, as a condition precedent to exemption of the transferrer from statutory liability, a transferrer who has not given notice conformably to the statute remains liable after a transfer of his stock. But stockholders who comply with such requirement are exempt after the time during which the act expressly continues a transferrer's liability.[67] This was formerly the law of Georgia, but the Acts of 1894, p. 76, Civ. Code, § 1888, dispense with publication of notice of a transfer.[68]

65. **Time of entry on registry.**—Hunt *v.* Seeger, 91 Minn. 264, 98 N. W. 91. See ante, "Time of Transfer," § 48 (1bc).

66. **Abandonment of intention to transfer.**—Where a member of a voluntary association conducting a banking business, after notifying the directors of his withdrawal as a member, directing them to transfer his stock to another person, and delivering his shares of stock to the secretary, on the failure of the directors to transfer his stock as directed, continues to act as a director with knowledge that his name is printed on leaflets of the bank as a director, and votes his stock in person or by proxy, it is not error for the trial court, in a suit by a depositor against such member, after the insolvency of the association, in which suit he is charged as partner, to submit to the jury the question of whether the defendant had abandoned his intention to transfer his shares and waived his notice of withdrawal and remained liable as a partner. Bradford *v.* National Ben. Ass'n, 26 App. D. C. 268.

67. **Publication of notice of transfer.**—Lane *v.* Morris, 8 Ga. 468; Brobston *v.* Downing, 95 Ga. 505, 22 S. E. 277. See, also, Brunswick Terminal Co. *v.* National Bank, 192 U. S. 386, 391, 48 L. Ed. 491, 24 S. Ct. 314; McDougald *v.* Bellamy, 18 Ga. 411.

68. *Georgia.*—A stockholder in the Brunswick State Bank is liable for his pro rata part of the debts of the corporation created after he transferred his shares, unless he gave notice of the transfer as prescribed in Code 1882, § 1496. Chatham Bank *v.* Brobston, 99 Ga. 801, 27 S. E. 790; Brobston *v.* Downing, 95 Ga. 505, 22 S. E. 277.

Where the charter of a bank renders the stockholders liable after a transfer of stock, unless sixty days' notice of sale is given in one of the public gazettes of the state, and provided the transfer is made six months before the failure of the corporation, all stockholders who have given notice in terms of the act are exempt, unless the failure occurs within six months thereafter. All other stockholders are liable for the redemption of the bills, whether they have transferred or not. This liability is not primary nor total, but secondary and proportional. Lane *v.* Morris, 8 Ga. 468.

Defendant, owner of all the stock in a bank, transferred it without consideration to third persons who desired to obtain the charter and carry on the business, and at the same time the bank transferred all of its property and assets to defendant. Of this transfer of his stock defendant gave notice by publication, as required by Code, § 1496. At that time the bank owed no debts, and the purchasers of the stock and charter paid in its capital. Held, that defendant was not liable to subsequent creditors who gave credit to the bank after its reorganization, and who were not misled by defendant. Morgan *v.* Brower, 77 Ga. 627.

Under the eleventh section of the charter of the Planters' & Mechanics' Bank of Columbus, any one who has been at any time a stockholder therein,

§ 48 (1bh) Record in Clerk's Office.—Failure of the transferee to file a certificate of the transfer in the county clerk's office to avoid liability for the debts of the seller will not continue the liability of the seller as a stockholder.[69]

§ 48 (1c) Nature and Extent of Liability—§ 48 (1ca) In General.—Secondary.—The liability, of one who has transferred his stock prior to the insolvency, is secondary only to the liability of the succeeding holders of the same stock, and not to the liability of all subsequent transferrers of other stock.[70]

Collection of Amount from Others.—A transferrer of stock, upon the insolvency of the bank, is liable only for his share of the existing indebtedness which also existed at the time of the transfer; but he is not released because this amount has been collected from others reached before him, in the order of liability adopted by the court.[71]

Dividends Realized from Corporate Assets.—A transferrer of stock, upon the insolvency of the bank within a year after the transfer, is entitled to the benefit of any dividend realized from the corporate assets.[72]

But One Satisfaction upon Each Share.—Where two or more successive owners of the same shares are alike liable, one of them because he owns the shares now, and another, or others, because of past ownership, the creditors, though entitled to recover severally against each, as though the liability were wholly his own, and the other or others were not liable, can have but one satisfaction, and this being had, it will operate as satisfaction as to all, save in respect to costs.[73]

§ 48 (1cb) Existing and Subsequent Creditors.—It is only cred-

and who has not transferred his stock and given sixty days' notice thereof in some public gazette of the state, continues liable to the bill holders; but his rights and obligations as a member of the corporation, inside of the charter, cease from the time of the transfer of the stock. McDougald *v.* Bellamy, 18 Ga. 411.

69. Failure to record certificate of transfer in clerk's office.—Under Kirby's Dig., § 849, providing that a certificate of the transfer of stock in any corporation organized under that chapter must be promptly filed in the county clerk's office, in order to avoid liability for the debts of the seller, where a stockholder in a bank in good faith sold his stock, and executed and delivered all the necessary instruments to allow transfer of the stock on the bank's books, and placed the same in the hands of the proper bank official, the mere fact that no certificate of the transfer was filed with the county clerk will not render him liable as a stockholder on the subsequent insolvency of the bank; the filing of such certificate being the duty of the transferee. Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896.

70. Nature and extent of liability.—Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610, 1069, construing Gen. Stat., 1894, § 2501.

Since, under Gen. St. 1894, § 2501, a stockholder who has transferred his stock within a year before the insolvency is only secondarily liable, execution should not issue against him until his transferee fails to respond to execution. Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

71. Collection of amount from others.—Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

72. Dividends realized from corporate assets.—Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

73. But one satisfaction upon each share.—Chatham Bank *v.* Brobston, 99 Ga. 801, 27 S. E. 790.

itors existing at the time of the fraudulent transfer who are injured thereby, and only as to such is the transfer invalid. The transferrer is liable to assessment to satisfy creditor existing at the time of the transfer, but not subsequent creditors.[74] The rule of nonliability in favor of subsequent creditors applies to a transfer of the charter by means of a transfer of all the stock.[75]

§ 48 (2) Transferee's Liability—§ 48 (2a) In General.—Ordinarily a transferee of bank stock is subject to the individual liability prescribed by the statute,[76] but in some instances the statutory liability of

74. **Existing and subsequent creditors.**—In cases in which the courts have used the general expression that in the event of a fraudulent transfer of stock the stockholder remains liable to the creditors of the bank, they were not called upon to discriminate between existing and subsequent creditors, since as a rule the insolvency of the bank followed soon after the transfer, and counsel did not call attention to the distinction. McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

"In the event of insolvency it is only existing creditors who can claim to have been damnified by a fraudulent transfer of shares. As to them such transfer is voidable. Subsequent creditors are apprised by the published list of the names of the shareholders, to whom transfers have been made, and of the persons to whom they may have recourse for the double liability." McDonald *v.* Dewey, 202 U. S. 510, 50 L. Ed. 1128, 26 S. Ct. 731.

Georgia.—A was indebted, by stock note, to the M. & M. Bank of Columbus. By contract with B, the stock was transferred from A to B, and A's note delivered up to him by the cashier of the bank, upon the verbal undertaking of B, to pay the amount of the subscription to the bank. The bank subsequently ratified this transaction, B having been elected a director upon the faith of this stock. Held, that A could not be made chargeable as a debtor to the bank, upon a liability incurred by the bank some years thereafter; and if responsible at all, it could only be in equity, for fraudulently abstracting the assets of the corporation. Mott *v.* Semmes, 24 Ga. 540.

Minnesota.—Under Gen. St. 1894, § 2501, providing that stockholders of banks of deposit and discount shall be individually liable, in an amount equal to double the amount of stock owned by them, for all debts of the bank, * * * after a transfer of their stock, the individual liability of a stockholder who transferred his shares in good faith is limited to such debts as were incurred prior to the transfer. Harper *v.* Carroll, 62 Minn. 152, 64 N. W. 145.

Wisconsin.—Under Rev. St. 1898, § 2024, subsec. 16, providing that any person holding stock in any bank who shall sell or assign his stock shall be held for six months after such sale personally liable to the amount of such stock for all debts of such bank existing at the time of such sale or assignment, the liability is limited to those who are creditors at the time of the transfer. Gager *v.* Paul, 111 Wis. 638, 87 N. W. 875.

75. **Transfer of charter.**—Where one owned all the shares in a bank which owed no debts, and he was proceeding to wind up its business, when certain others solicited a transfer of the charter to them in order that they might do a banking business, and under advice of counsel as to how it could be done without liability on his part, he transferred all the stock to such other persons without any consideration therefor, and the bank transferred to him all of the assets and property belonging to it, he giving notice of the transfer of the stock under § 1496 of the Code, and thereupon the new owners of the stock paid in more than the amount of the property before the transfer and proceeded to do a banking business, subsequent creditors of the bank, who became such after the notice of the transfer of the stock was published, and who did not know of or rely on the conduct of the original stockholder, had no right of action against him, he having acted in good faith throughout the transaction. Morgan *v.* Brower, 77 Ga. 627.

76. **Transferee's liability.**—Bowden

stockholders is imposed on subscribing stockholders and does not extend to stockholders by way of succession.[77]

§ 48 (2b) Requisites and Sufficiency of Transfer—§ 48 (2ba) Consent of Transferee.—The mere transfer of the stocks on the books of the bank, to the name of the transferee, does not impose upon him the individual liability attached by law to the position of shareholder in a bank or banking association. If the transfers were, in fact, without his knowledge and consent, and he was not informed of what was so done—nothing more appearing—he would not be held to have assumed or incurred liability for the debts, contracts and engagements of the bank. But if, after the transfers, he joined in the application to convert the savings bank into a national bank, or in any other mode approved, ratified or acquiesced in such transfers, or accepted any of the benefits arising from the ownership of the stock thus put in his name on the books of the bank, he was liable to be treated as a shareholder, with such responsibility as the law imposes upon the shareholder of national banks.[78]

§ 48 (2bb) Solvency of Bank at Time of Transfer.—That the transfer of stock is made after the failure of the bank does not render the transfer void, but the transferee becomes a stockholder and as such is liable upon his stock.[79]

§ 48 (2bc) Entry on Bank's Books.—It is not necessary that the stock be actually transferred to the purchaser on the books of the bank.[80]

v. Johnson, 107 U. S. 251, 27 L. Ed. 386, 2 S. Ct. 246.

If a party makes an actual purchase of shares from an individual or the bank (even if the latter had no authority to buy or sell its own stock), and voluntarily allows his name to go on the books as a stockholder, he is liable as such. In re Reciprocity Bank, 22 N. Y. 9.

77. A provision in a charter granted prior to Acts 1893, p. 76 (Civ. Code 1895, §§ 1903-1911), to promoters of a bank, to the effect that each stockholder shall be individually liable for the debts of the company to the amount of his unpaid subscription, and for an additional amount equal to the subscription, is, in view of the policy adopted by such act, of providing to what extent owners of stock in such institution may be held liable, to be understood as imposing individual liability on the stockholders subscribing to the capital stock, and not on shareholders who by way of succession become owners of stock. Reid *v.* De Jarnette, 123 Ga. 787, 51 S. E. 770.

78. Consent of transferee.—Keyser *v.* Hitz, 133 U. S. 138, 149, 33 L. Ed. 531, 10 S. Ct. 290.

Where the shares of a bank are transferred by A to B without consideration, and without the knowledge or consent of B, B is not the owner, in contemplation of the charter, and can only be made liable on the ground of fraud, viz: acquiescing in the transfer, after the fact is brought to his notice, for the benefit of some other person, and to the injury of the creditors of the corporation. Robinson *v.* Lane, 19 Ga. 337.

79. Transfer after failure.—Robison *v.* Beall, 26 Ga. 17.

80 Entry on books of bank.—The purchaser of bank stock deposited it as collateral with the bank for a loan, with which the stock was purchased; but, on repayment of the loan, the bank having suspended, he refused to take the stock. Held, that he was the owner of it, and individually liable, notwithstanding the stock had never been transferred to him on the books of the bank. Foster *v.* Broas, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

§ 48 (2bd) Pledgee.—As a general rule the holders of bank stock as collateral security or by way of hypothecation are liable as if they were absolute owners; this is the rule in Georgia,[81] Massachusetts,[82] Minnesota,[83] and New York,[84] but the statutes of California,[85] and Colorado[86] provide that the holder of bank stock as collateral security is exempted from liability to creditors when it appears on face of the bank's books that he holds only as a pledgee, and under the statutes of Michigan[87] a pledgee of bank

81. Pledgee.—*Georgia.*—Where the charter of a bank imposes on all its stockholders personal liability to its creditors, one who holds the legal title to stock as collateral security for debts due him becomes liable as though he had purchased the stock. Chatham Bank *v.* Brobston, 99 Ga. 801, 27 S. E. 790.

82. *Massachusetts.*—Crease *v.* Babcock, 51 Mass. (10 Metc.) 525.

83. *Minnesota.*—A pledgee of stock, by registering it on the books of the bank as transferred to him absolutely, voluntarily makes himself a stockholder, and is liable as such upon the subsequent insolvency of the bank. Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

Gen. St. 1894, § 2501, making the stockholder of a bank individually liable in an amount equal to double the amount of stock standing on the books of the corporation in his name, for all the debts of such bank, during the time he so holds said stock, and for one year after any transfer or sale by him of such stock, applies to one who holds the stock merely as collateral security. State *v.* Bank, 70 Minn. 398, 73 N. W. 153, 68 Am. St. Rep. 538.

84. *New York.*—Under the Act of 1849, persons to whom stock has been transferred by way of hypothecation for debts, and in whose name it stands at the time of default, are stockholders, and as such are liable to an equal additional amount for the outstanding debts of the bank. In re Empire City Bank, 18 N. Y. 199, 8 Abb. Prac. 192, reversing 6 Abb. Prac. 385.

The person liable as a stockholder is the one in whose name the stock stands on the books of the bank, although in fact it belonged to another person, who had transferred it to the person charged by way of hypothecation. In re Empire City Bank, 18 N. Y. 199, 8 Abb. Prac. 192, reversing (1858) 6 Abb. Prac. 385.

85. *California.*—Civ. Code, § 321, provides that every banking corporation shall keep in a place accessible to the stockholders, depositors, and creditors thereof a book containing a list of all stockholders and the number of shares held by each; that the entries in such book shall be conclusive evidence as to the number of shares held. Section 322 provides that the term "stockholder" shall apply to persons appearing to be such on the books of the corporation, and every equitable owner of stock, etc., but that stock held as collateral security does not make the holder a stockholder, except in cases above mentioned, so as to charge him with the debts and liabilities of the corporation. Held that, while the holder of bank stock as collateral security is exempted from liability to creditors, such exemption can only be availed of where it appears on the face of the corporation's books that he holds the stock only as pledgee. Hurlburt *v.* Arthur, 140 Cal. 103, 73 Pac. 734, 93 Am. St. Rep. 17.

86. *Colorado.*—1 Mills' Ann. St., § 495, provides that no person holding stock in any corporation as collateral security shall be personally subject to any liability as a stockholder of such corporation, but the person pledging the stock shall be considered as holding the same. Held, that where certain stock of an insolvent bank stood in the name of another bank as owner, and there was nothing on the stock-books to show that the stock was held as collateral security or otherwise than as the absolute owner, the bank holding such stock could not escape double liability imposed by 1 Mills' Ann. St., § 533, on the ground that it held the stock as collateral security. Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642.

87. *Michigan.*—B. owning stock of I. Bank, deposited it with defendant bank as collateral. On the request of an officer of defendant bank, a new certificate of stock was issued by the I. Bank to defendant for the purpose of transferring the stock to the latter, to be held by it as such collateral. The certificate was issued with this understanding, but it was issued to de-

stock is not liable to the creditors of the bank although the certificate was issued to him as absolute owner. After the stock is transferred back to the owner, the pledgee is not liable for debts subsequently contracted.[88]

§ 48 (2be) Trustees and Representatives.—Transferees who hold bank stock in trust as executor or administrator are liable in their representative capacity as for other debts of their decedents; and under some statutes they are liable as absolute owners.[89]

fendant as absolute owner. Defendant always held such stock as security, and not otherwise. Held, that defendant bank was not liable upon an assessment as a stockholder, under 3 How. Ann. St., § 3208e5, providing that persons holding stock as collateral security shall not be personally liable to the depositors as stockholders. May *v.* Genesee County Sav. Bank, 120 Mich. 330, 79 N. W. 630.

88. Debts contracted after retransfer to pledgor.—A transfer of bank stock on the books of the bank in favor of a pledgee which held it as collateral security does not render such pledgee liable as a stockholder for the bank's indebtedness created after the stock has been retransferred on the books of the pledgor upon payment of the loan, notwithstanding the pledgee's failure to give notice of the retransfer, which, under Code Ga. 1882, § 1496, is requisite to exempt from an existing individual liability as a stockholder under a corporate charter, where the stockholder's individual liability under the charter of the bank in question is limited to the par value of his stock, "at the time the debt was created." Decree (C. C. 1901) 112 F. 812, affirmed. Brunswick Terminal Co. *v.* National Bank, 192 U. S. 386, 48 L. Ed. 491, 24 S. Ct. 314.

The charter of a state bank in Georgia provided that, in addition to the liability of the bank, the stockholders should be individually liable as sureties to its creditors "to the extent of the amount of their stock therein, at the par value thereof, respectively, at the time the debt was created." A statute of the state (Code 1882, § 1496) provided that "when a stockholder in any bank or other corporation is individually liable under its charter and shall transfer his stock he shall be exempt from such liability unless he receives a written notice from a creditor within six months after such transfer of his intention to hold him liable, provided he shall give notice once a month, for six months, of such transfer immediately thereafter," etc. Held, that one who for a short time held stock of such bank as collateral security during which time it stood in his name, and was then transferred back to the owner, was not liable for debts of the bank subsequently contracted, without any reference to his holding of the stock, although no notice of the retransfer of the stock was published, but that the statute was intended only to enable stockholders who had become liable for existing debts to terminate such liability by giving the prescribed notice, and did not apply to a case where the stockholder was never in fact liable under the terms of the charter, because he did not hold the stock at the time the debt was created. Brunswick Terminal Co. *v.* National Bank, 112 Fed. 812, affirmed 192 U. S. 386, 48 L. Ed. 491, 24 S. Ct. 314.

National bank a pledgee of state bank stock.—Where a national bank, a pledgee of stock of a state bank, acquired the stock as pledgee, August 25, 1890, and the note to which it was collateral having been paid, retransferred it October 20, 1890, the retransfer being regularly entered on the books of the bank, and after this indebtedness to complainants arose, the national bank was not liable to such subsequent creditor, there being no element of estoppel involved. Brunswick Terminal Co. *v.* National Bank, 192 U. S. 386, 48 L. Ed. 491, 24 S. Ct. 314.

89. Trustees and representatives.—Rights and liabilities of transferees of stock in general, see ante, "Transfer of Stock," § 40.

Under Rev. St., c. 36, § 31, providing that the holders of stock in any bank at the time when its charter shall expire shall be liable for the debts of the bank, those who hold stock as collateral security, and those who hold it in trust, whether the trust does or does not appear on the books of the bank, are liable as if they were the absolute owners; and administra-

§ 48 (2c) Nature, Duration and Extent—§ 48 (2ca) Duration.—Where a transferee of bank stock is subject to the individual liability prescribed by the statute, this liability attaches to him until, without fraud as against the creditors of the bank, for whose protection the liability was imposed, he relieves himself from it.[90]

§ 48 (2cb) Liability for Antecedent and Subsequent Debts.—As a general rule a transferee of bank stock is individually liable for his pro rata part of the debts of said corporation created before he acquired his stock by transfer, as well as for a like part of those created during his ownership,[91] but the terms of the charter or articles of association may be such as to relieve such transferee from liability for antecedent deposits.[92]

§ 48 (2cc) Dividends Fraudulently Received by Transferrer.—The transferee of bank stock can not be held liable to account to creditors of a bank for unlawful dividends received by the original holder of the stock.[93]

tors of deceased stockholders are liable in their representative capacity as for other debts of their intestator. Crease *v.* Babcock, 51 Mass. (10 Metc.) 525.

Under Laws 1892, c. 689, §§ 52, 53, making a person in whose name bank stock stands at the time of the bank's insolvency liable as a stockholder for its debts, an executor is liable where bank stock was in intestate's name when the bank became insolvent, though the executor had transferred the shares to himself as trustee, pursuant to the surrogate's decree, before the failure of the bank, where such transfer was not made on the books of the bank. Mahoney *v.* Bernhardt, 27 Misc. Rep. 339, 58 N. Y. S. 748; Mahoney *v.* Bernhard, 45 App. Div. 499, 63 N. Y. S. 642, affirmed in 169 N. Y. 589, 62 N. E. 1097.

In a proceeding under Laws 1849, p. 343, to enforce the personal liability of stockholders of an insolvent bank for the payment of its debts after its assets are exhausted, executors may be properly charged as holders of stock appearing on the bank's books to have been originally held by their testator, and subsequently transferred to them. Diven *v.* Duncan (N. Y.), 41 Barb. 520.

90. Duration of liability.—Bowden *v.* Johnson, 107 U. S. 251, 261, 27 L. Ed. 386, 2 S. Ct. 246.

Pledgee.—See ante, "Pledgee," § 48 (2bd).

91. Liability for antecedent and subsequent debts.—It was so held under the charter of the Brunswick State Bank. Chatham Bank *v.* Brobston, 99 Ga. 801, 27 S. E. 790.

Under Rev. St. 1858, c. 71, which provides that stockholders of a bank shall be individually responsible to the amounts of their respective shares of stock for all liabilities of the bank, that the shares shall be transferable, and that every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and be subject to all the liabilities of prior shareholders, it is not the shareholders at the time a debt accrued, but the shareholders at the time an action is commenced thereon, who are individually responsible. Cleveland *v.* Burnham, 55 Wis. 598, 13 N. W. 677.

Pledgee.—See ante, "Pledgee," § 48 (2bd).

92. Antecedent deposits.—The fact that partnership articles of a banking firm allowed members thereof to sell their stock, after offering it to the bank at a stated price, and require the transfer to be made on the bank's books, and provide that all stockholders are individually bound to make good to all depositors the amount of their deposits, does not render a purchaser of stock liable for antecedent deposits. Christy *v.* Sill, 131 Pa. 492, 19 Atl. 295, 297.

93. Dividends fraudulently received by transferrer.—Under Rev. St. c. 94, § 22, providing that every person becoming a shareholder in a banking corporation, by transfer of shares, "shall, in proportion to his shares, succeed to all the rights, and be subject to all the

§ 48 (2cd) Indemnifying Transferrer.—A transferrer of bank stock may recover from the transferee the amount the transferrer has been held liable for to creditors of the bank because the transfer was not regularly entered on the books of the bank in compliance with the statute.[94]

§ 48½. —— Assessment by State Official to Make Good Impairment of Capital Stock.—The statute of Indiana authorizes the auditor of the state,[95] and those of Kentucky[96] authorize the secretary of state when the capital of a state bank becomes impaired, to levy an assessment in any amount deemed necessary, not exceeding the par value of the stock, upon the shareholder to make good the deficiency; and the court will not interfere with his determination unless it is clearly shown that he has abused the discretion vested in him.[97] A stockholder of a bank takes and holds his stock with the understanding that the capital stock must not be permitted to be impaired, and, when it is, an assessment may be made on the stockholders to restore the stock. The statute is a part of the contract between the bank and its stockholders, and any person to whom stock is sold and transferred by a stockholder takes it subject to the statutory burdens.[98]

Enforcement.—Under a state banking act which provides that, when the capital of a state bank becomes impaired, the state auditor shall levy an assessment upon the shareholders to make good the deficiency, and if any shareholder fails to pay such assessment, shall cause his stock to be sold to the highest bidder, the proceeds of a sale do not belong to the bank, but, after deducting the amount of the assessment and the cost of such sale, must be paid to the shareholder.[99]

liabilities, of prior shareholders," when a shareholder in an insolvent banking corporation, who has received unlawful dividends, transfers his stock to another party, the transferee can not be held liable to account to the creditors of the bank for the amount thus fraudulently received and appropriated by the original holder of the stock. Hurlbut *v.* Tayler, 62 Wis. 607, 22 N. W. 855.

94. Indemnifying transferrer.—Man *v.* Boykin, 79 S. C. 1, 60 S. E. 17, 128 Am. St. Rep. 830; 1 S. C. Code of Laws, 1902, § 1894.

95. *Indiana.*—Section 13 Ind. Bank Act as amended March 9, 1895. Chicago Title, etc., Co. *v.* State Bank, 30 C. C. A. 443, 86 Fed. 863.

96. Kentucky under Ky. St., § 586 (Russell Stat., § 2175), Corbin Banking Co. *v.* Mitchell, 141 Ky. 172, 132 S. W. 426.

97. Corbin Banking Co. *v.* Mitchell, 141 Ky. 172, 132 S. W. 426.

98. Corbin Banking Co. *v.* Mitchell, 141 Ky. 172, 132 S. W. 426.

A pledgee of bank stock, not being legally bound to pay an assessment levied to make good an impairment of the capital of the bank, may surrender the stock, and thus relieve himself from liability. Corbin Banking Co. *v.* Mitchell, 141 Ky. 172, 132 S. W. 426.

99. Enforcement.—Chicago Title, etc., Co. *v.* State Bank, 30 C. C. A. 443, 86 Fed. 863.

Under the statute of Indiana (4 Burns' Supp. 1897, § 13) which provides that when the state auditor determines that the stock of a state bank has become reduced, by impairment or otherwise, below the amount required by law, an assessment shall be levied on the stockholders, who shall be liable to an amount equal to the par value of their stock, and that on default in payment of such assessment for 60 days the stock shall be sold by the directors, the proceeds of such a sale, less the costs thereof, are the property of the stockholders, who may recover the same in an action at law as for money had and received; and the only requisite of a complaint in such an action, to establish a presump-

§ 49. —— Actions and Proceedings to Enforce—§ 49 (1) Nature and Forms.—Compromise of doubtful claims by receiver, see post, "Collection and Protection of Assets," § 77 (4). Conditions precedent, see ante, "When Liability Arises and Conditions Precedent," § 47 (10). Enforcement in action against consolidated corporation, see post, "Consolidation," § 67.

§ 49 (1a) Legislative Regulations—§ 49 (1aa) In General.—The manner of enforcing the statutory liability of holders of bank stock is a subject of remedial legislation, unless the remedy enters into and forms part of the obligation which the statute creates.[1]

§ 49 (1ab) Retroactive Effect of Statutes.—Laws respecting the remedy by which the individual liability of holders of bank stock is to be enforced operate retroactively,[2] but do not apply to actions already pending.[3]

tive right of recovery, is that it shall show ownership of the stock in plaintiff; any lien of the bank or liability of the stockholder for unpaid stock, or otherwise, being matter of defense, or to be asserted in a suit in equity. Chicago Title, etc., Co. v. State Bank, 57 C. C. A. 398, 121 Fed. 58.

1. Remedial legislation.—Terry v. Anderson, 95 U. S. 628, 24 L. Ed. 365; Pollard v. Bailey (U. S.), 20 Wall. 520, 22 L. Ed. 376; Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. Ed. 825, 7 S. Ct. 757.

As to the distinction between the administration of the effects of an insolvent Ohio banking corporation and of those of a national banking association, see King v. Armstrong, 50 O. St. 222, 34 N. E. 163.

2. Retroactive effect.—Laws 1897, c. 441, amending Banking Law, § 52 (Laws 1892, c. 689), by providing that actions to enforce the liability of stockholders of insolvent banks shall be brought in the name of a receiver, where the bank has been dissolved, and a receiver appointed, applies to banks in liquidation at the time of its adoption. Persons v. Gardner, 26 Misc. Rep. 663, 56 N. Y. S. 822, 42 App. Div. 490, affirmed 59 N. Y. S. 463, 42 App. Div. 490.

Laws 1897, c. 441, amending § 52, c. 689, Laws 1892, relating to banking corporations, and fixing liability of stockholders, providing that if such a corporation shall be dissolved, and a permanent receiver appointed, all proceedings to enforce the liability of stockholders shall be taken in the name of such receiver, unless he shall refuse to act on proper request made by a creditor, and in that event such proceeding may be taken by any creditor, is retroactive; and receivers of an insolvent bank, appointed prior to the above statute, may maintain proceedings to enforce the liability of stockholders of such corporation. Persons v. Gardner, 26 Misc. Rep. 663, 42 App. Div. 490, 56 N. Y. S. 822, affirmed 59 N. Y. S. 463.

3. Pending suits.—Laws 1897, c. 441, amending Laws 1892, c. 689, § 52, provides that, on the dissolution of a bank and the appointment of a receiver, actions or proceedings to enforce liability of stockholders "shall be taken and prosecuted only in the name and behalf of such receiver," unless the latter shall refuse to take action. Held, not to apply to actions actually pending on its passage, though operating retrospectively where actions have not already been commenced. Mahoney v. Bernhard, 169 N. Y. 589, 62 N. E. 1097, affirming 45 App. Div. 499, 63 N. Y. S. 642, which modified Mahoney v. Bernhardt, 27 Misc. Rep. 339, 58 N. Y. S. 748.

Laws 1897, c. 441, providing that all proceedings to enforce the individual liability of stockholders for the debts of a bank "shall be" prosecuted only in the name of the receivers, where receivers willing to prosecute such proceedings have been appointed, does not abate an action commenced by a creditor under Laws 1892, c. 689, § 52, against stockholders of an insolvent bank, before the passage of the chapter, though receivers have been appointed, and only a part of the stockholders were served with summons before such passage, in view of Laws

§ 49 (1b) Statutory Remedy Exclusive—§ 49 (1ba) In General.—Where the statute creating the liability of bank stockholders provides the remedy, this is exclusive of all others, and when such remedy is in equity, a common-law action is excluded.[4]

§ 49 (1bb) Ancillary Suit in Other Jurisdiction.—Where the statutory remedy is exclusive, an ancillary suit in another state is barred.[5]

Method of Enforcing Left to Court.—An individual liability of bank

1892, c. 677, § 31, providing that the repeal of a statute shall not affect an act done prior thereto. Mahoney *v.* Bernhardt, 27 Misc. Rep. 339, 58 N. Y. S. 748; Mahoney *v.* Bernhard, 45 App. Div. 499, 63 N. Y. S. 642, affirmed 169 N. Y. 589, 62 N. E. 1097.

Neither does it apply to defendants not served in an action pending on the date of its passage, as there is but one action, which is against the entire body of stockholders, and it is "taken," in the sense of the amendment, when the summons is served on one of them. Mahoney *v.* Bernhard, 169 N. Y. 589, 62 N. E. 1097, affirming 45 App. Div. 499, 63 N. Y. S. 642, which modified Mahoney *v.* Bernhardt, 27 Misc. Rep. 339, 58 N. Y. S. 748.

4. When equity jurisdiction exclusive.—Pollard *v.* Bailey (U. S.), 20 Wall. 520, 22 L. Ed. 376; Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 30 L. Ed. 825, 7 S. Ct. 757.

Where the charter of a bank provided for a proportionate liability on the part of the stockholders in case of insolvency, and also for a pro rata distribution of the fund so provided for among the several creditors, according to their respective priorities, and plainly indicated that such liability should be enforced by a proceeding in a court of chancery, such remedy is exclusive. Pollard *v.* Bailey (U. S.), 20 Wall. 520, 22 L. Ed. 376; Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 30 L. Ed. 825, 7 S. Ct. 757.

In such case creditors should proceed in equity, where the "proportion can be ascertained upon an account taken of debts and stock, and a pro rata distribution of the debts among the several stockholders." Pollard *v.* Bailey (U. S.), 20 Wall. 520, 22 L. Ed. 376; Terry *v.* Tubman, 92 U. S. 156, 23 L. Ed. 537; Hatch *v.* Dana, 101 U. S. 205, 213, 25 L. Ed. 885.

Especially is this so when other parts of the charter indicate plainly that the exercise of the powers of a court of chancery which could bring before it all the necessary parties, and adjust all their rights, was, in a case of insolvency, contemplated. Pollard *v.* Bailey (U. S.), 20 Wall. 520, 22 L. Ed. 376.

As this proportion can only be ascertained upon an account of debts and stock and a pro rata distribution of the indebtedness among the several stockholders, the provision, therefore, for a proportionate liability is equivalent to a provision for an appropriate form of equitable action to enforce it. Pollard *v.* Bailey (U. S.), 20 Wall. 520, 22 L. Ed. 376.

Nebraska.—The liability of a stockholder in a banking corporation imposed by Const., Neb. 1875, art. 11b, § 7, declaring that every stockholder of a banking corporation shall be individually responsible to its creditors above the amount of stock to an amount equal to his stock, is enforceable only in equity. Hazlett *v.* Woodhead, 27 R. I. 506, 63 Atl. 952.

5. Gen. St. Minn., § 2501, declares that a stockholder in a bank shall be individually liable in an amount double the amount of stock held by him for all the debts of the bank, and §§ 5905-5907, 5911, authorize the enforcement of such liability of bank stockholders by one suit in equity in any district court of the state, to which all of the creditors and stockholders of the bank over whom the court can obtain jurisdiction shall be made parties, etc. A suit was brought in Minnesota, and, after the liabilities of all the stockholders over whom jurisdiction could be obtained had been determined, there remained a balance of $80,000 due the creditors, and an ancillary suit was brought in Wisconsin against defendant, who was not a party to the original action, to enforce her statutory liability as a stockholder in the bank. Held, that the statutory remedy was exclusive, and hence the original action in Minnesota was a bar to the subsequent action in this state. Finney *v.* Guy, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486.

stockholders created by statute without a remedy being prescribed may be enforced by an appropriate common-law action.[6] The stockholders are bound by such proceedings; and it is immaterial that they were absent or nonresident.[7]

§ 49 (1c) Forms of Action—§ 49 (1ca) Creditor's Suit and Receivership.—The ordinary method of enforcing the liability of the shareholders of a bank for its debts, on its insolvency, is by means of a creditor's suit against the bank and a receivership to which all the stockholders are made parties. The liability constitutes a trust fund which may be collected and administered by means of a suit in equity in the nature of a creditor's bill.[8] In such an action a receiver is appointed, the affairs of the corporation administered, the amount of its assets and liabilities determined, the deficiency ascertained, and an assessment to meet this deficiency made ratable upon all stockholders.[9] Such an action must be prosecuted for the benefit or on behalf of all the creditors of the corporation, and against all the stockholders within the jurisdiction of the court. It may be brought by one or more of the creditors or by the receiver when there is a recovery, but must be for the benefit of all the creditors whether named as party to the suit or not.[10] A suit by and on behalf of one out of many creditors

6. Method left to court.—Pollard *v.* Bailey (U. S.), 20 Wall. 520, 22 L. Ed. 376; Fourth Nat. Bank *v.* Franklyn, 120 U. S. 747, 30 L. Ed. 825, 7 S. Ct. 757.

Where a statute imposing liability on the stockholders of a banking corporation does not prescribe a method of enforcing it; courts, in as much as such a right should be enforcible, will look to the statute to ascertain its extent, and decide upon a manner of enforcing it. Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301.

7. Hill's Ann. St. & Codes Wash., § 1511, imposed a double liability on the stockholders of banking corporations, but left the method of enforcing it to the courts, who decided that it could only be enforced by a duly-appointed receiver after he had applied all other available assets. Held, that subscribers must be assumed to have understood the statute as construed, and to have agreed that on insolvency of the corporation a receiver might be appointed, and the amount of liability determined, and they are bound by such proceedings; and it is immaterial that they were absent or nonresident. Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301.

8. Mosler Safe Co. *v.* Guardian Trust Co., 138 N. Y. Supp. 298. See, also, cases cited in the two following notes, 9, 10.

Stockholders' liability for debts under Banking Law, § 303, being joint and several, was enforceable by a creditor's suit at law or in equity against all or any number of stockholders. Mosler Safe Co. *v.* Guardian Trust Co., 138 N. Y. S. 298.

Liability of stockholders, under Banking Law, § 303, being secondary, it is proper for a creditor to sue in equity for corporate accounting, to determine the amount of liability. Mosler Safe Co. *v.* Guardian Trust Co. (App. Div.), 138 N. Y. S. 298.

9. Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301.

10. *Colorado.*—The proper procedure to enforce the liability of stockholders in an insolvent bank for debts of the corporation imposed by 1 Mills' Ann. St., § 553, is by suit in equity by a creditor or creditors for the benefit of all the creditors and against all the stockholders. Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642.

Under Code, § 1882, creating "double liability" against bank stockholders, an assessment in a receivership proceeding is the proper method to enforce the liability. Elson *v.* Wright, 134 Iowa 634, 112 N. W. 105.

Kentucky.—The double liability of stockholders of a bank created by Ky. St., § 547 (Russell's St., § 2131), constitutes a trust fund which may be collected and administered by means of

a suit in equity in the nature of a creditors' bill brought for the equal benefit of all creditors. Conway *v.* Owensboro Sav., etc., Trust Co., 185 Fed. 950.

The double liability of stockholders of an insolvent bank created by Ky. St. 1903, § 547, may be enforced in a suit in equity by one creditor for the benefit of all, or by separate suits against each stockholder by a receiver. Conway *v.* Owensboro Sav., etc., Trust Co., 165 Fed. 822.

Since a suit against stockholders of an insolvent bank to enforce the double liability imposed by Ky. St., § 547 (Russell's St., § 2131), must be prosecuted for the equal benefit of all creditors entitled to share in the trust fund to be so collected, the entire matter should be determined in one comprehensive suit to which all creditors may become complainants and in which all who owe or hold any of such trust fund may be made defendants either to the original bill or to a receiver's petition. Conway *v.* Owensboro Sav., etc., Trust Co., 185 Fed. 950.

Under Ky. St., § 547 (Russell's St., § 2131), which makes stockholders in banks and trust companies liable for an amount equal to the par value of their stock "equally and ratably and not one for the other for all contracts and liabilities of such corporations," the amounts recovered on account of such double liability from the stockholders of an insolvent bank or trust company constitutes a trust fund to be ratably distributed among the creditors, and such liability is properly enforced by a suit in equity brought in behalf of all creditors against all stockholders, who also have a common interest in the ascertainment of the amount of stock, assets, and indebtedness of the corporation, in which suit such questions can be determined and the fund collected and administered. Alsop *v.* Conway, 110 C. C. A. 366, 188 Fed. 568.

Massachusetts.—Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301.

Nebraska.—Pickering *v.* Hastings, 56 Neb. 201, 76 N. W. 587.

The double liability of a stockholder of a banking corporation or institution, as fixed by Const., art. 11, § 7, can be enforced by one creditor of the corporation or institution only for the benefit of all the creditors, or by the receiver of the corporation or institution when there is a receiver. Farmers' Loan, etc., Co. *v.* Funk, 49 Neb. 353, 68 N. W. 520.

New York.—Actions to enforce bank stockholders' personal liability under the New York Stock Corporation Law must be brought on behalf of the parties named and all other creditors. In re Ziegler, 98 App. Div. 117, 90 N. Y. S. 681.

North Carolina.—The usual and better practice to enforce the double liability imposed on stockholders in banks by Pub. Laws 1897, p. 473, c. 298, where a creditors' bill has been previously brought and a receiver appointed, is to seek such relief in the creditors' bill, instead of instituting a separate and subsequent action by the receiver; and in such creditors' bill the court, on the report of the receiver, may ascertain the amount for which each stockholder should be held liable, and assess him accordingly, and issue a notice to each stockholder to show cause why the assessment should not be enforced. Smathers *v.* Western Carolina Bank, 135 N. C. 410, 47 S. E. 893.

An action by a creditor against a stockholder, to enforce the latter's individual liability, should be brought in behalf of plaintiff and all other creditors who will come in. Von Glahn *v.* Harris, 73 N. C. 323.

Ohio.—Dickason *v.* Grafton Sav. Bank Co., 27 O. C. C. 357.

Pennsylvania. — Where stockholders of a bank are liable for its debts, then liability can not be enforced except by a judicial decree first obtained. Means' Appeal, 85 Pa. (4 Norris) 75, followed in Craig's Appeal, 92 Pa. 396.

Rhode Island.—Hazlett *v.* Woodhead, 27 R. I. 506, 63 Atl. 952.

Actions against stockholders for the debts of a bank involve complex contributions among the stockholders, and are the proper subject of equity jurisdiction. Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 376.

South Carolina.—Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

Wisconsin.—Under the general banking law (Rev. St. c. 71, § 18), fixing the liability of bank stockholders, the remedy against them is by suit in equity in which all the creditors should join, or one or more of them should sue for the benefit of all. Coleman *v.* White, 14 Wis. 700, 80 Am. Dec. 797.

A judgment creditor of a bank (whether he has or has not docketed his judgment, and issued execution against the real estate of the bank) may maintain an action (under Rev. St. c. 148) in behalf of himself and all other creditors who may choose to become parties thereto, against the bank

against certain selected stockholders will not lie,[11] but a demurrer on this ground to a complaint by a judgment creditor will not be sustained when it does not appear that there were any other creditors.[12] In actions of this character, each and every creditor, whether he is named as a party in the action or does not come into the suit, is entitled to the benefits of the decree entered therein, and is authorized to prove his claim, bear the burden and share in the distribution.[13]

§ 49 (1cb) Action at Law by Creditor—§ 49 (1cba) Right to Sue.—Undoubtedly, under the provisions of some charters and statutes, suits may be maintained by one creditor against one or more of the stockholders.[14] An action at law in form ex contractu[15] as an action of debt,[16]

jointly with the stockholders, to reach and appropriate its assets, and enforce the liability of the stockholders. Merchants' Bank *v.* Chandler, 19 Wis. 434.

United States courts.—Pollard *v.* Bailey (U. S.), 20 Wall. 520, 22 L. Ed. 376.

Where a bank charter provided that on the failure of the bank "each stockholder shall be liable and held bound for any sum not exceeding twice the amount of his shares," a suit in equity by or for all creditors is the appropriate mode of enforcing the liability incurred on such failure. Terry *v.* Little, 101 U. S. 216, 25 L. Ed. 864.

The proceedings to determine how large the assessment of the stockholders should be, should be in equity, and all of the stockholders should be parties. Tompkins *v.* Craig, 93 Fed. 885.

11. Hastings *v.* Barnd, 55 Neb. 93, 75 N. W. 49.

12. Where the charter of a bank makes each stockholder liable to twice the amount of his shares for its debts, and a judgment creditor sues at law a single shareholder, who owns nearly all the shares, and the defendant files a demurrer on the ground that the stockholder's liability can not be enforced by a single creditor to the injury of others, and it does not appear from the complaint that there are any other creditors besides the complainant, the demurrer will be overruled. Marsh *v.* Charleston, Fed. Cas. No. 9,113, 1 Hughes, 288.

13. In re Ziegler, 98 App. Div. 117, 90 N. Y. 681.

An action against stockholders of a bank, as authorized by stock corporation law, to enforce a liability for the payment of debts, is for the benefit of every creditor, though not named as a party, and though they do not join therein; and hence a nonparticipating creditor was entitled to the benefits derived from such an action where she applied to prove her claim before final distribution of the proceeds thereof, on proving a satisfactory excuse for failure to prove her claim before the referee within the prescribed period. In re Ziegler, 98 App. Div. 117, 90 N. Y. S. 681.

14. Action at law.—Terry *v.* Little, 101 U. S. 216, 25 L. Ed. 864.

Where stockholders of a bank are made, by its charter, individually liable to depositors, the remedy must be pursued at law, not in equity; and an action may be had against a single stockholder. Meisser *v.* Thompson, 9 Ill. App. 368.

In the absence of a statute requiring creditors of a banking corporation to bring their suit in equity to enforce the individual liability of shareholders on the insolvency of the bank, a creditor of an insolvent South Dakota bank may proceed against one or more of the stockholders to recover the amount of his indebtedness in an action at law. Union Nat. Bank *v.* Halley, 19 S. D. 474, 104 N. W. 213.

Suit on judgment against insolvent bank.—Under Const., art. 18, § 3, making stockholders of banking corporations organized under the laws of South Dakota individually liable for all contracts, debts, and engagements of the bank to the extent of the par value of their stock, in addition to the amount invested in such stock, a creditor may sue a stockholder on a judgment recovered against an insolvent banking association. Union Nat. Bank *v.* Halley, 19 S. D. 474, 104 N. W. 213.

15. Actions at law.—Porter *v.* Kepler, 14 O. 127.

16. Action of debt.—By the law of Georgia, as declared by its highest tribunal, an action of debt will lie against a stockholder for debts of the corporation where the amount of a

or an action on the case[17] will lie; but a provision that execution on a judgment against a bank may issue against the stockholders' property does not authorize a personal action against a stockholder.[18]

§ 49 (1cbb) Enjoining Creditors from Prosecuting Suit.—Where creditors have the right to enforce the liability of stockholders in a bank for its debts, the bank receiver can not enjoin such suit, although it is his duty to enforce such liability. Where the liability of stockholders in a bank is individual and several to the creditors of the bank, the bank receiver can not enjoin suit at law by individual creditors against individual stockholders.[19]

§ 49 (1cc) Action at Law by Receiver of Bank.—An action by a receiver to enforce a statutory liability of all the stockholders of an insolvent bank is cognizable in a court of law.[20]

§ 49 (1cd) Action by Attorney General to Dissolve Bank—§ 49 (1cda) Right to Enforce Stockholder's Liability.—Under the

bank's outstanding indebtedness and the number of shares held by a stockholder are known and can be stated, the extent of his liability in such cases being fixed, and the amount with which he should be charged being a mere matter of computation. A similar action at law will therefore be sustained in the circuit court of the United States. Mills *v.* Scott, 99 U. S. 25, 25 L. Ed. 294.

17. **Action on the case.**—Since the liability of stockholders arises from their acceptance of the act creating the corporation, and their implied promises to fulfill its requirements, the proper remedy is an action upon the case. Carrol *v.* Green, 92 U. S. 509, 23 L. Ed. 738.

An action on the case lies against stockholders, in South Carolina, to recover the debts of the bank. Carrol *v.* Green, 92 U. S. 509, 23 L. Ed. 738.

18. Charter of the Northwestern Bank of Georgia, § 18, provides that the individual property of each stockholder shall be liable for the redemption of the bills of the bank, and that any judgment obtained against the bank by any creditor shall not only bind the property of the bank, but shall also bind the individual property of each stockholder to the amount of his stock, without any necessity of bringing suit against the stockholder, and that execution may issue on such judgment against the stockholder's property. Held, that a personal action by a creditor of the bank against a stockholder is not authorized. Lowry *v.* Inman, 46 N. Y. 119, affirming 37 How. Prac. 153, 6 Abb. Prac., N. S., 394; S. C., 32 N. Y. Super. Ct. 117.

19. Laws 1897, c. 47, § 55, providing that the receiver of a defunct bank shall bring suit against the stockholders to recover the amount due on their stockholders' liability in case the assets are insufficient to pay the bank creditors, and that a creditor shall not bring an action to enforce such stockholders' liability unless it appears to the court that the receiver has failed to do so, does not take away from the creditors the right to enforce the stockholders' liability, but merely imposes a condition thereon; and therefore a receiver could not maintain injunction against a creditor to prevent him from prosecuting a suit to enforce such liability. Sims *v.* Brown, 10 Kan. App. 261, 62 Pac. 713.

The charter of a savings bank declared that all the stockholders should be severally and individually liable to the depositors to the amount of stock held by them respectively. The bank failed, and a receiver was appointed. Suits at law were brought by individual depositors against individual stockholders to enforce the liability created by the charter. The receiver sought in equity to enjoin these suits, and to enforce as such receiver the liability of the stockholders for the benefit of all concerned. Held, that the depositors could not be deprived of their right to sue at law. Wincock *v.* Turpin, 96 Ill. 135.

20. **Action by receiver.**—Moore *v.* Ripley, 106 Ga. 556, 32 S. E. 647.

Code of Civil Procedure of New York, § 1785, subd. 4, where an action to dissolve a bank is brought by the attorney general and a permanent receiver appointed, and the attorney general refuses after notice to sue the stockholders to enforce their liability for the bank's debts, the creditor may sue.[21]

§ 49 (1cdb) Intervention by Creditors.—Creditors may intervene in an action by the attorney general to forfeit the charter of a bank and enforce the individual liability of its stockholders.[22]

§ 49 (1ce) Superintendent of Bank Authorized to Enforce.—A banking law, authorizing the superintendent of banks to sue to enforce the liability of stockholders necessary to pay debts after taking possession of the affairs of the corporation, does not make the enforcement of such liability mandatory on the superintendent, nor does it deprive the creditor of his right to enforce such liability on behalf of himself and other creditors of the corporation.[23]

§ 49 (1cf) Nonresident Stockholder.—While, in a proper case, the liability of a nonresident stockholder of an insolvent bank would be determined by the construction placed on the statute creating such liability by the courts of the domicile of the corporation, the remedy or method of enforcing such liability against him must conform to the procedure of the forum whose aid is invoked.[24]

21. Right of creditor to enforce.—The people, under Code Civ. Proc., § 1785, subd. 4, brought an action to dissolve a banking corporation, and the permanent receiver appointed refused to sue stockholders on their statutory liability to make up a deficiency of assets over existing liabilities, as authorized by Laws 1892, c. 689, § 52, on the ground that the action was barred by limitations. Held, that there was no authority under the Code for an order, on the petition of a creditor of the corporation, to compel the attorney general to bring the stockholders into the action to dissolve the bank and determine their liability. People *v.* Commercial Bank, 37 Misc. Rep. 16, 74 N. Y. S. 806.

22. Intervention in action to forfeit charter.—The attorney general sued to forfeit the charter of a bank organized under state laws, for failure to reduce an indebtedness of the president of the bank to the statutory limits, as required by Gen. St. 1894, §§ 2525, 2628. Thereafter, before judgment, a creditor, with the consent of the attorney general, and with leave of court, intervened in the action, filed a complaint, and brought in stockholders as defendants to enforce their double liability. Held, that the action was fully authorized by Gen. St. 1894, §§ 5900-5902, and creditors might, during the pendency of such action, enforce such liability against the stockholders under § 5905, or proceed as in the case at bar. State *v.* Merchants' Bank, 67 Minn. 506, 70 N. W. 803.

23. It was so held under the New York Banking Law, as amended by Laws of 1908, c. 143, § 3, Consol. Laws 1909, c. 2, § 19. Cheney *v.* Scharmann, 145 App. Div. 456, 129 N. Y. 993.

24. Nonresident stockholder.—Covell *v.* Fowler, 144 Fed. 535.

Laws Colo. 1885, p. 264, § 1, provides that shareholders in banks shall be individually responsible for its debts, in double the amount of the par value of stock owned by them respectively. Held, that notwithstanding the courts of that state had determined that the obligation thereby created was secondary, yet when suit was brought thereon in California against a resident stockholder of an insolvent Colorado bank the lex fori would prevail with reference to the form of action essential to enforce such liability, which would be considered as an original

§ 49 (2) Jurisdiction—§ 49 (2a) Existence of Legal Remedy.—Every creditor has an interest in the liability of every stockholder; and hence equity has jurisdiction of a suit for an accounting of the assets, and to enforce the liability, in the absence of a statute pointing out a different course, though a legal remedy also exists, since a resort to the legal remedy would entail a multiplicity of suits.[25]

§ 49 (2b) Court in Which Receivership Pending.—In General.—After a bank has become insolvent and its property has been placed in the hands of a receiver for liquidation, the court in which the receivership proceedings are pending has power to levy assessments against stockholders to enforce their subscription liability.[26]

Stockholders Residing in Other County or Parish.—All the stockholders, though residing in different parishes, may be sued for contributions before the court liquidating the bank.[27]

statutory liability. Miller *v.* Lane (Cal.), 116 Pac. 58.

Laws Colo. 1885, p. 264, providing no method for enforcing the double liability imposed in an action outside the state, the course of procedure must be regulated by the law of the state where it is sought to make the remedy available, under the rule that remedies are regulated by the lex fori, and no law existing in Maine whereby, in actions at law, one or more persons may sue for the benefit of themselves and others interested in a question of common or general interest, an action in Maine by three creditors of a Colorado bank to enforce double liability imposed by the Colorado statute upon stockholders can not be maintained. Miller *v.* Spaulding, 107 Me. 264, 78 Atl. 358.

Laws Colo. 1885, p. 264, imposes upon stockholders in banking corporations a liability to creditors in double the amount of the value of the stock held by them respectively, but no special remedy is provided for enforcement of the liability. Held, that Civ. Code Colo., § 12, providing that when a question is one of a general interest to many persons, or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue the defendant for the benefit of all, and the court may order the action to be so prosecuted or defended, obviously enacted without any special reference to the method of enforcing the liability of stockholders for the debts of insolvent corporations, making no provision for appointment of an assignee or receiver to be vested with the rights of creditors, and empowered as their representatives to enforce the liability of stockholders, but simply establishing a local method of procedure, without force beyond the jurisdiction of the state, and no part of the contract entered into by the shareholders in subscribing for their stock, furnishes no remedy to creditors of a Colorado bank to enforce the double liability of a nonresident stockholder in Maine. Miller *v.* Spaulding, 107 Me. 264, 78 Atl. 358.

25. **Existence of legal remedy.**—It was so held under Act Dec. 24, 1885 (19 St. at Large, p. 212), § 4, making stockholders of a bank liable to the amount of five per cent of their stock in addition thereto for its debts. Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

26. **Court in which receivership pending.**—Covell *v.* Fowler, 144 Fed. 535.

Under 3 How. Ann. St., § 3208e5, making bank stockholders individually liable to the amount of their stock for the benefit of depositors, and § 3208f4, directing the court, on being satisfied of the bank's insolvency, to appoint a receiver, who shall take possession of the books and enforce all liability of the stockholders, the court has jurisdiction to determine ex parte the necessity for enforcing the individual liability and to ascertain the amount necessary to meet the deficit. Foster *v.* Broas, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565.

27. **Stockholders residing in other county or parish.**—Stark *v.* Burke, etc., Co., 5 La. Ann. 740.

§ 49 (2c) Courts of Foreign Jurisdiction.—Action by Creditors.—By the weight of authority, the individual liability of holders of bank stock is enforceable by creditors of the bank in the courts of another state, where it is a primary liability and not a penalty,[28] where it is a substantive right,[29] or where it is a liability arising on contract;[30] but where such liability is not contractual but created solely by statute, the cause of action is local and not enforceable in another state.[31]

§ 49 (2d) Loss or Divestiture.—Mere lapse of time between an interlocutory order in receivership proceedings, in a suit against a bank, determining who were creditors and who were stockholders, and the amount for which each stockholder was liable, and providing for the enforcement of the liability, and retaining jurisdiction for that purpose, and the final judgment; is no indication that the court lost jurisdiction.[32]

§ 49 (3) Courts and Venue.—Court of County in Which Bank Located.—Where a bank has become insolvent, and, under the general laws, it is sought to make the stockholders liable for its debts, proceedings must be in the court of common pleas of the county in which the bank is located.[33]

Real Estate of Nonresident Stockholders.—A court administering the affairs of an insolvent bank and enforcing the statutory liability of its stockholders has jurisdiction over real estate, situate in the state of the forum, but belonging to nonresident stockholders.[34]

28. The liability of an Arkansas stockholder of an insolvent California bank under Civ. Code Cal., § 322, making a stockholder in a corporation liable to each creditor of the corporation for the portion of the debt which the stock owned by such stockholder bears to the whole subscribed capital stock, may be enforced in Arkansas by a suit at law. Lanigan *v.* North, 69 Ark. 62, 63 S. W. 62.

Civ. Code Cal., § 322, making a stockholder in a corporation liable to each creditor of the corporation for the portion of the debt which the stock owned by such stockholder bears to the whole subscribed capital stock of the corporation, does not create a penalty, but renders the stockholder primarily liable on such debt, and authorizes an action in Arkansas against an Arkansas stockholder of an insolvent California bank. Lanigan *v.* North, 69 Ark. 62, 63 S. W. 62; Childs *v.* Blethen, 40 Wash. 340, 82 Pac. 405.

29. Under Hill's Ann. St. & Codes Wash., § 1511, providing that bank stockholders shall be liable to the creditors to the amount of the par value of the stock in addition to the amount invested in such stock, the liability of the stockholders is a substantive right, and is enforceable against a resident of the state who is a stockholder in such insolvent corporation in the state of Washington. Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301.

30. Under the provision of the charter of a bank in Illinois making stockholders liable for the debts of the bank to the amount of their stock, the liability arises on contract, and therefore it may be enforced in courts of another state. Hodgson *v.* Cheever, 8 Mo. App. 318.

31. The individual liability of a stockholder of a Kansas banking corporation, is not enforceable in the courts of New Hampshire. Crippen *v.* Laighton, 69 N. H. 540, 44 Atl. 538, 46 L. R. A. 467, 76 Am. St. Rep. 192.

32. Loss or divestiture.—Childs *v.* Blethen, 40 Wash. 340, 82 Pac. 405.

33. Courts and venue.—Appeal of Means (4 Norris), 85 Pa. 75.

34. Real estate of nonresident stockholders.—When receivers are appointed to take possession of the property of a bank, a lien is created by

§ 49 (4) Set-Off and Counterclaim—§ 49 (4a) Set-Off.—A stockholder who is also a creditor of an insolvent bank can not set off its debt to him against his statutory liability for its debts,[35] since his liability is to the creditors, and for the further reason that such set-off would result in a preference;[36] but in Maryland[37] a stockholder who is also a creditor is entitled to set up as an equitable defense the debt of the bank to him against his own liability.

A stockholder purchasing claims against the bank at a discount is not entitled to credit at the full face value but can only be allowed his actual outlay and is still liable for the difference between the amount and that of his liability as a stockholder,[38] but a stockholder who is an assignee of

statute (Rev. St. 1857, c. 47, § 74), upon the real estate, situate in this state, of the stockholders liable for claims which exist against the bank. Therefore the court has jurisdiction over the real estate of nonresident stockholders. Wiswell *v.* Starr, 50 Me. 381.

35. Set-off.—Barnes *v.* Arnold, 169 N. Y. 611, 62 N. E. 1093, affirming 45 App. Div. 314, 61 N. Y. S. 85.

In proceedings to enforce the personal liability of stockholders of a bank under Laws 1849, c. 226, relative to closing up the affairs of an insolvent bank, a stockholder, who is also a creditor, can not offset his claim against his liability as a stockholder. In re Empire City Bank (N. Y.), 6 Abb. Prac. 385.

As against the liability imposed by Banking Law, § 303, the stockholders are not entitled to offset an indebtedness of the corporation to them. Mosler Safe Co. *v.* Guardian Trust Co. (App. Div.), 138 N. Y. S. 298.

Deposit.—A stockholder of an insolvent bank can not set off his deposit in the bank against his unpaid stock subscription. Williams *v.* Traphagen, 38 N. J. Eq. 57

36. Under Act Dec. 24, 1885 (19 St. at Large, p. 212), § 4, making stockholders of a bank liable to the amount of five per cent of their stock in addition thereto for the bank's debts, stockholders can not set off claims due them by the bank against their statutory liability, since their liability is to the creditors, and for the further reason that such set-off would result in a preference. Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

37. *Maryland.*—Cahill *v.* Original Big Gun, etc., Ass'n, 94 Md. 353, 50 Atl. 1044.

Where defendant indorsed the note of a bank in which he was a stockholder, and on the insolvency of the bank was required by order of court to pay a sum greater than his statutory liability as a stockholder, he thereby became a creditor of the bank, and as such was entitled to plead such payment as an equitable set-off to an action by a creditor of the bank to enforce his liability as a stockholder. Strauss *v.* Denny, 95 Md. 690, 53 Atl. 571.

38. Purchasing claims at a discount.—Where a charter makes the stockholders liable for the debts of the bank to an amount equal to their stock, they can not, by purchasing claims against the bank at a discount, reduce their liability. They can be allowed no more than their actual outlay, and will still be liable to other creditors for the difference between that and the amount of their stock. Gauch *v.* Harrison, 12 Ill. App. 457.

Director purchasing claims against insolvent bank.—After a chartered bank has been adjudicated a bankrupt, a member of its last active board of directors (the board in existence when the failure occurred and the act of bankruptcy was committed) can not buy up claims against it at a discount, and entitle himself to credit therefor at full face value in settlement with creditors on his personal liability as a stockholder. At least, this can not be done so as to defeat the suit of a creditor who commenced his actions before the bought-up claims were actually applied in extinguishment of the stockholder's personal liability, and whilst the stockholder held them, as transferee, open against the bank, he not having surrendered or canceled them until after the action was brought. Holland *v.* Heyman & Bro., 60 Ga. 174.

a judgment rendered in favor of a note holder may have his liability extinguished pro tanto by said assigned judgment.[39]

Share of Surplus.—Stockholders are not depositors to the amount of the surplus and may not defend on the ground that they are creditors to the amount of a proportional share of the surplus.[40]

Assessment by Superintendent of Banks.—Stockholders, having paid an assessment levied by the bank superintendent, under the New York Banking Law, § 17, to swell assets for liquidation, held entitled to offset the amount so paid against their liability to creditors, under Banking Law, § 303.[40a]

§ 49 (4b) Counterclaim.—In an action by the receiver of a bank against a stockholder under a statute imposing a liability upon stockholders for the debts of the bank, the defendant can not plead as a counterclaim a claim for damages against the bank for false representations made at the time he bought his stock, the bank not being a party to the action.[41]

§ 49 (5) Time to Sue, and Limitations and Laches—§ 49 (5a) Time to Sue.—Depositors of an insolvent bank in suits against stockholders are not bound to wait for the settlement of given claims for contribution between living stockholders and the estates or heirs of deceased stockholders. The adjustment of such controversies will be left to suits having that as the main and primary object.[42]

Premature Suit.—When the contingency of a deficiency exists, a suit to determine the amount is not prematurely brought.[43]

39. **Assignee of judgment in favor of note holder.**—Marr *v.* Bank, 72 Tenn. (4 Lea) 578.

40. **Share of surplus.**—Under Comp. Laws, §§ 6102, 6116, 6135, 6141, authorizing a bank to declare a dividend after providing for expenses and surplus, providing for a reserve, making stockholders liable to the depositors to the amount of the stock in addition to the stock, and limiting loans which may be made by the bank, the stockholders of a bank are not depositors to the amount of the surplus; for, until a division thereof, the surplus is owned by the shareholders collectively, and is by them collectively embarked as the capital of the bank in the banking business, and stockholders sued on their statutory liability may not defend on the ground that they are creditors of the bank to the amount of a proportional share of the surplus, for the word "depositors" in the statute is used in its ordinary meaning in the business of banking. Wedemeyer *v.* Hindelang, 161 Mich. 600, 126 N. W. 708.

40a. **Assessment by superintendent of banks.**—Mosler Safe Co. *v.* Guardian Trust Co. (App. Div.), 138 N. Y. S. 298.

41. **Counterclaim.**—Sheafe *v.* Larimer, 79 Fed. 921.

42. **Time to sue.**—Wood *v.* Wood, 40 Ill. App. 182.

43. **Premature suit.**—Where, in proceedings against the American Banking & Trust Company, the final account of the receiver showing a full administration of the assets and no balance in his hands is by decree approved and allowed, and the report of the commissioners on the claims against the corporation previously accepted and allowed shows the amount of the liabilities of the corporation, the fact and amount of the deficiency of assets, if any, have been judicially ascertained, and a suit to enforce the statutory liability of the stockholders imposed by Sp. Laws 1889, p. 547, c. 349, § 6, in amendment of its original charter begun immediately thereafter, is not premature, and there is no need of a further decree to declare the obvious mathematical truth. Flynn *v.* Ameri-

§ 49 (5b) What Statutes Applicable.—The state statute of limitations applicable to an action to recover on a bank stockholder's personal liability depends upon the phraseology of the statute creating the liability and that of the general statute of limitations.[44]

In United States Courts.—Suits, either at law or in equity, in the United States circuit court, by creditors to enforce the stockholders' liability under a state statute, are governed by the state statute of limitations.[45]

can, etc., Trust Co., 104 Me. 141, 69 Atl. 771.

An action to enforce an agreement binding stockholders of an insolvent bank to give their notes to it, to be collected in case there was a deficiency in assets to discharge liabilities existing at the date of the agreement, was not prematurely brought where it appeared from the complaint that there was such a deficiency when the action was commenced, and that an accounting was necessary to determine the exact amount thereof. Thompson *v.* Gross, 106 Wis. 34, 81 N. W. 1061.

44. Limitation of actions—statute applicable.—The statute of limitations (Act N. H. June 16, 1791), providing that unless "all actions of debt, grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, are commenced within six years," etc., does not apply as a bar to an action of debt brought upon a statutory provision that the stockholders of a bank whose bills are dishonored shall be personally liable to the holder for the payment thereof. Bullard *v.* Bell, Fed. Cas. No. 2,121, 1 Mason, 243.

45. State law governs in United States Courts.—Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 756, 30 L. Ed. 825, 7 S. Ct. 757, citing Terry *v.* Tubman, 92 U. S. 156, 23 L. Ed. 537; Carrol *v.* Green, 92 U. S. 509, 23 L. Ed. 738; Terry *v.* Anderson, 95 U. S. 628, 24 L. Ed. 365.

The Exchange Bank of Columbia, S. C., failed in February, 1865. In June, 1872, its creditors filed a bill in equity to enforce their claims against the stockholders under a clause of the charter, which, "upon the failure of the bank," rendered them individually liable for any sum not exceeding double the value of their respective shares. The defense set up the Statute of Limitations of 1712, which requires actions upon the case, and actions of debt, grounded upon any contract without specialty, to be brought within four years. Held, that as the liability of the stockholders arose from their acceptance of the act creating the corporation, and their implied promises to fulfill its requirements, the proper remedy was an action upon the case; and that, as the statute barred such an action at law, it was also a good defense in equity. Carrol *v.* Green, 92 U. S. 509, 23 L. Ed. 738.

The Statute of Georgia of 1869, limiting the time for enforcing rights accrued prior to June 1, 1865, may be set up as a valid bar to suits brought after Jan. 1, 1870, to enforce the individual liability of the stockholders of a bank in that state for the ultimate redemption of its bills which it ceased and failed to pay before June 1, 1865, or to recover the unpaid balance due on stock subscriptions at the time of such failure, as it allowed sufficient time, before the bar attached. Terry *v.* Anderson, 95 U. S. 628, 24 L. Ed. 365.

In Terry *v.* Tubman, 92 U. S. 156, 23 L. Ed. 537, it was decided that where the charter of a bank contained a provision binding the individual property of its stockholders for the ultimate redemption of its bills in proportion to the number of shares held by them respectively, the liability of the stockholder arose when the bank refused or ceased to redeem, and was notoriously insolvent; and that when such insolvency occurred prior to June 1, 1865, an action against a stockholder not commenced by Jan. 1, 1870, was barred by the statute of limitations of Georgia of March 16, 1869. That act, as recited in its preamble, was passed on account of the confusion that had "grown out of the distracted condition of affairs during the late war," and substantially barred suits upon all actions which accrued before the close of the war, if not commenced by the first day of January, 1870. Terry *v.* Anderson, 95 U. S. 628, 632, 24 L. Ed. 365.

§ 49 (5c) In What Actions Available.—A plea of the statute of limitation is applicable both to a creditor's bill against the stockholders of an insolvent bank and to proceedings under the receivership to enforce his personal liability.[46]

§ 49 (5d) When Statute Begins to Run.—The point of time from which the statute of limitations with respect to actions on bank stockholders' personal liability begins to run depends upon the language of the statutes of various states. Thus the statute may begin to run at the time when the bank failed to pay its depositors or its outstanding circulating notes;[47] from the suspension of specie payment;[48] from the day the bank's doors are closed;[49] from the time when the corporation was placed in the hands of an assignee in bankruptcy or insolvency, or of a receiver to wind up its

46. **In what actions available.**—The objection that a creditor's claim against stockholders of an insolvent bank, under the liability imposed by § 52 of the banking law, is barred by limitations, is just as available where he is made a party to an action to enforce such liability by another creditor in his own behalf and in behalf of all others as it would be if he came in only under the interlocutory judgment. Hagmayer *v.* Alten, 41 App. Div. 487, 58 N. Y. S. 684.

47. **Failure to pay depositors or circulating notes.**—Where the charter of a state bank made its stockholders, at the time of its failure or within a year prior thereto, liable individually for a sum not over twice the amount of their holdings, such failure occurred when the bank failed to pay its depositors or the outstanding circulating notes, and the statute then began to run against such liability. Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944.

Where a South Carolina state bank failed, within the meaning of the clause of its charter, in November, 1860, it follows that only those who were then shareholders, or who had been within twelve months before, are liable, or could be liable, in this suit, and as to those who were then stockholders the statute of limitation is a perfect bar, and no action can be maintained against them. Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944.

Where a bank failed to pay the deposits then held, or the circulating notes it had then out, according to its legal obligations to do so, it was not able to do so, and therefore was insolvent. It did not do so, and was therefore bankrupt. It refused to do so, and therefore it had failed. Godfrey *v.* Terry, 97 U. S. 171, 179, 24 L. Ed. 944.

"Since it never did pay or offer to pay these obligations, since it was never after this able to pay these obligations, it was ever afterwards insolvent, and its failure must bear date of this first and continued refusal and inability to pay." Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944.

The suspension of specie payments took place on the twenty-seventh day of November, 1860, and the statute of limitations of four years of the state of South Carolina, applicable to such cases, bars the right of recovery by a holder of its notes upon the statutory individual liability of its stockholders. This point was adjudged in this court against the present complainant in Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944; Terry *v.* McLure, 103 U. S. 442, 26 L. Ed. 403. See, also, Carrol *v.* Green, 92 U. S. 509, 23 L. Ed. 738.

48. **Suspension of specie payment.**—The statute runs against the right to enforce, by action, the personal liability of stockholders in a bank from the time of the suspension of specie payments by the bank. Long *v.* Bank, 90 N. C. 405.

49. **When doors closed.**—As against a stockholder's statutory liability for the bank's debts, in double the amount of stock held by him, limitations begin to run from the day the bank's doors are closed. Amer *v.* Armstrong, 6 Pa. Co. Ct. Rep. 392.

affairs;[50] or from the date of suit against the bank.[51]

§ 49 (5e) Period of Limitations and Suspension of Statute.—The period of limitations varies with the statutes of the various states;[52] in some the period is that which bars an action on a specialty,[53] in others it is that applicable to a simple contract,[54] or penalty;[55] while in Illinois the stockholders can not plead the statute unless the action is barred against the bank.[56]

50. Assignment for creditors or receivership.—Taking possession of a bank's assets for liquidation did not dissolve the bank, as effecting limitations on suit to enforce the stockholders' personal liability under Banking Law (Consol. Laws, c. 2), § 71. Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. S. 798.

It is well settled that the statutory liability of stockholders of Ohio corporations is complete, so as to set the statute of limitations running in their favor, when the corporate property has been placed in the hands of an assignee in bankruptcy or insolvency, or of a receiver to wind up its affairs. The exact amount of the liability of each stockholder may not then be known, and can only be ascertained in the progress of the action; yet the court may retain control of the cause and parties until the amount is definitely fixed, and the ultimate rights of the parties are adjusted. Younglove *v.* Lime Co., 49 O. St. 663, 33 N. E. 234; King *v.* Armstrong, 50 O. St. 222, 34 N. E. 163.

51. Date of suit.—When the charter of a bank declares that the stockholders of a bank shall be individually liable, "at the time of suits," for the ultimate payment of debts of the bank, in a given proportion, no cause of action arises against the stockholders until there has been a suit by a creditor against the bank, and the statute of limitations does not begin to run in favor of the stockholders until after the date of such a suit. Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626.

52. Stockholders in the American Banking & Trust Company are not subject to suit by the creditors of the corporation to enforce the stockholders' liability imposed by Sp. Laws 1889, p. 547, c. 349, § 6, in amendment of its original charter, until in proceedings against the corporation its assets are fully administered, and the fact and amount of deficiency of assets judicially ascertained; and a suit within six years after such judicial ascertainment is in time where an action to enforce their liability as transferrers was brought in one year thereafter. Flynn *v.* American, etc., Trust Co., 104 Me. 141, 69 Atl. 771.

In New York the suit must be brought within two years after maturity of the debt. Stock Corporation Laws (Consol. Laws, c. 59), § 59; Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. S. 798.

53. Where liability in nature or specialty.—The statutory liability of a stockholder in a bank is in the nature of a specialty, and is not barred until twenty years. Thornton *v.* Lane, 11 Ga. 459; Neal *v.* Moultrie, 12 Ga. 104; Central Bank *v.* Williams, 17 Ga. 193.

54. Baker *v.* Atlas Bank (Mass.), 9 Metc. 182.

Massachusetts.—An action by creditors against stockholders of an insolvent bank, to enforce a statutory liability of the stockholders, is barred after six years by Rev. St. c. 120, § 1, which provides that all actions of debt founded on any contract not under seal, and all actions of assumpsit or upon the case founded on contract, express or implied, shall be commenced within six years. Baker *v.* Atlas Bank (Mass.), 9 Metc. 182.

A suit in equity, under St. 1860, c. 167, for the confirmation of an assessment, by the receivers of a banking corporation, upon the stockholders, of an amount sufficient to redeem its bills, can not be brought more than six years after the injunction upon the bank was made perpetual. Commonwealth *v.* Cochituate Bank (Mass.), 3 Allen 42.

55. This liability being in the nature of a penalty for issuing the notes in a form, and with a design to be circulated as money, a right of action thereon would be barred in four years. Lawler *v.* Burk, 7 O. St. 340, overruling Lawler *v.* Walker, 18 O. 151.

56. *Illinois.*—Where, by the charter of a bank, the stockholders are liable to the amount of their stock for the payment of the debts of the bank, they can not plead the statute of limita-

Liabilities Incurred Prior to Close of Civil War Period.—Statutes limiting the time for suing to enforce rights which accrued prior to or during the Civil War period apply to actions to enforce a bank stockholder's personal liability.[57]

Order of Distribution.—In a proceeding to secure distribution of fund paid into court by stockholders of an insolvent bank in full of their stock liability, on the condition that, if it should be found there was an overpayment, the amount should be repaid, where such payment was made within six years after the appointment of the receiver, and six years have not elapsed since the fund was so paid, during which time the receiver was restrained from taking proceedings against stockholders secondarily liable, the right of the receiver to apply for an order vacating the injunction and distributing the fund is not barred.[58]

§ 49 (5f) Operation and Stay of Proceedings.—A perpetual stay of proceedings will be granted upon a motion therefor upon a reference for the apportionment of the debts of an insolvent bank among its stockholders where the apportionment is not made within the time limited by the act or the utmost extension of time that could be granted thereunder.[59]

§ 49 (5g) Laches and Lapse of Time.—Lapse of time sufficient to justify the application of the doctrine of stale demands precludes creditors of insolvent banks from enforcing a stockholder's personal liability in equity, which if freshly pursued would be available.[60]

Period in Equity in Analogy to Law.—When the statute bars an action at law to enforce a bank stockholder's personal liability, it is also a good defense in equity.[61]

tions in bar to an action against them for such debt, unless the action is barred as against the bank. Fleischer *v.* Rentchler, 17 Ill. App. 402.

57. **Liabilities incurred prior to close of civil war period.**—A suit in equity, begun December 2, 1870, against stockholders of a bank, for a failure occurring in November, 1860, under the provisions of a statute of South Carolina rendering each stockholder, in case of a failure of the bank, individually liable for a sum not exceeding twice the amount of his share or shares, was held barred by the statute of limitations. Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944.

The liability of a stockholder of a bank, whose insolvency occurred prior to June 1, 1865, is barred by the Georgia statute of limitations of March 16, 1869, if not commenced by January 1, 1870, by the direct provisions of such statute. Terry *v.* Tubman, 92 U. S. 156, 23 L. Ed. 537.

The Georgia Act of March 16, 1869, limiting the time for suing to enforce rights which accrued prior to June 1, 1865, and declaring that such suits must be brought before January 1, 1870, may be pleaded as a bar to suits brought after that time to enforce the individual liability of the stockholders of a bank for the redemption of bills which it ceased and failed to pay before June 1, 1865, or to recover the unpaid balance due on stock subscription at the time of such failure. Terry *v.* Anderson, 95 U. S. 628, 24 L. Ed. 365.

58. **Order of distribution.**—Pope *v.* Germania Bank, 106 Minn. 446, 119 N. W. 61.

59. **Stay of proceedings.**—In re Empire City Bank (N. Y.) 4 Abb. Prac. 118, so holding under N. Y. Act 1849 (Laws 1849, c. 226).

60. **Lapse of time.**—Twelve years may constitute the lapse of time. Gilmore *v.* Bank, 8 O. 62.

61. **Period in equity in analogy to**

§ 49 (5½) Process and Appearance.—A judicial ascertainment of the liabilities of an insolvent bank, such as is necessary before an action to enforce the liability of stockholders, can only be had in an action where the bank, being a party, has been properly served, or where it has voluntarily appeared.[62]

§ 49 (6) Parties—§ 49 (6a) Parties Plaintiff—§ 49 (6aa) Necessary and Proper Parties—§ 49 (6aaa) Suit to Enforce Liability for Debts of Bank—§ 49 (6aaaa) In General.—Since the individual liability of shareholders of bank stock is purely statutory, there can be no general rule as to who are proper parties to enforce such liability. In every instance the question must be determined from the statutes creating the liability and prescribing means to enforce it.[63]

§ 49 (6aaab) Creditors.—The statutory liability of stockholders of a bank is enforceable only by the creditors in the states of Georgia,[64] Indiana,[65] Kentucky,[66] Maine,[67] Maryland,[68] New York,[69] and Utah,[70] and not by the bank or corporation, receiver, assignee for the benefit of creditors, or trustee.

law.—Carrol *v.* Green, 92 U. S. 509, 23 L. Ed. 738.

Twenty years after the appointment of a receiver of an insolvent bank is a period of time beyond which by analogy no proceedings should be allowed to enforce the liability of stockholders. In re Bank (N. Y.), 32 Hun 462.

62. **Process and appearance.**—Andrews *v.* Holcomb, 79 Neb. 660, 113 N. W. 204.

63. **Proper parties plaintiff.**—Runner *v.* Dwiggins, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645.

Idaho.—Rev. Codes, § 2979, provides that stockholders of incorporated banks shall be liable to the amount of their stock at its par value, in addition to the stock held by them, and that such liability may be enforced by the bank in liquidation, or by any receiver or person succeeding to its legal rights. McTamany *v.* Day (Idaho), 128 Pac. 563.

64. *Georgia.*—**Suit by billholder.**—Lane *v.* Morris, 8 Ga. App. 468.

See post, "Liability of Stockholders or Officers," § 211.

65. *Indiana.*—Runner *v.* Dwiggins, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645.

66. *Kentucky.*—Farmer's Bank *v.* Scott, 144 Ky. 575, 139 S. W. 801; Alsop *v.* Conway, 110 C. C. A. 366, 188 Fed. 568.

67. *Maine.*—The liability imposed by Sp. Laws 1889, p. 547, c. 349, § 6, in amendment of the original charter of the American Banking & Trust Company on the stockholders in that corporation for all contracts, debts, and engagements of the corporation to the amount of their stock, in addition to the amount invested therein, is not an asset of the corporation, and can not be enforced by the corporation or its receiver, but only by creditors of the corporation. Flynn *v.* American, etc., Trust Co., 104 Me. 141, 69 Atl. 771.

68. *Maryland.*—The indebtedness of the stockholders in a Maryland bank, liable under its charter "to the amount of their respective share or shares of stock in their corporation for all its debts" is to the creditors and not to the corporation and enforceable only by the former. Colton *v.* Mayer, 90 Md. 711, 45 Atl. 874, 47 L. R. A. 617, 78 Am. St. Rep. 456.

69. *New York.*—Hirschfeld *v.* Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839, rehearing denied in 157 N. Y. 707, 52 N. E. 1124, reversing Hishfeld *v.* Bopp, 27 App. Div. 180, 50 N. Y. S. 676.

70. *Utah.*—Under Acts 18th Gen. Assem. Iowa, c. 208, fixing the liability of stockholders, in excess of their stock, for debts of the bank, and declaring such liability to be to the creditors, not to the bank, an action against stockholders upon the liability created by said act should be brought by the creditors, and not by the bank or its receiver. Steinke *v.* Loofbourow, 17 Utah 252, 54 Pac. 120.

§ 49 (6aaac) Corporation or Bank.—The statutory liability of stockholders in a bank can not be enforced by the bank or corporation in Maine,[71] New York,[72] and Utah.[73]

§ 49 (6aaad) Receivers.—The statutory liability of stockholders in a bank for its debts is enforceable by its receivers and creditors are not allowed to supersede them in enforcing the liability without first showing good cause and obtaining leave of court in Idaho,[73a] Iowa,[74] Minnesota,[75] New York,[76] and Washington;[77] but such liability can not be enforced by a receiver of the bank in Georgia,[78] Kentucky,[79] Maryland,[80] Missouri[81] and

71. *Maine.*—Flynn *v.* American, etc., Trust Co., 104 Me. 141, 69 Atl. 771.

72. *New York.*—A bank's stockholder's statutory liability for its debts is not an asset of, and can not be enforced by, the bank, being for the exclusive benefit of creditors whose debts are payable within two years, and who sue thereon within two years after maturity, as provided by Stock Corporation Law (Consol. Laws, c. 59), § 59. Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. S. 798.

See ante, "Time to Sue and Limitations and Laches," § 49 (5).

73. *Utah.*—Steinke *v.* Loofbourow, 17 Utah 252, 54 Pac. 120.

73a. *Idaho.*—McTamany *v.* Day (Idaho), 128 Pac. 563.

74. *Iowa.*—In a suit by the state, under Code, § 1572, to wind up an insolvent bank, the liability of the stockholders under Acts 18th Gen. Assem. c. 208, is not directly to the creditors, but constitutes a fund for the debts of the bank, which the receiver is authorized to collect and distribute. State *v.* Union Stock Yards, etc., Bank, 103 Iowa 549, 70 N. W. 752, 72 N. W. 1076.

75. *Minnesota.*—Receivers appointed under Laws 1895, c. 145, § 20, have primarily an exclusive right to institute proceedings to enforce the stockholders' liability; and creditors are not permitted by Gen. St. 1894, c. 76, to supersede them in the exercise of this right, without first showing good cause and obtaining leave of court. Anderson *v.* Seymour, 70 Minn. 358, 73 N. W. 171.

76. *New York.*—Under New York Law 1897, c. 441, the receiver is required to bring the action to enforce bank stockholder's personal liability; but that provision is not retroactive. Mahoney *v.* Bernhardt, 27 Misc. Rep. 339, 58 N. Y. S. 748; Mahoney *v.* Bernhard, 45 App. Div. 499, 63 N. Y. S. 642, affirmed in 169 N. E. 589, 62 N. E. 1097. See, also, Mahoney *v.* Adams, 29 App. Div. 629, 51 N. Y. S. 1082.

77. *Washington.*—A receiver of a Washington state bank may maintain an action to enforce the individual liability of stockholders to the extent of their stock. Under the decision of the Washington courts this liability can only be enforced by a receiver under the direction of the court. Howarth *v.* Ellwanger, 86 Fed. 54.

The contingent liability of stockholders of a bank under Const., art. 12, § 11, for its debts, can be enforced only by its receiver. Watterson *v.* Masterson, 15 Wash. 511, 46 Pac. 1041.

78. *Georgia.*—Lane *v.* Morris, 8 Ga. 468.

79. *Kentucky.*—Ky. St., § 616 (Russell's St., § 2256), authorizes the appointment of a receiver for an insolvent bank or corporation who shall, under the direction of the court, take possession of the "assets of every description" of such bank or corporation and collect or dispose of the debts due it and sell all of its property. Section 547 (§ 2131) provides that stockholders in corporations "shall be liable to creditors" only for the unpaid part of their stock, "except stockholders in banks, trust companies * * * shall be liable equally and ratably, and not one for the other, for all contracts and liabilities of such corporations to the extent of the amount of their stock at par value, in addition to the amount of such stock." Held, under the decisions of the court of appeals of the state, that the double liability of stockholders in a bank or trust company is not an asset of the corporation and can not be enforced by a receiver appointed under § 616. Alsop *v.* Conway, 110 C. C. A. 366, 188 Fed. 568.

80. *Maryland.*—Acts 1896, c. 349, requiring all the assets of an insolvent

81. *Missouri.*—Millisack *v.* Moore, 76 Mo. App. 528.

Utah.[82]

Action to Recover Loss to Depositor.—In an action to recover from a stockholder of a banking corporation for loss sustained by a depositor in the failure of the bank, the receiver is not a necessary plaintiff, since the amount to be recovered does not belong to the receiver, but is additional security for the individual depositor.[83]

§ 49 (6aaae) Assignees for Benefit of Creditors.—In the absence of statutory authority, an assignee for the benefit of creditors can not sue to enforce the statutory liability of the stockholders for the bank's debts.[84] A general assignment executed by a bank of its effects to a trustee for the benefit of its creditors does not carry the statutory liability of the stockholders for debts outside of unpaid subscription.[85]

In Pennsylvania where a bank has become insolvent, and, under the general laws, it is sought to make the stockholders liable for its debts, proceedings must be in the name of the assignee.[86]

§ 49 (6aaaf) Trustees.—See ante, "Creditors," § 49 (6aaab).

§ 49 (6aaag) Superintendent of Banks.—See ante, "Superintendent of Bank Authorized to Enforce," § 49 (1ce); post, "Necessary Allegations," § 49 (7aa).

§ 49 (6aaah) Comptroller of Banks.—See post, "Suit on Stockholder's Bond," § 49 (6aac).

§ 49 (6aaai) Attorney General.—See ante, "Action by Attorney

corporation to be distributed to its creditors in the same way as the assets of an insolvent debtor, and Code, art. 23, § 269, vesting in receivers of a corporation "all the estate and assets of every kind belonging to such corporation," do not enable the receivers of a bank to sue its stockholders under its charter (Acts 1888, c. 294), making them liable "to the amount of their respective share or shares of stock in this corporation for all of its debts;" the indebtedness being to the creditors, and not to the corporation. Colton *v.* Mayer, 90 Md. 711, 45 Atl. 874, 47 L. R. A. 617, 78 Am. St. Rep. 456.

82. *Utah.*—Steinke *v.* Loofbourow, 17 Utah 252, 54 Pac. 120.

83. Action to recover loss to depositor.—Millisack *v.* Moore, 76 Mo. App. 528.

84. *Georgia.*—Lane *v.* Morris, 8 Ga. 468.

Indiana.—Runner *v.* Dwiggins, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645.

The double liability of the stockholders of a bank is not a "right" or "credit" of the bank, which Rev. St. 1894, § 2908 (Rev. St. 1881, § 2671), authorizes the assignee for the benefit of creditors to collect. Runner *v.* Dwiggins, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645.

Kentucky.—Ky. St., § 547 (Russell's St., § 213), provides that stockholders in banks shall be liable equally and ratably, and not one for the other, for all contracts and liabilities of the corporation, to the extent of the amount of their stock at par value, in addition to the amount of such stock. Held, that such liability was not an asset of the corporation on insolvency, recoverable by the corporation's assignee for the benefit of creditors. Farmers' Bank *v.* Scott, 144 Ky. 575, 139 S. W. 801.

85. Passage under general assignment.—Terry *v.* Abraham, 93 U. S. 38, 40, 23 L. Ed. 794.

86. *Pennsylvania.*—Appeal of Means (4 Norris), 85 Pa. 75.

General to Dissolve Bank," § 49 (1cd); post, "Forms, Requisites and Validity," § 49 (9cb).

§ 49 (6aaaj) County Treasurer.—See post, "Suit for Public Moneys," § 49 (6aab).

§ 49 (6aab) Suit for Public Moneys.—The county treasurer is the proper party to sue stockholders of a bank to recover public moneys belonging to the county.[87]

§ 49 (6aac) Suit on Stockholder's Bond.—See ante, "Stock Mortgages and Bonds," § 39 (6).

§ 49 (6ab) Interest.—An objection to a creditor's suit to enforce the liability of certain stockholders in a bank for its debts to the amount of the plaintiffs' claims against the bank, because of the trifling interest of the plaintiffs, can not be sustained where they have a real and tangible claim against the defendants.[88]

§ 49 (6ac) Joinder of Parties Plaintiff—§ 49 (6aca) Receivers and Creditors.—Where the statute authorizes the enforcement of the statutory liability of stockholders in a bank by one suit in equity a suit by the receiver of the bank and all participating creditors is not bad for misjoinder of parties plaintiff.[89]

87. **Suit for county money.**—Kirby's Dig., § 1990, provides that county treasurers may deposit public funds in their custody in incorporated banks for safekeeping, and that said officers and their sureties and the bank and its stockholders shall be liable for all such funds, if such bank, upon demand, shall fail to pay the person entitled to receive the same. Section 1159 provides that the county treasurer is the proper person to receive all moneys payable into the county treasury, and § 6002 provides that the trustee of an express trust a person in whose name a contract has been made for the benefit of another, or any officer, may bring an action without joining with him the person for whose benefit it is prosecuted. Held, that the county treasurer is the proper party to sue stockholders of an insolvent bank to recover the public moneys belonging to the county. Warren *v.* Nix, 97 Ark. 374, 135 S. W. 896.

88. **Interest.**—Where the claims of plaintiffs against an insolvent banking corporation amounted to only $2,800 out of a total liability of $485,000, the contention that plaintiffs could not maintain an action in equity to enforce the individual liability of defendants as the owners of $2,500 worth of shares in the bank because of the trifling interest of plaintiffs can not be sustained, since in theory all creditors are plaintiffs to such an action, and, if the other creditors refused to join in the prosecution of the suit on due notice, defendants were liable to plaintiffs to the full amount of their shares. Rehbein *v.* Rahr, 109 Wis. 136, 85 N. W. 315.

89. **Joinder of receivers and creditors.**—While there is no necessity for joining creditors of a bank as parties plaintiff in a suit brought by the receiver to enforce the stockholders' double liability imposed by Pub. Laws 1897, p. 473, c. 298, such joinder is not prejudicial to defendants. Smathers *v.* Western Carolina Bank, 135 N. C. 410, 47 S. E. 893.

Under Gen. St. Minn., § 2501, declaring that a stockholder in a bank shall be individually liable for a sum double the amount of the stock held by him for all the debts of the bank, and §§ 5905-5907, 5911, authorizing enforcement of the double liability of stockholders by one suit in equity, etc., a suit by the receiver of a bank and all participating creditors was not bad for misjoinder of parties plaintiff, since such liability is several as to each stockholder to all the creditors, but

§ 49 (6acb) Creditor and Assignee of Claim against Bank.—The assignee of a claim against an insolvent bank has the same rights as his assignor to be made a party to an action by a creditor in his own behalf and in behalf of all others to enforce the liability of its stockholders, whether he became assignee before or after the action was begun.[90]

§ 49 (6ad) Bringing in Parties Plaintiff.—Creditors.—Creditors of an insolvent bank may be made parties to an action by another creditor in behalf of himself and all other creditors to enforce the liability for stockholders, after the action is at issue and before it has been noticed for trial.[91]

§ 49 (6b) Parties Defendant—§ 49 (6ba) Proper and Necessary Parties—§ 49 (6baa) Creditor's Suit against Bank.—Necessity for Making Stockholder's Party.—Under Code, § 1882, creating double liability against certain bank stockholders, and providing that the receiver, etc., may maintain an action to determine the stockholders' liability, and that "all persons interested shall be brought into court" to make an assessment binding upon a stockholder, he must be brought into the litigation individually before the assessment.[92]

Nonresident Stockholders.—Nonresident stockholders, who are not in reach of the process of the court and against whom it can not render a personal judgment, enforcing their statutory liability for the debts of the bank, need not be made parties to a suit to sequester the assets of the corporation, and ascertain the assessment to be made to liquidate the bank's debts as they were represented by the corporation, or its general receiver, appointed prior to the institution of such suit.[93]

§ 49 (6bab) Actions against Stockholders by Creditors.—Receivers.—Receivers of an insolvent bank are not necessary parties defendant in an action by a creditor against the stockholders under New York Laws 1892, c. 689, § 52, commenced prior to the passage of Laws 1897, c. 441, requiring the receivers to bring such actions.[94]

joint in that it requires one action in equity, in which all the creditors participating must appear on one side, and all the stockholders over whom jurisdiction can be obtained on the other. Finney *v.* Guy, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486.

90. Creditor and assignee of claim against bank.—Hagmayer *v.* Alten, 41 App. Div. 487, 58 N. Y. 684.

91. Bringing in parties plaintiff—Creditors.—Hagmayer *v.* Alten, 41 App. Div. 487, 58 N. Y. S. 684.

92. Necessity for making stockholders' party.—Elsom *v.* Wright, 134 Iowa 634, 112 N. W. 105.

93. Nonresident stockholders.—Childs *v.* Cleaves, 95 Me. 498, 50 Atl. 714. See post, "Nonresident Stockholders," § 49 (6bbabb).

94. Receivers.—Mahoney *v.* Bernhardt, 27 Misc. Rep. 339, 58 N. Y. S. 748; Mahoney *v.* Bernhard, 45 App. Div. 499, 63 N. Y. S. 642, affirmed in 169 N. Y. 589, 62 N. E. 1097.

In an action brought in 1896 by a creditor of a banking corporation to enforce the stockholders' liability, under Laws 1892, c. 689, § 52, a motion for leave to bring in, as parties defendant, permanent receivers subsequently appointed, was opposed on the ground that Laws 1897, c. 441, amending § 52 so as to require such an action to be brought by the receivers, was retroactive. Held, that the question thus raised should be left to be de-

§ 49 (6bb) Joinder of Parties—§ 49 (6bba) Joinder of Stockholders—§ 49 (6bbaa) Action at Law by Creditors—§ 49 (6bbaaa) In General.—Where the liability of stockholders in a bank for its debts is several, the stockholders must be separately sued, even where an action at law is maintainable by one creditor.[95] This is the rule in the courts of the United States.[96]

§ 49 (6bbaab) Stockholders Who Transferred Stock.—In an action by a depositor in an insolvent bank against the stockholders to recover the balance due him at the time of the suspension of the bank, it is not necessary to join as defendants persons who signed the articles of incorporation, but have since transferred their stock, though such transfer was not made in the manner provided by the articles of incorporation.[97]

§ 49 (6bbab) Creditors Suits—§ 49 (6bbaba) In General.—The liability of stockholders of a bank for its debts must be enforced in a single action, against all stockholders within the jurisdiction of the court and not against certain selected stockholders. This is the rule in the states of Minnesota,[98] Nebraska,[99] and South Carolina.[1]

§ 49 (6bbabb) Nonresident Stockholders.—Under Laws 1892, c. 689, § 52, making the stockholders of an insolvent bank "individually responsible equally and ratably, and not one for the other," for the bank's debts, a creditor of such a bank may sue such stockholders as are residents, and omit others who are nonresidents;[2] but it is proper for the receiver of an insolvent bank to include nonresident stockholders in the equity suit for the purpose of determining their liability.[3]

termined upon the trial, and that the motion should be granted. Mahoney *v.* Adams, 29 App. Div. 629, 51 N. Y. S. 1082.

95. Liability several.—Terry *v.* Little, 101 U. S. 216, 25 L. Ed. 864; Pollard *v.* Bailey (U. S.), 20 Wall. 520, 22 L. Ed. 376.

96. Where a bank charter provided that, on failure of the bank, each stockholder should be liable for a sum not exceeding twice the amount of his shares, even were an action at law maintainable by one creditor, the stockholders must be separately sued. Terry *v.* Little, 101 U. S. 216, 25 L. Ed. 864.

97. Shareholders who have transferred stock.—Wadsworth *v.* Hocking, 61 Ill. App. 156.

98. *Minnesota.*—An action will not lie in favor of a creditor against individual stockholders to enforce their liability for the debts of a bank imposed by Gen. St. 1866, c. 33, § 21; but such liability must be enforced by a single action, in which all persons claiming any interest in the subject-matter shall be joined or properly represented, and their respective rights and liabilities determined. Allen *v.* Walsh, 25 Minn. 543.

99. *Nebraska.*—Hastings *v.* Barnd, 55 Neb. 93, 75 N. W. 49.

The liability of stockholders in banking corporations under Const., art. 11, § 7, must be enforced against all stockholders liable. A suit by and on behalf of one out of many creditors against certain selected stockholders will not lie. Pickering *v.* Hastings, 56 Neb. 201, 76 N. W. 587; Hastings *v.* Barnd, 55 Neb. 93, 75 N. W. 49.

1. *South Carolina.*—Terry *v.* Martin, 10 S. C. 263.

2. Nonresident stockholders.—Mahoney *v.* Bernhardt, 27 Misc. Rep. 339, 58 N. Y. S. 748; Mahoney *v.* Bernhard, 45 App. Div. 499, 63 N. Y. S. 642, affirmed in 169 N. Y. 589, 62 N. E. 1097. See ante, "Creditor's Suit against Bank," § 49 (6baa).

3. It is the duty of the receiver of a Nebraska bank to include nonresident

§ 49 (6bbac) Actions by Receiver.—In an action by the receiver, under order of court, to enforce the statutory liability of the stockholders of an insolvent bank having no assets, all of the stockholders may be joined as defendants in the one action,[4] but such joinder is not necessary. An action may be maintained against a single stockholder.[5]

Rule of Federal Court as to Iowa Statute.—The federal court has held that a receiver of an insolvent Iowa bank can not maintain a suit in equity in a federal court against a number of stockholders to recover assessments levied under the state statute, as the liability of the defendants is several, arising on their contracts of subscription, each of which is a separate obligation, and is a legal, and not an equitable, liability.[6] Such a suit can not be maintained on the ground that it will prevent a multiplicity of suits, but is objectionable upon the ground of multifariousness.[7]

§ 49 (6bbb) Joinder of Bank, Its Trustee or Assignee—§ 49 (6bbba) Actions by Creditors.—An action by creditors to enforce the liability of bank stockholders should be against the bank and all the stockholders, unless it be impossible or impracticable to bring them all before the court, or unless some other sufficient cause for the omission be shown. This is the rule under the laws of North Carolina[8] and Wisconsin,[9] and the

stockholders in the equity suit in Nebraska, for the purpose of determining their liability. Hazlett *v.* Woodhead, 27 R. I. 506, 63 Atl. 952.

4. *Georgia.*—Moore *v.* Ripley, 106 Ga. 556, 32 S. E. 647.

5. Where a bank is forced into liquidation, and the stockholders are decreed to contribute pro rata on their debts for stock, a suit to enforce such decree may be sustained against one of the stockholders to the decree. Bank *v.* Iglehart, Fed. Cas. No. 860, 6 McLean 568.

Where the court, on petition of the receiver of an insolvent bank, proceeded to ascertain the amount of liabilities, and the value of the assets, and the amount required in addition thereto to pay the liabilities, and determined the amount of statutory liability of stockholders, the receiver might thereafter maintain an action against a single stockholder to enforce such statutory liability; the question of allowing such action being one of policy, resting in the discretion of the court. Shucy *v.* Adair, 24 Wash. 378, 64 Pac. 536.

6. Rule of Federal court as to Iowa statute.—Tompkins *v.* Craig, 93 Fed. 885.

7. Tompkins *v.* Craig, 93 Fed. 885.

8. Action by creditors—*North Carolina.*—Glenn *v.* Farmers' Bank, 72 N. C. 626.

9. *Wisconsin.*—Coleman *v.* White, 14 Wis. 700, 80 Am. Dec. 797; Merchants' Bank *v.* Chandler, 19 Wis. 434.

Rev. St. c. 148, § 25 (2 Taylor's St. p. 1734), provides, with reference to proceedings against corporations, for failure to pay debts or for charter violations, that if an application for an injunction and the appointment of a receiver be made by a creditor of any corporation whose stockholders are liable for the payment of the debt, in any event or contingency, they "or any of them may be made parties to the action, either at the commencement thereof, or in any subsequent stage of the proceedings, whenever it shall become necessary to enforce such liability." Section 26 provides that if any creditor desires to make stockholders parties to the action, "after a judgment therein against the corporation," he may do so by filing a complaint against them founded on such judgment. Held, that § 26 is but an extension of the remedy to such creditors as may choose to proceed to judgment before resorting to the equitable proceeding, and is not an implied denial of the action expressly authorized by § 25; and hence a creditor of a bank, existing under the laws of Wisconsin, may, without having obtained a judgment at law against it, maintain an action against the bank and its stockholders jointly, to re-

trustees of the bank may be joined.[10]

In Colorado neither the bank nor its assignee is a necessary party.[11]

§ 49 (6bbbb) Actions by Receiver.—In an action by the receiver, under order of court, to enforce the statutory liability of stockholders of an insolvent bank having no assets, the bank, as a corporation, need not be made a party defendant.[12]

§ 49 (6bc) Bringing in Parties Defendant.—Omitted stockholders may be brought in by the defendant stockholders or by other creditors.[13]

§ 49 (6bd) Death of Party—Revival.—In a suit by a creditor of a banking company to enforce the individual liability of stockholders, where some of the latter die pending the suit it is not necessary to revive it against the personal representatives.[14]

§ 49 (6be) Dismissal and Striking Off Parties.—Parties Not Served.—A bill by a creditor of a banking company to enforce the individual liability of the stockholders will be dismissed as to those named in the bill but not served with process, without regard to whether or not they could be brought before the court.[15]

Parties as to Whom Bill Taken Pro Confesso.—A bill by a creditor of a banking company to enforce the individual liability of the stockholders will be dismissed as to those who were served with process, but did not answer, and to whom the bill was taken pro confesso and set down for hearing.[16]

§ 49 (6½) Dismissal of Suit.—An assignee of the claim on which a

strain the further exercise of corporate franchises, and to procure the appointment of a receiver, the distribution of assets, and, if necessary, enforce the stockholders' individual liability. Cleveland *v.* Marine Bank, 17 Wis. 545.

10. **Trustee.**—An action against an insolvent bank and the stockholders therein, on account of their individual liability, is properly brought also against certain trustees of the bank. Glenn *v.* Farmers' Bank, 72 N. C. 626.

11. *Colorado.*—Where the object of a suit by creditors of an insolvent banking corporation is to ascertain the liability of stockholders under Mills' Ann. St., § 533, defining the liability of stockholders in banks, neither the bank nor its assignee is a necessary party, but the suit may be maintained against the stockholders alone. Kipp *v.* Miller, 47 Colo. 598, 108 Pac. 164.

12. **Action by receiver.**—Moore *v.* Ripley, 106 Ga. 556, 32 S. E. 647.

13. **Omitted stockholder.**—In an action by certain creditors of an insolvent bank to enforce the individual liability of stockholders, the fact that plaintiffs elected to omit certain stockholders because of their insolvency will not preclude the defendants or any other creditors or the court from bringing in the omitted stockholders, since an adjudication in the case will bar all creditors from any demand on the omitted stockholders, and the defendants from any right of contribution against them. Rehbein *v.* Rahr, 109 Wis. 136, 85 N. W. 315.

14. **Death of party—Revival.**—Riggs *v.* Swann, Fed. Cas. No. 11,831, 3 Cranch, C. C. 183, reversed in 2 Pet. 482, 7 L. Ed. 493.

15. **Parties not served.**—Riggs *v.* Swann, Fed. Cas. No. 11,831, 3 Cranch, C. C. 183, reversed in 2 Pet. 482, 7 L. Ed. 493.

16. **Parties as to whom bill taken pro confesso.**—Riggs *v.* Swann, Fed. Cas. No. 11,831, 3 Cranch, C. C. 183, reversed in 2 Pet. 482, 7 L. Ed. 493.

creditor of a bank has sued the stockholder to enforce their personal liability can dismiss such suit.[17]

§ 49 (7) Pleading.—See ante, "Enjoining Illegal Acts and Practices," § 45 (2).

§ 49 (7a) Complaint, Declaration or Petition—§ 49 (7aa) Necessary Allegations.—The complaint in an action to enforce the liability of a stockholder for the debts of the bank should allege a compliance with the requirements without which no liability exists or such a state of facts as render a compliance unnecessary.[18]

As to Necessity for Enforcement.—The facts showing it necessary to enforce the individual liability of bank stockholders must be alleged in an action brought by the superintendent of banks to enforce such liability.[19]

Judicial Determination of Insolvency.—In an action to enforce the secondary liability of stockholders of an insolvent bank, an averment of such a judicial determination of the insolvency of the corporation as ren-

17. **Dismissal by assignee of claim.**—Where a creditor of an insolvent bank, under an agreement with the receivers that they would bear half the expenses, sues the stockholders, joining the receivers as defendants, and the claim is afterwards assigned and settled, and the assignee seeks to dismiss the action, the receivers can not carry it on, as, under Laws 1892, c. 688, § 55, providing that "no action shall be brought against a stockholder for any debt of the corporation until judgment therefor has been recovered against the corporation and an execution therein has been returned unsatisfied," the receivers could not have brought the action. Judgment Hirschfeld *v.* Bopp, 27 App. Div. 180, 50 N. Y. S. 676, reversed. Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839, rehearing denied, 157 N. Y. 707, 52 N. E. 1124.

18. **Allegation of compliance with conditions precedent.**—Laws 1892, c. 688, § 55 (Stock Corporation Law), providing that no action shall be brought against a stockholder for any debt of the corporation until certain requirements have been complied with, must be construed in connection with Laws 1892, c. 689, § 52 (Banking Law), which provides that, "except as prescribed in the stock corporation law," stockholders of banks shall be liable for corporate debts to a certain extent, thereby rendering the stockholders' liability secondary; and therefore a complaint against a stockholder for a debt of the bank must allege a compliance with the requirements of § 55, or facts showing that such compliance was impossible. Hirshfeld *v.* Kursheedt, 81 Hun 555, 30 N. Y. S. 1023, 63 N. Y. St. Rep. 217, judgment affirmed in 145 N. Y. 84, 39 N. E. 817.

19. **Action by superintendent of bank.**—Const., art. 8, § 7, provides that the stockholders of every banking corporation shall be individually liable for the amount of their respective shares of stock for all its debts and liabilities, and Banking Law (Consol. Laws 1909, c. 2) § 19, provides that the superintendent of banks may take possession of the property and business of any corporation or individual banker, under specified circumstances, and retain possession until the corporation or banker shall resume business or its affairs be liquidated, and that such superintendent, if necessary to pay the debts of the corporation, may enforce the individual liability of stockholders. Held that, since the superintendent was authorized to take possession of the affairs of the bank for reasons other than its inability to pay debts, it was insufficient in an action by the superintendent against a stockholder to recover the amount of his personal liability to show that the superintendent had considered it necessary to enforce such liability; it being essential that the facts showing such necessity be alleged and proved. Cheney *v.* Scharmann, 145 App. Div. 456, 129 N. Y. S. 993.

dered the liability of such stockholders enforceable against them is necessary.[20]

As to Ownership of Shares.—In an action to enforce the individual liability imposed on bank stockholders, the complaint should state the time when the several defendants became stockholders,[21] and in an action against a single stockholder the numbers of shares held by him.[22]

As to Debts.—In an action to enforce the liability of a stockholder for the debts of the bank, the complaint should state the amount of the debts;[23] and the dates when they were contracted,[24] but need not set out the consideration.[25]

Suit on Bank Bills.—Where the suit is upon the bank's bills, it should set out and describe them.[26]

Property Belonging to Defendant.—It is not necessary in a petition seeking to enforce bank stockholders' personal liability to allege that the defendants had property or of what that property consisted.[27]

Ultimate Exhaustion of Liability.—The complaint in an action to enforce the individual liability of bank stockholders need not allege the facts which show that the liability will ultimately have to be exhausted in order to pay the debts.[28]

Exhibiting Petition under Which Receiver Appointed.—It is not necessary that the petition under which the receiver was appointed should be exhibited with the petition in a suit by such receiver to enforce the liability of stockholders for the debts of the bank.[29]

Actions against Nonresident Stockholders.—The declaration in an action against a nonresident stockholder in a bank to enforce his liability for its debts must show that the appointment of the receiver was not made

20. Judicial determination of insolvency.—Dickason *v.* Grafton Sav. Bank Co., 27 O. C. C. 357.

21. Ownership of shares.—It was so held in an action by a receiver, under N. C. Pub. Laws 1897, p. 473, c. 298. Smathers *v.* Western Carolina Bank, 135 N. C. 410, 47 S. E. 893.

22. Number of shares.—Under 1 Mills' Ann. St., § 518, declaring stockholders of a banking corporation individually liable for all its debts contracted while they were stockholders equally and ratably to the extent of their shares, the complaint in an action against a single stockholder should show the total number of shares of defendants holding. Richardson *v.* Boot, 18 Colo. App. 140, 70 Pac. 454.

23. Amount of debts.—It was so held under 1 Mill. Am. St. of Colorado, § 518. Richardson *v.* Boot, 18 Colo. App. 140, 70 Pac. 454.

24. Dates when contracted.—Richardson *v.* Boot, 18 Colo. App. 140, 70 Pac. 454.

It was so held under N. C. Pub. Laws 1899, p. 473, c. 298. Smathers *v.* Western Carolina Bank, 135 N. C. 410, 47 S. E. 893.

25. Consideration.—It was not necessary for the declaration seeking to enforce bank stockholder's individual liability to set out the consideration of the contract sued on. Porter *v.* Kepler, 14 O. 127; Porter *v.* Porter, 14 O. 220.

26. Bank bills.—Branch *v.* Knapp, 61 Ga. 614.

See post, "Liability of Stockholders or Officers," § 211.

27. Property belonging to defendant.—Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626.

28. Ultimate exhaustion of liability.—Booth *v.* Dear, 96 Wis. 516, 71 N. W. 816.

29. Exhibiting petition under which receiver appointed.—Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626.

without notice to the stockholders.[30] And a declaration in such action which fails to allege that the stockholders had notice or were parties to the proceedings establishing the liability of the stockholders to the creditors is fatally defective, although it alleges that the bank was a party.[31]

§ 49 (7ab) Sufficiency of Allegations.—A petition in an action to enforce the liability of a stockholder in a bank for its debts, which sets forth the substance of a cause of action given by the statute, is sufficient.[32]

Appointment of Receiver.—Allegations which fully describe the proceedings under which the receiver was appointed are sufficient to show his

30. Notice—Action against nonresident stockholder.—A declaration, in an action in Rhode Island to enforce liability of stockholders of a Nebraska bank, by the receiver appointed in Nebraska, which alleges that prior to and since the appointment of the receiver the laws of Nebraska authorized the appointment of a receiver of a banking corporation conducting business in an unsafe manner, etc., and empowered the receiver to enforce the liability of stockholders, and which annexed as an exhibit the statutes (Comp. St. Neb. 1905, c. 8, §§ 34, 35) which took effect in July, 1895, and which shows that the appointment was made in March, 1895, shows that the receiver is not governed by such statute, but is governed by Code Civ. Proc. Neb. §§ 266, 267, 274, relating to the appointment of receivers, and declaring that an order appointing a receiver without notice shall be void. Hazlett *v.* Woodhead (R. I.), 67 Atl. 736.

31. A declaration, in an action in Rhode Island to enforce the liability of stockholders of a Nebraska bank, imposed by Const. Neb. 1875, art. 11b, § 7, making every stockholder in a banking corporation liable to its creditors above the amount of stock to an amount equal to the stock, which fails to allege that the stockholders had notice of or were parties to the proceedings in the Nebraska court establishing the liability of the stockholders to the creditors, is fatally bad though it alleges that the bank was a party, since, in a proceeding touching the individual liability of stockholders, the bank can not represent them. Hazlett *v.* Woodhead, 27 R. I. 506, 63 Atl. 952.

A declaration, in an action in Rhode Island to enforce the liability of stockholders of a Nebraska bank, which sets forth notice by publication to all stockholders to appear on or before February 24, 1902, in a court in Nebraska, but which shows that leave had been given on June 27, 1898, to the receiver to sue stockholders, on the court in Nebraska, finding that the assets of the bank had been exhausted, and which fails to show that any notice had been given to all stockholders of the pendency of the proceedings which resulted in such finding, is fatally bad for failing to allege that the stockholders had notice of or were parties to the proceedings in the Nebraska court establishing the liability of the stockholders. Hazlett *v.* Woodhead (R. I.), 67 Atl. 736.

32. Substance of cause of action.—*Georgia.*—In an action by a receiver of a bank against the stockholders, a petition, alleging that defendant was a subscriber to the capital stock for a certain number of shares, and the stock held by him represented his subscription to the capital stock, and that there were debts against the bank which were unpaid, and that there were not assets sufficient to pay the debts referred to, and praying a judgment against defendant for the sum representing the par value of the stock, set forth a cause of action. Reid *v.* Jones, 127 Ga. 114, 56 S. E. 128.

Ohio.—The declaration filed under the act of 1816, to prohibit the issuing and circulating of unauthorized bank paper (Swan's Stat. 136), was sufficient, if it contained the requisites prescribed in the thirteenth section of that act. 2 Bates' Anno. Stat., § 3821-4; Act Jan. 27, 1816, § 14; Kearny *v.* Buttles, 1 O. St. 362; Lawler *v.* Walker, 18 O. 151.

Wisconsin.—It is sufficient to allege that plaintiff is a creditor having a debt due; that he sues on behalf of himself and all other creditors; that defendants are stockholders, liable for such indebtedness, under the Wisconsin Laws 1852, c. 479, § 47; and, where the corporation is not a defendant, that sufficient reason exists for the omission, setting forth such reason. Booth *v.* Dear, 96 Wis. 516, 71 N. W. 816.

authority to bring a suit to enforce the stockholders' liability for debts of the bank, without the petition under which he was appointed being exhibited.[33]

Demurrer.—A petition stating the substance of a cause of action in a suit to enforce the individual of bank stockholder is good against a general demurrer although defective as against a special demurrer directed to and specifying the defects therein.[34]

Particular Allegation.—There are many instances in which particular allegations in a complaint to enforce the liability of stockholders in a bank for its debts have been held sufficient for the purpose of a demurrer. The following allegations which are set out in full in the footnotes, to wit: that defendants were stockholders,[35] of the dissolution of the bank,[36] of reason for omitting certain stockholders from writ;[37] of several liability,[38] and of nonpayment,[39] were held sufficient; but an averment that a judgment at

33. Appointment of receivers.—Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626.

34. Demurrer.—A petition against stockholders of a bank alleged the insolvency of the bank; stated approximately the amount due depositors, and that, in order to pay them, it would be necessary for each stockholder to be assessed the full amount of his statutory liability, which under the charter, was a sum equal to the amount of stock held by each stockholder; made the persons named as stockholders parties defendant; and prayed judgment against each of them for the amount of their statutory liability. Held not subject to a general demurrer. Moore *v.* Ripley, 106 Ga. 556, 32 S. E. 647.

35. Allegation that defendants stockholders.—In a complaint to enforce the liability of stockholders of an insolvent bank, an allegation that defendants were stockholders within two years before the commencement of the action, there being no allegation that they transferred their stock, sufficiently shows them to be stockholders, where the objection is by demurrer; since, for the purpose of the demurrer, it will be presumed that they remained stockholders until the dissolution. Persons *v.* Gardner, 26 Misc. Rep. 663, 56 N. Y. S. 822, 42 App. Div. 490, affirmed in 59 N. Y. S. 463, 42 App. Div. 490.

It was sufficient in such declaration to aver that the defendant was a stockholder at the dates of the notes, or subsequently, without showing him such at the commencement of the suits. Kearny *v.* Buttles, 1 O. St. 362.

36. Dissolution of bank.—An allegation that a bank has suspended business for more than a year is a sufficient averment of the dissolution of the corporation, under Gen. St. 1889, par. 1200, to authorize a suit by a creditor against a stockholder. Sterne *v.* Atherton, 7 Kan. App. 20, 51 Pac. 791.

37. Reason for omitting stockholder.—In an action to fix the liability of stockholders of an insolvent bank, an allegation that some of the stockholders are dead and their estates are unrepresented, that others are corporations which are "defunct," and that others are beyond the jurisdiction of the court, sets forth a sufficient reason for omitting them from the suit as parties defendant. Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626.

38. Allegation of several liability.—A bill was filed by the assignee of a bank against a number of the stockholders of another insolvent bank to compel such stockholders to ratably contribute under a clause in the charter which makes them personally liable for the bills in circulation, and also to appropriate the amount of stock subscribed by them and unpaid to the payment of debts due by the latter institution to the former as a trust fund in their hands. Held, that a demurrer on the ground that the liability of the stockholders is several, and not joint, was not warranted by the bill, it seeking to charge them severally, and not jointly. Robison *v.* Carey, 8 Ga. 527.

39. Nonpayment.—The allegation of the complaint, in an action against shareholders in a bank, that "defendant, though demanded, has failed and refused to pay said assessment, or any

law against the bank could not have been obtained, was held insufficient.[40]

§ 49 (7ac) Prayer for Recovery.—The complaint must contain a sufficient prayer for recovery.[41]

§ 49 (7ad) Amendments and Aider by Verdict.—The general rules as to amendments and aider by verdict apply to petitions in actions to enforce the individual liability of bank stockholders.[42]

§ 49 (7ae) Affidavit of Amount of Indebtedness.—The statute may require the plaintiff in an action to enforce a bank stockholder's liability to file with his declaration an affidavit stating amount the defendant is indebted to him, etc.[43]

part thereof," is a sufficient averment, as against a general demurrer, of nonpayment at the time action was commenced. O'Connor *v.* Witherby, 111 Cal. 523, 44 Pac. 227.

40. Inability to obtain judgment against bank.—It is not a sufficient allegation that no judgment at law could have been obtained against the bank to aver, that the stockholders have failed and refused to elect directors and officers, an act of the legislature expressly authorizing process to be served on the late president, cashier or any director. Blake *v.* Hinkle, 18 Tenn. (10 Yerg.) 218.

41. Prayer for recovery.—While the petition as amended did not pray for the recovery of a specific sum of money against each of the defendants, there was a prayer that recovery be had against each defendant for the par value of his stock, with interest from date the suit was filed; and the averments of the petition was sufficient to show the exact sum for which each defendant would be rendered liable under this prayer. Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626.

42. Amendments—Aided by verdict.—Where subscribing shareholders of a bank were liable under charter provisions for an amount equal to their stock upon insolvency of the bank, and the declaration contained allegations that he was a shareholder when the debt was created and the bank failed, but there was no allegation in express terms that he was a subscribing shareholder, it was held that this was amendable and cured by verdict; and after verdict and judgment a motion to set aside such judgment on that ground should not be sustained. Reid *v.* Hearn, 127 Ga. 117, 56 S. E. 129.

New cause of action.—Where the subscribing stockholders of a bank upon insolvency were liable under charter provisions for an amount equal to their subscription to its stock and the petition of the receiver of the insolvent bank failed to make the allegation that defendant was a subscribing shareholder, but contained allegations that defendant was a stockholder at the time the debts were contracted, which were unpaid as well as at the time of the failure of the bank and there were not sufficient assets to pay the above debts, it was held that the petition above set forth a cause of action and should not have been dismissed and that the amendment as to subscribing stockholders did not set forth a new cause of action and should have been allowed. Reid *v.* Jones, 127 Ga. 114, 56 S. E. 128.

43. Affidavit of amount of indebtedness.—Act 1886, p. 308, c. 184, § 171, requires plaintiff to file with his declaration an affidavit "stating the true amount defendant is indebted to him over and above all discounts, and shall file the bond, bill of exchange, note, or other writing or account by which defendant is so indebted; or, if the action be founded on a verbal or implied contract, shall file a statement of the particulars of defendant's indebtedness thereunder." Held, in an action to enforce the liability of a stockholder in a banking corporation under Acts 1892, p. 156, c. 109, § 851, that the affidavit, which was accompanied by an account for money due plaintiff as depositor with the corporation of which defendant was stockholder, setting forth the dates and amounts of all deposits made and the aggregate thereof, with credits for money withdrawn, was sufficient with-

§ 49 (7b) Cross Bill.—Where a bill was filed against parties charged as being directors and stockholders of a bank organized under the general banking law, or, in the alternative, as being fraudulent partners, the object of the bill being to enforce payment of notes of the bank, the defendants were not entitled to file a cross bill to compel complainant to disclose when he became owner of the notes or how much he paid for them, as such discovery would be immaterial to the defense.[44]

§ 49 (8) Evidence.—See ante, "In General," § 47 (1).

§ 49 (8a) Presumptions and Burden and Degree of Proof.—The facts without the existence of which the statute does not enforce liability on the stockholder in a bank for its debts must be affirmatively shown. Thus where the power to enforce the liability can be exercised only in the case of a bank issuing bills for circulation that fact must be affirmatively shown.[45] In an action by the superintendent of banks to enforce the liability of a stockholder in a bank for its debts, it is essential for him to allege and prove the facts showing necessity for such action in order to pay the debts of the bank.[46]

Insolvency.—To entitle creditors of a bank to subject the capital stock in the hands of stockholders to payment of their claims, they must show that the bank is insolvent, or has no property from which the claims may be satisfied.[47]

That Defendant a Stockholder.—Proof must be made of the fact that the person sought to be charged is a stockholder in order to sustain a judgment.[48]

As to Issuance and Signature of Stock Certificate.—In a suit against a stockholder for assessments levied by the comptroller of the currency, it will be presumed that the stock certificate bearing the corporate seal of the bank was issued and signed by the officer having authority so to do.[49] In a suit to charge defendant as a stockholder in an insolvent banking corpora-

out filing plaintiff's bankbook or defendant's certificates of stock. Coulbourn Bros. *v.* Boulton, 100 Md. 350, 59 Atl. 711.

44. Cross bill.—It was so held under the general banking law of Michigan enacted in 1837. Cook *v.* Wheeler (Mich.), Har. 443.

45. Bank's issuing bills.—Const., art. 8, § 7, declares that stockholders in every corporation and general stock association for banking purposes, "issuing bank notes or any kind of paper credits to circulate as money," shall be individually responsible, to the amount of their respective shares, for all debts and liabilities of the corporation or association. Special and summary proceedings to enforce this liability are provided for by Act April 5, 1849. Held, that the power to enforce the liability can be exercised only in the case of a bank issuing bills for circulation, which fact must be affirmatively shown. In re Empire City Bank (N. Y.), 6 Abb. Prac. 385.

46. Cheney *v.* Scharmann, 145 App. Div. 456, 129 N. Y. S. 993.

47. Insolvency.—Wood *v.* Dummer, Fed. Cas. No. 17,944, 3 Mason, 308.

48. That defendant a stockholder.—So held in proceedings under Laws 1849, c. 226, providing for the enforcement of the liability of stockholders, as such, of banks of issue. Diven *v.* Lee, 36 N. Y. 302, 34 How. Prac. 197.

49. As to issuance and signature.—Davis *v.* Watkins, 56 Neb. 288, 76 N. W. 575.

tion with double liability under the statute, where it was shown that certificates of stock, issued in his name, were in his safety deposit box at the time of the failure, and that he had been credited on his bank book with two dividends thereon, the presumption is that he was the owner of such stock, and the burden rested on him to prove the contrary.[50]

§ 49 (8b) Admissibility.—Evidence Respecting Transfer of Stock.—Evidence of the bona fides of the transfer of the stock[51] and that the transfer was made pursuant to an agreement with the associates that the transferrer was to be released on substituting responsible transferees,[52] is admissible.

The bank's stock ledger, identified and supported by the evidence of the ex-cashier of the bank, is admissible to prove that defendants, in an action against alleged stockholders of an insolvent bank to enforce their statutory liability for its debts, appearing by the book to be stockholders, were such in fact.[53]

Pass Book as Proof of Character of Deposit.—When the charter of a banking corporation provides that its officers, when required by any person making a deposit in its savings department, shall issue certificates for the same, and makes the stockholders personally liable to depositors, it is not essential to the liability of the stockholders that a certificate be given, as the character of the deposit may be shown by a pass book given to the depositor.[54]

§ 49 (8c) Weight and Sufficiency.—The fact that the defendant in an action to enforce the liability of a stockholder in a bank for its

50. As to ownership.—Alsop *v.* Conway, 110 C. C. A. 366, 188 Fed. 568.

51. Bona fides of transfer.—In a suit against the former owner of all the stock of a bank, who transferred it to third persons without consideration, and at the same time received a transfer of all the property and assets of the bank, evidence is admissible to show the bona fides of the transaction, and that no fraud was intended, but only a transfer of the charter without rendering the former owner of the stock liable for the subsequent debts. Morgan *v.* Brower, 77 Ga. 627.

52. In an action by the receiver of a bank to enforce the liability of an original stockholder who had transferred his stock before anything was paid therefor, to which transfer the bank consented, evidence that the transfer was made pursuant to an agreement with the associates that he was to be released, on substituting responsible transferees, is admissible to show that the bank intended to relieve him from liability, though not as a complete bar. Cowles *v.* Cromwell (N. Y.), 25 Barb. 413.

53. Stock ledger.—Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642.

Transfer book.—In a suit against one as a stockholder in a bank, a transfer of stock by him on the transfer book of the bank, is evidence against him that he once owned stock to the amount of the stock so transferred. Robinson *v.* Bealle, 20 Ga. 275.

In an action by a bill holder against a stockholder of a bank, a transfer of stock made on the books of the bank by its cashier to which the defendant stockholder had free access under the law, is prima facie evidence of his ownership of the shares. Thornton *v.* Lane, 11 Ga. 459.

The ledger of a bank, although not a book of original entry, is competent evidence against a stockholder of the bank in an action against him by a depositor to establish his personal liability under the terms of the charter of the bank. Dows *v.* Naper, 91 Ill. 44.

54. Pass book as proof of character of deposit.—Dows *v.* Naper, 91 Ill. 44.

debts was a stockholder may be sufficiently proved by the bank's stock ledger;[55] or by proof of a colorable transfer of stock which in fact belonged to the defendant and on which he was liable or the issuance of the stock certificate in another name.[56]

An answer alleging that defendant transferred his stock in good faith for value is not an admission that he did not transfer to the person in whose name it appears on the books and inconsistent with evidence that the sale was in good faith for value.[57]

Judgment Ascertaining Bank's Insolvency.—The allegations in a bill by receivers of a bank against the stockholders, that the court has decided that the assets of the bank are insufficient to pay the claims against it, can be proved only by the record of a judgment to which the bank was a party.[58]

Production of Certificate of Deposit.—The creditor must prove ownership of the certificate of deposit sued on by production thereof.[59]

Pass Book as Proof of Character of Deposit.—See ante, "Admissibility," § 49 (8b).

§ 49 (9) Trial and Judgment—§ 49 (9a) Reference and Receiver's Report.—Time of Apportionment.—A provision in the law, relative to closing up the affairs of an insolvent bank, prescribing the time within which the referee is to make the apportionment of liabilities among the stockholders, is directory only, and such apportionment made after the

55. Stock ledger as proof of ownership.—Adams *v.* Clark, 36 Colo. 65, 85 Pac. 642.

56. Proof of colorable transfer.—In an action to enforce the liability of a stockholder in an insolvent bank, evidence held to show that a certificate issued to defendant's wife was in fact stock belonging to defendant and on which he was liable. Hunt *v.* Reardon, 93 Minn. 375, 101 N. W. 696.

Evidence in action to enforce stockholder's liability, held to show that defendant was a stockholder. Voorhees *v.* Bank, 19 O. 463.

57. Answer as evidence.—In an action by the receiver of an insolvent bank to recover an assessment against a stockholder, the complaint alleged that defendant caused a pretended transfer of his stock to be entered on the books of the bank to a certain company to evade his stock liability, and that he never specifically made any transfer, and the answer denied all allegations of fraud, and alleged that defendant had for value sold and transferred the certificate to a party other than the one to whom the transfer was entered on the books of the bank, and that such person was then solvent, and that such purchaser transferred the stock from the name of defendant, the answer is not an admission that defendant did not transfer his stock to the person in whose name it appears on the books; the claim being and the court finding that the stock was sold in good faith and was finally transferred on the books of the bank, and defendant not being allowed to state to whom and for what consideration the transfer was made, so that a finding that it was made in good faith was sustained by the evidence and was not inconsistent with the allegations of the answer. Hunt *v.* Doran, 92 Minn. 423, 100 N. W. 222.

58. Judgment ascertaining bank's insolvency.—Hewett *v.* Adams, 54 Me. 206.

59. Production of certificate of deposit.—Allowance by the court of a verified claim, based on a certificate of deposit presented to the assignee of a bank, is not a judgment in personam, even against the bank, and does not, in an action against the stockholders, avoid the necessity of proof of ownership of the certificate by production thereof. Zang *v.* Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145.

time prescribed, in pursuance of extensions of the time ordered by the court, is not invalid.[60]

Claims Which May Be Counted as Debts.—The referee appointed to apportion among the stockholders of a bank its liabilities is not authorized, without proof, to apportion liabilities not admitted by the receiver nor established by the determination of a competent tribunal. The report of the referee should not count as debts certain claims which the receiver is resisting by litigation.[61]

Right of Auditor to Disallow Claim of Stockholders.—See ante, "In General," § 47 (12a).

Persons Who May Object.—In proceedings to enforce the personal liability of stockholders, under laws relative to closing up the affairs of insolvent banks, only those who are directly affected thereby are entitled to object to defects in the account presented by the receiver, and referred to the referee.[62]

Jurisdiction of Court over Proceeding on Report.—A want of particularity, in respect to certain debts of the bank, in the account presented by the receiver and referred to the referee, or the omission of the place of residence of some of the stockholders, in the list of the stockholders, does not affect the jurisdiction of the court over the proceedings on the referee's report, based on that account.[63]

Questioning Receiver's Account and Allowance of Attorneys' Fees.—The stockholders of an insolvent bank, not having been parties to the suit in behalf of its creditors, in which its assets were collected and distributed through a receiver, may, in an action against them on their stockholders' liability, be heard on the accounts of the receiver, and may attack any items as improper or excessive.[64]

Allowance of Attorney's Fees.—The decree, in a suit against an insolvent bank on behalf of its creditors, having merely contemplated that the fees of plaintiff's counsel should be paid from the fund going to creditors, and not adjudged them debts of the bank, or a liability of its stockholders, such stockholders, though appearing in such suit in opposition to the allowance of the fees, are not estopped to assert, in an action against

60. **Time of apportionment.**—It was so held under the Laws of New York, 1849, c. 226. In re Empire City Bank (N. Y.), 6 Abb. Prac. 385, affirmed in 18 N. Y. 199, 8 Abb. Prac. 192, reversing 4 Abb. Prac. 118.

61. **Claims which may be counted as debts.**—It was so held in proceedings to enforce the personal liability of stockholders, under Laws of New York 1849, c. 226, relative to closing up the affairs of insolvent banks. In re Empire City Bank, 18 N. Y. 199, 8 Abb. Prac. 192, reversing 6 Abb. Prac. 385.

62. **Persons who may object.**—It was so held under N. Y. Laws of 1894, c. 226. In re Empire City Bank (N. Y.), 6 Abb. Prac. 385.

63. **Jurisdiction of court over proceeding on report.**—It was so held in proceedings to enforce the personal liability of stockholders, under Laws of 1849, c. 226, relative to closing up the affairs of an insolvent bank. In re Empire City Bank (N. Y.), 6 Abb. Prac. 385.

64. **Questioning receiver's account and allowance of attorneys' fees.**—Buist *v.* Williams, 81 S. C. 495, 62 S. E. 859.

them on their stockholders' liability, that their liability is not increased by allowance of the fees.[65]

§ 49 (9b) Findings of Fact and Conclusions of Law.—The findings of fact in a suit to enforce the individual liability of bank stockholders must not be contrary to the evidence;[66] and the conclusions of law must not conflict with the findings of fact.[67]

§ 49 (9c) Judgment or Decree—§ 49 (9ca) Form, Requisites and Validity.—See post, "Execution," § 49 (9cga).

Jurisdiction and Service of Process.—No judgment enforcing a bank stockholder's personal liability can be rendered against a man who is not brought within the jurisdiction of the court, because somebody else is on a similar liability.[68]

Proper Pleadings and Issue.—Where the liability of bank stockholders is not put in issue by any pleading, notice or paper in an action by creditors against an insolvent bank, no part of the decree should relate to the liability of the stockholder.[69]

Default Judgments.—A default judgment may be entered against a stockholder in a bank in an action to enforce his individual liability, but in an action against all the stockholders for the entire debt of the bank a

65. **Allowance of attorney's fees.**—Buist *v.* Williams, 81 S. C. 495, 62 S. E. 859.

66. **Findings of fact and conclusions of law.**—In a suit on certificates of deposit against an alleged stockholder in the issuing bank, it appeared from the stock book that a certain number of shares had been issued to defendant, and that the same stood in her name until the certificate was surrendered and canceled. Two days after the certificate was issued, defendant assigned the same to her husband, but continued to appear on the books as the holder. The husband testified that, on notifying defendant of the issue of the stock, she refused to accept it, and that he told her that, if she would not receive it, she must assign it to him, but there was no finding as to such facts. Held, that under Civ. Code, § 322, providing that the term "stockholder" includes not only persons appearing on the books to be such, but also every equitable owner of stock, a finding that defendant was never the owner of any stock was contrary to the evidence. Abbott *v.* Jack, 136 Cal. 510, 69 Pac. 257.

67. **Conclusions of law.**—Where, in an action to hold defendant as a stockholder in an insolvent bank, the findings of fact show that he, as a former stockholder, in good faith ordered the officers of the bank to enter the transfer, which he had in good faith made of his stock, but that such officers neglected to enter on the stock books at the time, such findings are in conflict with the conclusion of law that defendant was liable on a statutory assessment against the stockholders. Hunt *v.* Seeger, 91 Minn. 264, 98 N. W. 91.

68. **Jurisdiction and service of process.**—Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944, citing Pollard *v.* Bailey (U. S.), 20 Wall. 520, 22 L. Ed. 375; Hornor *v.* Henning, 93 U. S. 228, 23 L. Ed. 879.

69. **Proper pleadings and issues.**—The holder of the notes of an insolvent bank, the stockholders whereof are liable for so much of the just claims of creditors as remain unpaid after the assets of the bank shall be exhausted, filed a bill in equity to wind up the affairs of the institution under the provisions of its charter. The stockholders were not made parties, nor served with process; nor was any motion, petition, or prayer filed to subject them to liability. Held, that so much of the final decree as discharged them from all liability for and on account of any debt or demand against them or the bank was erroneous. Terry *v.* Commercial Bank, 92 U. S. 454, 23 L. Ed. 620.

judgment by default against one for the whole amount can not be taken.[70]

Form—Joint or Several.—Where a statute provides that, in case of the failure of a bank, each stockholder shall be individually liable for a sum in addition to the amount of his share or shares, it is the duty of a court of equity, in granting relief against the stockholders under such statute, to do justice to all the stockholders, as far as may be, by equalizing and properly distributing among them the relief and burden. The judgment, therefore, should not be joint but against each party served, severally.[71] In receivership proceedings in a suit against an insolvent bank, the court rendered judgment which determined the amount due each creditor and which fixed the statutory liability of each stockholder to the creditors, the judgment was a several judgment against the several stockholders, authorizing the creditors to sue any stockholder on the judgment.[72]

Form under New York Code of Civil Procedure.—Code Civ. Proc., § 1786, after declaring that an action by the people to dissolve a bank as provided by § 1785 shall be brought by the attorney general, provides for an action by a creditor, where the attorney general, after notice, omits to sue the stockholders; and it is only to such an action, and not to an action by the attorney general, that Code Civ. Proc., §§ 1790, 1795, authorizing the making of stockholders parties in order to determine their individual liability, and directing the form of the several judgments against such stockholders, apply.[73]

Verdict against Part of Defendants.—In an action against persons, charging them as stockholders of an unauthorized banking association, if the jury find a verdict against a part of the defendants and in favor of others, judgment can be rendered against those found to be liable by the jury.[74]

70. **Default judgment.**—Under Gen. Laws 1883, c. 19, § 43, providing that "the officers and stockholders of every banking corporation or association formed under the provisions of this act shall be individually liable for all debts contracted during the term of their being officers or stockholders of such corporation equally and ratably to the extent of their respective shares of stock, * * *" in an action against all the stockholders for the entire debt of the corporation a judgment by default against one for the whole amount will be reversed. Buenz *v.* Cook, 15 Colo. 38, 24 Pac. 679.

71. **Joint or several judgment.**—Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944.

A decree which leaves the marshal of the court to collect the whole of each execution out of one man, or any number, as he pleases, is erroneous. It was no trouble to take the sum due to each creditor and the sums due from each holder, give a decree nisi with time for each man to pay the sum assessed. Against such as did not pay let execution issue; and if nulla bona was returned, there must be a new assessment against the others until all should be paid or the sum of the several liabilities exhausted. On the other hand, the whole benefit of the chancery remedy, namely, the power to do justice to all by equalizing and properly distributing the relief and the burden was not exercised by this decree. Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944, citing Pollard *v.* Bailey (U. S.), 20 Wall. 520, 22 L. Ed. 376; Hornor *v.* Henning, 93 U. S. 228, 23 L. Ed. 879.

72. Childs *v.* Blethen, 40 Wash. 340, 82 Pac. 405.

73. **Form under New York Code of Civil Procedure.**—People *v.* Commercial Bank, 37 Misc. Rep. 16, 74 N. Y. S. 806.

74. **Verdict against part of defend-**

§ 49 (9cb) Amount for Which Rendered.—A judgment against stockholders of a bank on their stockholders' liability should be for the full amount thereof, such assessments to be made from time to time as are found necessary, and the stockholders are not entitled to have the amount necessary to pay creditors estimated and prorated among the stockholders and judgment entered accordingly.[75] The creditors are entitled to judgment against each stockholder for the full amount of his statutory liability, though this exceeds the aggregate of all the indebtedness and the costs and expenses of the action.[76]

Amount Greater than Demand in Complaint.—No greater judgment can be taken against stockholders of an insolvent bank in an action by a creditor in his own behalf and in behalf of all others to enforce their liability, under the banking law, than is demanded in the original complaint, though other creditors are afterwards allowed to be made parties thereto.[77]

Suit by Part of Creditor against Part of Stockholder.—In a suit by part of the creditors of a bank against part of the stockholders to subject the dividends of capital stock received by defendants to payment of plaintiffs' claims, the decree will be that defendants pay so much of the claims of plaintiffs as the number of shares held by defendants bears to the whole number of shares issued.[78]

§ 49 (9cc) Second Assessment.—When one assessment has been made and confirmed, no second assessment to make good deficiencies in the collection of the first is authorized, while the first apportionment remains in force, neither reversed or modified.[79]

§ 49 (9cd) Persons Bound and Matters Concluded—§ 49 (9cda) Judgment in Creditor's Suit against Bank—§ 49 (9cdaa) Persons Bound—§ 49 (9cdaaa) Stockholders.—Where the statute or the charter of a bank makes the private or individual property of each stockholder subject to execution and sale if the proceeds of the property of the bank be insufficient to pay off the execution, a judgment against the bank is also a judgment against each stockholder to the extent of his stock.[80] The ascertainment of the deficiency of the assets of an insolvent bank and order of assessment to meet their deficiency is like the common case of a judg-

ants.—The common-law rule upon this subject was changed, by the act of the Ohio legislature of January 27, 1816. 2 Bates' Anno. Stat., § 3821-5; Porter *v.* Kepler, 14 O. 127. See, also, Porter *v.* Porter, 14 O. 220; Johnson *v.* Bentley, 16 O. 97; Kearny *v.* Buttles, 1 O. St. 362.

75. Amount.—Man *v.* Boykin, 79 S. C. 1, 60 S. E. 17, 128 Am. St. Rep. 830.

76. Harper *v.* Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

77. Amount greater than demand in complaint.—It was so held under § 52 of N. Y. banking law. Hagmayer *v.* Alten, 41 App. Div. 487, 58 N. Y. S. 684.

78. Suit by part of creditors against part of stockholders.—Wood *v.* Dummer, Fed. Cas. No. 17,944, 3 Mason 308.

79. Second assessment.—In re Hollister Bank, 27 N. Y. 393, 84 Am. Dec. 292; Hollister *v.* Hollister Bank, 41 N. Y. (2 Keyes) 245, 2 Abb. Dec. 367.

80. Stockholders bond.—Lowry *v.* Parsons, 52 Ga. 356.

ment against a corporation which is binding on stockholders. Such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation.[81]

§ 49 (9cdaab) Stockholders Not Served.—See post, "Nonresident Stockholders," § 49 (9cdaac); "Matters Concluded," § 49 (9cdab).

§ 49 (9cdaac) Nonresident Stockholders.—The judgment, fixing the liability of each stockholder, in receivership proceedings in a suit against an insolvent bank, is binding on nonresident defendants upon whom notice was had by personal service by a court of general jurisdiction, having authority under the laws of the state to render such judgment;[82] but such judgment is not binding on a nonresident never brought within the jurisdiction of the court administering the affairs of the bank.[83]

§ 49 (9cdab) Matters Concluded.—In an action under an order of court by a receiver against a stockholder of an insolvent bank for an assessment to discharge his individual liability over and above the amount of his stock, such stockholder can not contest any matter that was considered and determined in making said order of assessment.[84] The assessment forms a basis for recovery and is binding in so far as it determines the amount as a whole of the superadded liability.[86]

81. Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301.

82. Nonresident stockholders.—Childs *v.* Blethen, 40 Wash. 340, 82 Pac. 405.

83. A judgment of a Colorado court administering the affairs of an insolvent bank, imposing a double liability on stockholders under a Colorado statute, was not binding on a resident of California never brought within the jurisdiction of the Colorado court. Miller *v.* Lane (Cal.), 116 Pac. 58.

In an action in one state to enforce the statutory liability against bank stockholders, the fact that the corporation was made a party to the suit is not sufficient to bind nonresident stockholders, in respect to the determinations in such suit, in an ancillary proceeding against such nonresident stockholders in their own state to enforce their statutory liability, since the corporation in no way stood for or represented such absent stockholders in the original action. Finney *v.* Guy, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486. See post, "Matters Concluded," § 49 (9cdab).

84. Matters concluded.—State *v.* Union Stock Yards, etc., Bank, 103 Iowa 549, 70 N. W. 752, 72 N. W. 1076. So held under act 18th Gen. Assem., c. 208, § 1.

Under Code, § 1629, providing a corporation whose charter has expired may continue to act to wind up its affairs, on an appeal from a judgment allowing recovery under the stockholders' double liability law, it must be presumed the lower court in the receivership proceeding determined the necessity of an assessment upon the stockholders and the amount thereof on the basis of the bank's liability as a corporation, and the stockholder can not insist that the indebtedness for which he is sought to be held liable was indebtedness for which he was not liable to assessment as a stockholder, though the bank's charter had expired when the receivership proceeding was brought. Elson *v.* Wright, 134 Iowa 634, 112 N. W. 105.

86. Where the court, on petition of the receiver of an insolvent bank, proceeded to ascertain the amount of liabilities and value of the assets, and the amount required in addition thereto to pay the liabilities, and to assess the stockholders on their statutory liability, and on this assessment the receiver brought suit against a stockholder, in which it appeared that the defendant had been assessed for a proportionate share of the indebtedness regardless of the amount of the debt that accrued before he was a

Personal Liability as Stockholders.—Stockholders of an insolvent bank are bound by a judgment entered against the bank, in proceedings to which they are not parties, only so far as it concerns the affairs of the bank itself; and such judgment does not conclude them on questions respecting their personal liability as stockholders.[87] Where a creditor of a bank obtained a judgment against it for services rendered after the bank was placed in the hands of a receiver, such judgment, though prima facie conclusive on the question of the indebtedness of the corporation did not deprive a court of equity sitting in another state of the right to determine whether the claimant's right of action was such as to bind the stockholders, in a proceeding to enforce a stockholder's subscription and statutory liability.[88]

Amount of Debt.—In a suit to charge a bank's stockholders with its debts, a former judgment against the bank on the debts is not conclusive as to the amount thereof.[89]

Nonresident Stockholders.—In a proceeding to sequester assets of a banking corporation, nonresident stockholders, who are not parties, are not concluded by the finding on the ultimate question of their individual liability, nor as to the measure of such liability, which is not an asset of the corporation, and in which neither the corporation nor its receiver has any legal interest to render them representatives of the stockholders, but in an action by the receiver to enforce the individual liability of a nonresident stockholder, such defendant is bound by the decree of the court, in which the parent suit was instituted and whereby, the assets of the corporation having been sequestered, the plaintiff was appointed receiver for creditors.[90]

A default judgment against a bank on a liquidation agreement does not preclude any defenses otherwise open to stockholders subsequently sued on their statutory liability, where the judgment was conclusive.[91]

§ 49 (9cdb) Judgment against a Bank as Stockholder.—Under the law of Kansas, as settled by the decisions of its supreme court, a judgment against a bank, adjudging it liable for an assessment as a stockholder in another bank, is conclusive upon its stockholders as to such liability,

stockholder, the proceedings in which the assessment was made were not invalid, so as not to form a basis for recovery, but they were binding on stockholders in so far as it determined the amount, as a whole, of their superadded liability. Shuey *v.* Adair, 24 Wash. 378, 64 Pac. 536.

87. **Personal liability as stockholder.**—In re Receivership, 91 Minn. 494, 98 N. W. 341, rehearing denied in 98 N. W. 867; Tompkins *v.* Craig, 93 Fed. 885 See, also, Flash *v.* Conn, 109 U. S. 371, 27 L. Ed. 966, 3 S. Ct. 263.

In a proceeding under Code, § 1572, to wind up an insolvent bank, the court may, on the application of the receiver, make an ex parte order for an assessment against the stockholders, to discharge their liability, under Acts 18th Gen. Assem., c. 208, § 1, subject to the right of each stockholder to contest such liability when sued for payment of the assessment. State *v.* Union Stock Yards, etc., Bank, 103 Iowa 549, 70 N. W. 752, 72 N. W. 1076.

88. Covell *v.* Fowler, 144 Fed. 535.

89. **Amount of debt.**—Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. 798.

90. Childs *v.* Cleaves, 95 Me. 498, 50 Atl. 714. See ante, "Nonresident Stockholders," § 49 (9cdaac).

91. **Default judgment.**—Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. 798.

and a stockholder sued on such judgment in another jurisdiction to enforce his statutory liability can not set up the want of power of the bank to become a subscriber to the stock of another corporation.[92]

§ 49 (9ce) Lien and Priority.—When a charter of a bank or a statute provides that "the individual property of the stockholders" shall be liable for the ultimate payment of debts, etc., a liability is imposed upon a stockholder which may result in a personal judgment against him, binding all of his property at the date of the judgment and any that may be thereafter acquired.[93]

Priorities.—Where the statute or the charter of a bank makes the private or individual property of each stockholder subject to execution and sale if the proceeds of the property of the bank be insufficient to pay off the execution, as between judgments against the bank, which are also judgments against each stockholder to the extent of his stock, the oldest has the right to be first paid out of any money raised by the sheriff out of the property of any stockholder.[94]

§ 49 (9cf) Payment and Discharge.—See ante, "Prior Recovery or Payment of Judgment," § 47 (11eb).

Interest.—See ante, "Interest," § 47 (12e).

§ 49 (9cg) Enforcement—§ 49 (9cga) Execution.—Motion for Execution.—It is a good defense to a motion for execution against a stockholder of a bank either that the judgment against the bank was rendered without jurisdiction or that it was obtained by fraud.[95]

§ 49 (9cgb) Action on Judgment or Assessment.—After the rate of assessment to meet a deficiency in the assets of a bank has been fixed, and the individual liability of each stockholder thus ascertained, enforcement of such liability is the proper subject of a suit at law, in which the separate rights of the individual stockholders are distinctively to be considered.[96]

Enforcement of Foreign Judgment—Against Shareholder Not a Party.—A receiver of an insolvent bank whose assets are insufficient to pay its debts can not maintain an action in a foreign jurisdiction against a shareholder in such bank for the amount of an assessment directed to be made by the court in the parent suit to which the shareholder was not a party and to which he did not appeal and could not have been required to appeal because of his being beyond the jurisdiction of the court.[97]

92. **Judgment against bank as stockholder.**—Martin *v.* Wilson, 58 C. C. A. 181, 120 Fed. 202.

93. **Lien and priorities.**—Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626.

94. **Priorities.**—Lowry *v.* Parsons, 52 Ga. 356.

95. **Motion for execution.**—Choate *v.* Boyd, 59 Kan. 682, 54 Pac. 1042.

96. **Action on assessment.**—Tompkins *v.* Craig, 93 Fed. 885; Flash *v.* Conn, 109 U. S. 371, 27 L. Ed. 966, 3 S. Ct. 263. See ante, "Matters Concluded," § 49 (9cdab).

97. **Foreign judgment—Shareholder not a party.**—Wigton *v.* Bosler, 102 Fed. 70.

The individual liability of the share-

Foreign Judgment—Defendant Personally Served.—Where the judgment was rendered against the defendants upon notice by personal service by a court of general jurisdiction having authority under the laws of the state to render such a judgment, the creditors, together with the receiver, directed to collect the judgment, are authorized to sue on the judgment in court of the state of residence of the stockholder.[98]

§ 49 (10) Liability for Expenses.—Where a creditor of a bank applied to share in the proceeds of an action to enforce a stockholders' statutory liability, he was chargeable with a proportionate amount of the expenses of such litigation.[99]

holders of a bank to the creditors of the corporation, being conditioned by the statute of Iowa upon the bank having become insolvent, and upon the insufficiency of its assets to pay its debts, and being limited to the stockholder's share of the deficiency only, the receiver of a bank, appointed under the general powers of a court in Iowa, can not maintain an action in a foreign jurisdiction against a shareholder, for the amount of an assessment upon stock directed to be made by the court in Iowa, in a proceeding to which the shareholder was not a party, and to which he did not appear, and to which he could not have been required to appear, because of his being beyond the jurisdiction of the court. Wigton *v.* Bosler, 102 Fed. 70.

Gen. St. Minn. 1878, c. 33, § 21, imposes on stockholders of state banks a double liability for debts of the bank. Laws Minn. 1899, p. 315, c. 272, provides that in a receivership proceeding the court shall set a time for hearing, and that direct notice be given by publication or otherwise, and if at the hearing it appears that the corporation assets are insufficient to pay its debts, and that it is necessary to enforce the stockholders' liability, the court shall levy an assessment on all the stockholders, and direct the payment of the amount so assessed within a specified time, and authorizes the receiver, if necessary, to prosecute actions against every party failing to pay the assessment, wherever such party may be found, within or without the state. Held, that an order of a Minnesota court directing the payment of an assessment is not enforceable as a judgment in the courts of Wisconsin against a resident of Wisconsin. Hunt *v.* Whewell, 122 Wis. 33, 99 N. W. 599.

98. **Foreign judgment—Defendant personally served.**—Pending receivership proceedings in a suit in a sister state against an insolvent bank, a creditor intervened on behalf of the creditors and impleaded the stockholders as parties defendant for the purpose of enforcing their statutory liability in accordance with law of the foreign jurisdiction. The stockholders were within the jurisdiction of the court and were summoned. The court determined the amount due to each creditor, and fixed the liability of each stockholder, and rendered judgment in favor of the creditors. Held, that the creditors, together with the receiver directed to collect the judgment, were authorized to sue on the judgment in the courts of Washington. Childs *v.* Blethen, 40 Wash. 340, 82 Pac. 405.

99. **Liability for expenses.**—In re Ziegler, 98 App. Div. 117, 90 N. Y. S. 681. See ante, "Reference and Receiver's Report," § 49 (9a).

CHAPTER V.

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D. OFFICERS AND AGENTS.[1]

§ 50. Constitutional and Statutory Provisions.—As to statutory provisions with respect to the cumulative voting of stock upon the election of officers, see post, "Election or Appointment, Qualification and Tenure," § 51. As to the ipso facto operation of statutes removing those officers violating provisions with respect to loans to officers, see post, "Election or

1. Of loan, trust and investment companies, see post, "Officers and Agents," § 314.

Of national banks, see post, "Election or Appointment of Officers," § 251; "Nature and Extent," § 253; "Actions to Enforce Liability," § 254; "Officers," § 256; "Prosecutions and Punishment," § 257.

Of savings banks, see post, "Officers and Agents," § 294. Representation of bank by officers and agents, see post, "Representation of Bank by Officers and Agents," §§ 102-118.

Right to sue directors depending on plaintiff's title to character of receiver, see post, "Appointment and Removal," § 77 (1).

Criminal responsibility of officers of national banks, see post, "Criminal Responsibility of Officers or of Persons Aiding or Abetting Them," § 255; "Officers," § 256; "Prosecution and Punishment," § 257.

Authority during liquidation of bank to assign pledged securities to pledgee, see post, "Insolvency and Its Effect in General," § 73.

Effect of dissolution on right to compensation, see post, "Effect of Dissolution," § 72.

Enforcement of lien on stock, see ante, "Lien of Bank on Stock and Dividends," § 42.

Appointment, Qualification and Tenure," § 51. As to constitutional and statutory provisions relating to the civil and criminal responsibility of officers receiving deposits knowing the bank to be insolvent, see post, "Election or Appointment, Qualification and Tenure," § 51; "Offenses," § 61.

License or Occupation Tax.—See footnote 2.

§ 50a. Definitions and General Considerations.—See, generally, post, "In General," § 54 (1).

§ 51. Election or Appointment, Qualification and Tenure—§ 51 (1) Authority to Employ Officers and Agents—How Appointed.—A bank may appoint an agent to transact any business which it may lawfully do, and such appointment may be made by a mere corporate vote.[3]

Necessity for Actual Employment or Consent on Part of Bank.—Before one can be deemed the agent of a bank, however, so as to hold the bank liable for his acts or omissions, there must have been either such actual employment or consent on the part of the bank, or such conduct as amounts to a ratification or estoppel.[4]

2. License or occupation tax.—Under § 2, par. 2, of the acts of general assembly approved Dec. 16, 1902 (Acts 1909, p. 19) one who acts as president of two or more banks, must pay the tax of $10 for each bank of which he is president. Witham *v.* Stewart, 129 Ga. 48, 58 S. E. 463.

3. Authority to employ agent.—Bates *v.* Bank, 2 Ala. 451.

Act Feb. 1839, providing that the several attorneys of the Bank of the State of Alabama, and its branches, shall hereafter receive an annual salary of $1,000, and no more, does not prohibit the banks from employing such other legal assistance as their interests may require. Bank of Alabama *v.* Martin, 4 Ala. 615.

Agent or attorney to convey real estate.—An agent or attorney may be duly appointed to convey the real estate of an incorporated bank by a vote of the directors, without a power, under the corporate seal. Savings Bank *v.* Davis, 8 Conn. 191.

Filling vacancies—Statutory provisions.—The appointment of a bank cashier by the finance committee to fill a vacancy, subject to the approval of the board at its semi-annual meeting, constituted under the rules and by-laws of the bank concerned in this action a valid and legal appointment, where the appointee proceeded to act under the appointment, and gave bond pursuant thereto, and particularly where the bond recites that the principal therein "has been chosen and appointed cashier." Fancher *v.* Kaneen (O.), 5 N. P., N. S., 614.

If a person appointed a director of a bank by the executive, under Act March 22, 1837 (Sess. Acts, p. 57), declines to accept the office, or resigns, the executive is not authorized to make another appointment, but his place is to be supplied by the appointment of the directors of the bank. Bank *v.* Robinson, 46 Va. (5 Gratt.) 174.

4. Necessity for actual employment or recognition.—Holman *v.* Bank, 12 Ala. 369; National Bank *v.* Allen, 33 C. C. A. 169, 90 Fed. 545.

Neither a remittance of money to one as the agent of a bank by another party, and his consent to receive it as such, nor his admissions, or the fact that he is a director of the bank, have any tendency to prove that he is the agent of the bank. The consent of the bank that he should so act is necessary. Holman *v.* Bank, 12 Ala. 369.

Neither the fact that a bank held as collateral security a majority of the stock of a mercantile corporation, nor that one of its officers was for a time a director of the mercantile company, renders the latter the agent of the bank, so as to make the bank liable to creditors of the company for misrepresentations as to its financial condition made by its officers. National Bank *v.* Allen, 33 C. C. A. 169, 90 Fed. 545.

Servant quoad hoc.—If a bank delivers to A certain notes, with a re-

Presumption as to Approval or Consent.—Where one is employed by less than all of the directors of the bank and proceeds to perform the duties of the position with full knowledge and without objection on the part of the others, it will be presumed that they approved of his employment.[5]

§ 51 (2) Eligibility—Statutory and Charter Provisions.—It is not necessary that a director should be a stockholder unless expressly required by the charter or by statute.[6] Where the charter provides that

quest that he would pass them away for the benefit of the bank, or, if he could not do that, to return them, which he agrees to do, A, quoad hoc, is the servant of the bank. Towson *v.* Havre-de-Grace Bank (Md.), 6 Har. & J. 47, 14 Am. Dec. 254.

5. **Presumption as to approval of consent.**—Bradstreet *v.* Bank, 42 Vt. 128.

A contract employing plaintiff was originally made by two directors of a bank, and afterwards approved by a third. The contract was not in terms limited to time, and the same three directors, by re-election, continued in office during the entire service of five years. Held, that it would be presumed that the contract was approved by the three directors during the whole time, although it did not affirmatively appear that more than two of them assented to the employment after the first year. Bradstreet *v.* Bank, 42 Vt. 128.

6. **Eligibility—Statutory and charter provisions.**—Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728.

In the case just cited, it was held, construing the charter and the general law together, that not more than two-thirds of the directory need be stockholders in the bank for which they acted as directors. Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728.

Statutes limiting terms and forbidding directors to succeed themselves.—Charter of the State Bank (§ 3) provides that the board of directors shall consist of eighteen members, six to be appointed by the governor, and twelve to be elected by the stockholders; provided, however, that no more than two-thirds of the directors elected by the stockholders, and no more than two-thirds of the directors appointed by the governor, who shall be in office at the time of an annual election, shall be elected or appointed for the next succeeding year, and no director shall hold his office more than three years out of four. Held, that directors under appointment of the governor for the previous year, and left out in the reappointments, could not be considered new members, if then elected by the stockholders. Jordy *v.* Hebrard, 18 La. 455.

Director removed by operation of law, not again eligible.—Where the office of a cashier and director has become vacant by operation of law, by reason of his indebtedness to the bank, it is beyond the power of the corporation, either by direct or indirect means, to make of him a de jure or a de facto officer, so long as the disability continues. Cupit *v.* Park City Bank, 20 Utah 292, 58 Pac. 839.

Requiring directors of Mechanics' Bank to be practical mechanics.—Under the charter of the Mechanics' Bank of Alexandria, which provided that "there shall be fifteen directors, eight of which at least shall be practical mechanics," it was not necessary that such eight directors should be in actual practice at the time of election. Gray *v.* Mechanics' Bank, Fed. Cas. No. 5,723, 2 Cranch, C. C. 51.

Requirements of federal statutes.—Section 5146, U. S. Rev. Stat., prescribes the qualifications of directors: (1) Every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the state, territory or district in which the association is located, for at least one year immediately preceding their election, and must be residents therein during their continuance in office. (2) Every director must own, in his own right, at least ten shares of the capital stock of the association. A director who ceases to be the owner of ten shares or otherwise becomes disqualified shall thereby vacate his place. Mason *v.* Moore, 73 O. St 275, 76 N. E. 932, 4 L. R. A., N. S. 597.

stockholders only shall be elected directors, persons having no interest in the stock, but fraudulently and collusively receiving the transfer of a share to qualify them, are not eligible; and the stockholders combining in such fraud have no power to confer upon them authority to do corporate acts.[7]

Same Person Serving as Director in More than One Bank.—A bank charter forbidding the appointment of a director of any other bank, or the co-partner of a director, applies to directors of banks in other states.[8]

§ 51 (3) Election.—Original Incorporators Not Ipso Facto Directors.—The original persons who associate themselves together for the purpose of organizing the corporation and bringing it into being, do not, even when limited to a small number, as five or seven, become its directors ipso facto upon the completion of the organization, unless the statute so provides. Ordinarily they are merely stockholders, and should proceed to the election of directors in the manner prescribed by statute.[9] Under the act of congress with reference to national banks, the directors are elected annually by the stockholders.[10]

Time and Place of Election.—An election of directors must be held at the time and place fixed by law, or designated according to law.[11]

Quorum.—What shall constitute a quorum of the directorate for the purpose of holding an election or transacting other business is a matter of statutory regulation. Where, in the election of a president, a majority of the directors constitute a board to do business, and a majority vote, the

7. **Directors having no bona fide ownership of stock.**—Bartholomew *v.* Bentley, 1 O. St. 37.

8. **Directors serving in more than one bank.**—State *v.* Buchanan (O.), Wright 233.

In view of the failures of banks caused by overtrading, the legislature intended to cut off facilities to combined overissue of bank notes by the restriction requiring them to have no officer in common with any other bank. State *v.* Buchanan (O.), Wright 233.

9. **Incorporators not ipso facto directors.**—Kinsela *v.* Cataract City Bank, 18 N. J. Eq. (3 Green) 158.

Where "seven (or more) citizens of this state" associated to establish an office of discount, deposit, and circulation, under the act to authorize the business of banking, approved February 27, 1850, and executed, acknowledged, and had recorded, in the offices of the secretary of state and the clerk of the county where said office was proposed to be located, the certificate required by the sixteenth section of the act, which certificate also stated that the associates had elected one of their number to be president of the association, and the association went into operation without further organization, except the selection of a cashier, held, that the persons signing said certificate were only associates and corporators or stockholders, and not managers or directors of said corporation; the eighteenth section giving to them only power to "choose a board of directors," under whose "direction" the business of banking might be conducted. Kinsela *v.* Cataract City Bank, 18 N. J. Eq. (3 Green) 158.

10. **Under National Banking Act.**—Brown *v.* Farmers', etc., Nat. Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359.

11. **Time and place of election.**—State *v.* Ashley, 1 Ark. 513.

The election for all the directors of the Real-Estate Bank must be held at one and the same time, and at one and the same place, to be appointed by the central board. State *v.* Ashley, 1 Ark. 513.

person receiving a majority of the votes cast is duly elected.[12]

De Facto Officer Elected by Less than Quorum.—As regards outside parties, one may be a de facto officer though elected at a meeting attended by a less number than required by the charter to constitute a quorum.[13]

Manner of Voting.—A stockholder can not be deprived of his charter right to vote for the entire directory of the institution;[14] though where the statute so provides, he may multiply his shares by the number of directors to be elected and vote them all for one director.[15]

Election or Appointment of Director to Fill Vacancy.—On application, in proceedings to liquidate a bank, for the appointment of a director to take the place of one who has resigned, the burden is on one claiming to have been elected to the office to show such election, and where there is no evidence of, but merely an answer to the petition alleging such appointment, the court is authorized to appoint another.[16]

§ 51 (4) Qualification—§ 51 (4a) Oath.—Where the statute or charter requires it, officers and directors must qualify by taking an oath

12. **Quorum.**—Booker *v.* Young, 53 Va. (12 Gratt.) 303.

Under Code, c. 58, § 4, a majority of the board of directors of a bank are a quorum to elect a president and, a quorum voting, a majority of them will elect him. Booker *v.* Young, 53 Va. (12 Gratt.) 303.

13. **De facto officers elected by less than quorum.**—Baird *v.* Bank (Pa.) 11 Serg. & R. 411.

One elected to the office of bank director at a meeting of five directors, and subsequently acting as such, is a de facto director, so that his acts are binding so far as they are relied on by outside parties, though under the bank's charter a meeting of a majority of thirteen directors was required to make a valid election of another director. Baird *v.* Bank (Pa.), 11 Serg. & R. 411.

14. **Manner of voting.**—State *v.* Ashley, 1 Ark. 513.

15. **Right to cumulate shares.**—Attorney General *v.* Bridgman, 134 Mich. 379, 96 N. W. 438.

Same—Repeal of statute.—Comp. Laws, § 8553, provides that a stockholder may multiply his shares of stock by the number of directors to be elected, and cast that number of votes for one director. Held that, if such act ever applied to banks organized under the banking law of 1887, it was repealed by Comp. Laws, §§ 6101, 6153, subsequently enacted, providing that bank directors shall be elected at a meeting of stockholders, each shareholder being entitled to one vote for each share for each director, and repealing all acts inconsistent therewith. Attorney General *v.* Bridgman, 134 Mich. 379, 96 N. W. 438.

Election of different classes by different interests.—Where the charter requires the board to consist of thirteen members, eleven to be chosen by the ordinary stockholders and two by the city council, the city being a stockholder, there is no distinction among the directors; they all have the right of voting to fill vacancies in either class of directors. Prieur *v.* Commercial Bank, 7 La. 509.

A bank, being so authorized by its charter, established a branch and furnished to it a capital of $62,500. An equal amount of stock was subscribed at the branch, but only $33,660 were paid in. The charter provided that the parent bank and the branch bank should choose nine directors, the former four and the latter five, if each furnished an equal amount of capital. As the branch furnished a less amount of capital than the parent, the latter claimed the right to choose six, and chose six, leaving three to be chosen by the branch. Held, that as capital meant not stock subscribed, but cash paid in, the division was equitable and proper. State *v.* Thompson, 27 Mo. 365.

16. **Filling vacancy—Presumption.**—Braslan *v.* Superior Court, 121 Cal. 123, 56 Pac. 792.

before entering upon the duties of the office.[17] Under the act of congress with reference to national banks, each director, before entering upon the discharge of the duties of such office, is required to make oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of the association.[18]

§ 51 (4b) Bond.—Form and Validity.—The surety bond required of a bank official should be made payable to the person designated by statute.[19] Such bond is not void because executed after the officer has entered upon his duties.[20] Nor is the validity of a bond given at a time when the statute did not require it affected by the subsequent enactment of a statute requiring a bond.[21]

Formal Defects.—Generally speaking, the validity of the bond is not affected by mere clerical errors and formal defects.[22] The failure to join the official, the faithful discharge of whose duties it is given to secure, will not release the sureties where such bond has been accepted by the directors.[23] And even the failure to express any consideration will not vitiate it, though the appointment was made before its execution, where it appears that the execution of the bond was necessary to render the appointment effectual.[24] Naming a greater penalty than that prescribed

17. Qualification—Oath.—State Bank *v.* Chetwood, 8 N. J. L. (3 Halst.) 1; Mason *v.* Moore, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597.

"By § 5147, each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of the association, and will not knowingly violate or willingly permit to be violated, any of the provisions of this title, and that he is the owner in good faith and in his own right of the number of shares of stock required, etc." Mason *v.* Moore, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597.

It is the duty of the cashier of a bank to be sworn before he enters upon the duties of his office. State Bank *v.* Chetwood, 8 N. J. L. (3 Halst.) 1.

18. Under National Banking Act.—Brown *v.* Farmers', etc., Nat. Bank, 88 Tex. 265, 275, 31 S. W. 285, 33 L. R. A. 359.

19. Bond—Form and validity.—Anderson *v.* State, 2 Ga. 370.

In 1841 a bank charter was repealed, and the assets transferred to another bank, which appointed an agent to collect them, who gave bond to the governor of the state. The charter of such other bank required its officers to give bonds, payable to the governor. Held, that the bond of the agent was rightly made payable to the governor. Anderson *v.* State, 2 Ga. 370.

20. Execution after principal has assumed duties.—Bank *v.* Brent, Fed. Cas. No. 910, 2 Cranch, C. C. 696.

21. Effect of subsequent enactment on bond already given.—Lionberger *v.* Krieger, 88 Mo. 160.

22. Formal defects.—Pendleton *v.* Bank (Ky.), 1 T. B. Mon. 171; Fancher *v.* Kaneen (O.), 5 N. P., N. S., 614.

A misnomer of the corporation, in the official bond of a cashier, by the omission of the words "and company," does not vitiate the bond. Pendleton *v.* Bank (Ky.), 1 T. B. Mon. 171.

Under the terms of a bond given to the directors of a bank as directors and not as individuals, with the relations and understanding of the parties as in this case, the bank becomes the real and sole party in interest with the right to sue thereon, and the assignee of the bank succeeds to the same right. Fancher *v.* Kaneen (O.), 5 N. P., N. S., 614.

23. Failure to join principal in bond.—Bank *v.* Cresson (Pa.), 12 Serg. & R. 306.

24. Failure to express consideration.—Fourth Nat. Bank *v.* Spinney, 14 N. Y. St. Rep. 216, 47 Hun 293.

by the charter or by-laws of the bank will not prevent the bond being a good and binding obligation upon the sureties.[25] In such a case, the charter provision may be construed as directory and not mandatory or imperative.[26]

Sureties.—Where the statute provides that such a bond shall not be signed by a director, it will be valid, though signed by a director, where he ceases to be one before it is accepted.[27]

Conditions.—A bond voluntarily executed and containing nothing contrary to law is not invalid because the condition varies from the form required by statute,[28] since it is a general principle, as to statutory bonds, that superadded and distinct conditions not imposed by the statute may be rejected as illegal, and the conditions required by the statute enforced as valid.[29]

Acceptance of Bond.—The acceptance of a bond need not be by an express act, nor in the manner prescribed by the charter in order to render the sureties liable for a breach of its conditions. Its retention by the directors or their permitting the officer to enter upon and continue in the discharge of the duties of the position without raising objections to the bond, will be deemed an acceptance thereof.[30] Record evidence of ap-

25. **Naming greater than prescribed penalty.**—Durkin *v.* Exchange Bank (Va.), 2 Pat. & H. 277 (citing Carter *v.* Bank of Va. special court of appeals, 1851, unreported).

26. **Same—Charter provisions held to be directory.**—Durkin *v.* Exchange Bank (Va.), 2 Pat. & H. 277.

27. **Director as surety.**—Franklin Bank *v.* Cooper, 36 Me. 179.

28. **Conditions.**—Grocers' Bank *v.* Kingman (Mass.), 16 Gray 473.

A condition in a cashier's bond "to account for, settle, and pay over all moneys," etc., is tantamount to the condition prescribed by statute, which is "for his good behavior." And, if it were not, yet the condition prescribed by the statute does not preclude the insertion of the former. State Bank *v.* Locke, 15 N. C. 529.

A bank authorized to make by-laws, and to take bond from the cashier for the "faithful discharge of the duties of his office," may take a bond with condition that he shall perform the duties of his office according to law and the by-laws of the institution, and that he shall not make known any secrets, or the state of the funds, etc., to any person except the directors, etc. As these things may be required of the cashier by the by-laws, they may be required in the bond. Bank *v.* Hopkins (Ky.), 1 T. B. Mon. 245, 15 Am. Dec. 113.

29. **Same—Superadded conditions.**—Banks *v.* McDowel, 41 Tenn. (1 Coldw.) 85, 87; Sharp *v.* Pickens, 44 Tenn. (4 Coldw.) 268; McLean *v.* State, 55 Tenn. (8 Heisk.) 22; Ranning *v.* Reeves, 2 Tenn. Ch. 263, all citing this case. And see Davis *v.* Bratton, 29 Tenn. (10 Humph.) 179, where this case is cited to distinguish the point decided. Polk *v.* Plummer, 21 Tenn. (2 Humph.) 500, 37 Am. Dec. 566.

30. **Acceptance of bond.**—Bank *v.* Dandridge (U. S.), 12 Wheat. 64, 6 L. Ed. 552. See, also, Jacksonville, etc., Nav. Co. *v.* Hooper, 160 U. S. 514, 522, 40 L. Ed. 515.

Where a board of directors, by a vote, approved of two persons as sureties in a bond to be given by the cashier, and a bond, duly executed by them and the cashier, was afterwards found in the possession of the president, it was held that there was a sufficient acceptance thereof by the corporation. Union Bank *v.* Ridgely (Md.), 1 Har. & G. 324; Dedham Bank *v.* Chickering (Mass.), 3 Pick. 335.

The facts that the bond of a cashier was delivered to, and considered and retained by, the directors of a bank, and that the cashier was placed in office, are sufficient to establish the acceptance of the bond, though no acceptance is shown by the minutes of the board. Pryse *v.* Farmers' Bank, 17 Ky. L. Rep. 1056, 33 S. W. 532.

proval by the directors is not necessary; presumptive evidence with proof of its execution is sufficient.[31]

Failure to Require Bond—Liability for Negligence.—If the directors fail to exact a bond of the cashier as required by law, they are liable to the stockholders for any loss resulting from their negligence in that behalf.[32] But where, in such a case, the directors, supposing that a bond has been taken, settle with the cashier for his delinquencies and order his bond cancelled, they can not be held liable for their failure to take a bond, since even if one had been taken all liability of the cashier and his sureties thereon would have been extinguished by the settlement. In other words, there can be no recovery for their negligence where no injury resulted therefrom.[33]

§ 51 (5) Beginning and Duration of Term.—The title of a person to the presidency of a bank is complete at the moment that the vote of a majority of the directors declaring him to be elected to such office is declared.[34]

Tenure.—Where, by the charter of a bank, the directors are to be chosen annually, and they, "for the time being, have power to appoint a cashier, and such other officers under them, as may be necessary for executing the business of said corporation," a cashier so appointed is an officer of the corporation, the duration of whose office, in the absence of an express limitation, is limited only by the duration of the charter; but he is liable to be removed by the directors as occasion may require, and is not necessarily an annual officer.[35]

Holding Over.—The tendency of the cases is, in the absence of terms in a charter restricting or enlarging the powers of the corporation upon the point, to maintain the authority of the officers, who hold over without an election, to exercise the corporate authority.[36] And it is held that any

31. Evidence of approval.—Bank *v.* Dandridge (U. S.), 12 Wheat. 64, 6 L. Ed. 552.

Proof of execution and approval of bond.—In a suit brought by the president, directors and company of the Bank of the United States, upon a bond given to the bank to secure the faithful performance of the official duties of one of its cashiers, it was held that evidence of the execution of the bond, and of its approval by the board of directors (according to the rules and regulations contained in the charter of the bank), was admissible notwithstanding there was no record of such approval; and that the plaintiff might prove the fact of such approval by the board, by presumptive evidence, in the same manner as such fact might be proved in the case of private persons, not acting as a corporation, or as the agents of a corporation. Bank *v.* Dandridge (U. S.), 12 Wheat. 64, 6 L. Ed. 552.

32. Failure to require bond—Liability for negligence.—Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582.

33. Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582.

34. Beginning and duration of term.—Booker *v.* Young, 53 Va. (12 Gratt.) 303.

35. Tenure.—Union Bank *v.* Ridgely (Md.), 1 Har. & G. 324; Dedham Bank *v.* Chickering (Mass.), 3 Pick. 335.

36. Holding over.—Nashville Bank *v.* Petway, 22 Tenn. (3 Humph.) 522.

The power of election was vested in a board of directors, who were accustomed to elect their cashier annually, according to a resolution to that

provision of the charter looking to a continuance of the power of the board of directors in case of a failure to elect at the proper time, ought to receive a favorable consideration.[37]

Effect of Insolvency, Suspension, Abandonment of Office, etc.—The insolvency of a bank and the suspension of all its corporate functions during a long period of years may operate also as a suspension of its directory and all its corporate officers.[38]

§ 51 (6) Removal or Discharge.—Ipso Facto Removal by Operation of Statute.—A statute which provides that the office of any director

effect, but the charter provided that, before he entered upon the duties of his office, he should give bond. Held, that the term of office did not expire at the end of the year, but that the old cashier continued in office until a new one was qualified by giving a bond. Sparks *v.* Farmers' Bank, 3 Del. Ch. 274.

37. Same—Charter—Construction.—Nashville Bank *v.* Petway, 22 Tenn. (3 Humph.) 522.

Therefore, a provision which, after fixing the time for the annual election of directors and the day when the new board shall go in, stipulates that, until the new directors take their seats, the former board shall continue to manage the affairs of the company, is sufficient to keep alive the powers of the old board, and the addition of a specific reference to the date of the first election is not restrictive, but amplifying in its meaning. Nashville Bank *v.* Petway, 22 Tenn. (3 Humph.) 522.

Under a bank charter providing for the election of directors by the stockholders, and then providing that "the officers" shall hold their offices for one year, but may be removed by a majority at a meeting of the stockholders, and that the directors may appoint certain officers, the limitation of the term to one year applies only to the directors, and not to the officers appointed by them. Deposit Bank *v.* Hearne, 104 Ky. 819, 20 Ky. Law Rep. 1019, 48 S. W. 160.

The charter of a bank provided that the directors should serve until the end of the first Monday in January next ensuing the time of their election, and no longer; that the directors, at the first meeting after their election, should choose one of their number president; that, if it should happen that an election of directors should not take place upon the proper day, the corporation should not be deemed dissolved, but the election should be had on some other day. At a meeting of the stockholders, held on December 20, 1865, the directors were authorized to cause the then president and cashier to execute a deed of assignment. The instrument was made and delivered on January 4, 1866, by the president and cashier in office at the time of the aforesaid meeting of the stockholders. The first Monday in January, 1866, was then passed, and no new board of directors or new officers had been elected. Held, that the president and cashier before referred to were the proper officers to execute such assignment. They were officers de facto, if not de jure. Milliken *v.* Steiner, 56 Ga. 251.

38. Effect of insolvency, suspension, etc.—Bartholomew *v.* Bentley, 1 O. St. 37.

Directors of a bank elected in 1822, the bank being entirely insolvent and performing no corporate acts from that time until 1838, will not be held to have continued in office until the latter period, although the charter provided that they should continue in office until their successors were elected. Bartholomew *v.* Bentley, 1 O. St. 37.

The act of such persons in appointing directors to fill vacancies in the board was entirely void, although the charter provided that a part of the directors of the bank might fill such vacancies. Bartholomew *v.* Bentley, 1 O. St. 37.

Where the stockholders of a bank, in an instrument authorizing its conversion from a state to a national bank, named all the directors who had been elected at the last annual election as those "who are now the directors of said bank," the court can not hold that two of those so named were not directors merely because they had never acted in that capacity since their election, five months previously. Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253.

or other official shall become vacant by reason of his violation of the prohibitions contained therein is self-executing, and operates to ipso facto vacate his office upon proof of violation of its terms.[39]

Time of Taking Effect.—See footnote.[40]

Proceedings to Remove.—In an action to remove the directors of a bank, acting as trustees under the statute in closing up its affairs, a petition which does not allege that the trustees have been in any way extravagant or negligent or dilatory in the performance of their duties, or that they have violated any law or contract, or done any wrong or withheld any right or threatened to do any such thing, is insufficient to state a cause of action.[41]

Dishonesty—Proof of.—Proof of dishonesty is a question for the jury upon all the evidence in the case.[42]

§ 51 (7) Trial of Right or Title to Office.—Quo warranto is the proper remedy to inquire by what authority a person holds the office of bank director. It is the proper writ to try the right to office, and to arrest the usurper.[43] Such writ will be made returnable forthwith, or at short day, so that a trial may be had before the term of office expires, that course being necessary to the due administration of justice.[44] On return of such writ, short rules will be granted for pleading to issue, and the defendant has no right to send the cause to the common rules for pleading, as that would work a continuance, and defeat the object of the writ.[45]

39. **Ipso facto removal.**—Cupit *v.* Park City Bank, 20 Utah 292, 58 Pac. 839.

Comp. Laws 1888, § 2515, provides that no officer of any bank organized under this law shall borrow money from it unless he furnish security in at least double the amount of the loan made, and no loan by any officer shall be made for a period to exceed three months, nor shall any officer become an indorser or security for loans to others. It also provides that the office of any director or officer who acts in contravention to the provision immediately thereon becomes vacant. Held, that the statute is self-executing, so that from the time a loan by way of overdraft, unsecured, was made by the bank to a firm of which a cashier who was also a director was a member, his office became vacant, and from that time on he had no authority to act for the corporation. Cupit *v.* Park City Bank, 20 Utah 292, 58 Pac. 839.

40. **Time of taking effect.**—A bank, on being informed that its cashier had been guilty of a breach of trust, by resolution, suspended him from office until the further pleasure of the board, but which resolution was not communicated to him nor carried into effect until three days after its passage. Held, that the suspension did not take effect until it was known to the cashier. Bank *v.* Magill, Fed. Cas. No. 929, 1 Paine 661, affirmed in 12 Wheat. 511, 6 L. Ed. 711.

41. **Proceedings to remove.**—Sands *v.* Gund, 4 Neb. 316, 93 N. W. 990.

42. **Proof of dishonesty.**—Merchants' Nat. Bank *v.* Guilmartin, 93 Ga. 503, 21 S. E. 55, 44 Am. St. Rep. 182.

The purchase or sale of stock by the cashier of a bank would not of itself be proof of dishonesty, while the buying and selling of stock beyond his evident means might be. This is entirely a matter for the jury. It is for them to determine whether or not speculation on his part is such a circumstance as would render him unfit to hold his position as cashier. Merchants' Nat. Bank *v.* Guilmartin, 93 Ga. 508, 21 S. E. 55, 44 Am. St. Rep. 182.

43. **Trial of title to office—Quo warranto.**—State *v.* Buchanan (O.), Wright 233.

44. **Same—Return of writ.**—State *v.* Buchanan (O.), Wright 233.

45. **Same—Pleading—Imparlances.**—State *v.* Buchanan (O.), Wright 233.

Evidence of Authority.—The records of a corporation are the best evidence of its officers, but it is competent to prove that such officers exist by the admissions of the defendant.[46] Newspaper statements and the understanding of a witness from such sources is no evidence who are directors of a bank.[47]

Presumption and Burden of Proof.—See footnote.[48]

§ 52. Meetings of Directors.—Notice of Meeting.—It is the general rule that, where no provision is made in the statute or in the by-laws of a bank or corporation for the notice required for regular meetings of the directors, or the mode of calling special meetings, all meetings must be called by special notice, to be given to each director.[49]

But, where, by the charter of a bank, a certain number of its directors are made a quorum, the bank is bound by the unanimous concurrence of that number at a casual meeting, and without notice to the others, if notice is not prescribed by the charter or by-laws.[50] And if the directors of a bank have long pursued an established custom of holding meetings and transacting business at the bank during business hours whenever a sufficient number were present, the custom would carry with it a standing notice to each director, and enable those present to proceed, in the absence of a controlling by-law or statute.[51]

Object of Meeting—Specifying.—Failure of the notice to specify the object of the meeting will not prevent its being a legal meeting for the transaction of ordinary business.[52]

46. **Evidence.**—State *v.* Buchanan (O.), Wright 233.

47. **Same.**—State *v.* Buchanan (O.), Wright 233.

48. **Presumption and burden of proof.**—Presumption that the law requiring a bank cashier to be director has been complied with. See Hibernia Sav. Bank *v.* McGinnis, 9 Mo. App. 578.

Burden of proving that bank cashier was not a director as required by the law. See Hibernia Sav. Bank *v.* McGinnis, 9 Mo. App. 578.

49. **Meeting of directors—Notice.**—Paola, etc., R. Co. *v.* Anderson, 16 Kan. 302; Scott *v.* Paulen, 15 Kan. 162; Aikenan *v.* School Dist., 27 Kan. 129; National Bank *v.* Drake, 35 Kan. 564, 11 Pac. 445; National Bank *v.* Shumway, 49 Kan. 224, 30 Pac. 411.

50. **Same—Unanimous concurrence of quorum without notice.**—Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207.

Three of the seven directors of an insolvent bank were nonresidents, and could not be notified of a meeting of the directors in time to attend the same. The four remaining directors, being a quorum, called a meeting, and passed a resolution authorizing the president and secretary to assign all of the bank's property for the benefit of its creditors, after which a deed of assignment was executed in due form and properly filed. Subsequently, two of the absent directors recognized the assignment by attending and participating in the election of an assignee, as provided by law. Neither the bank as a corporation, nor any director, objected to the assignment. Held, that the assignment was valid, notwithstanding the absence of the three directors from the meeting of the board. National Bank *v.* Shumway, 49 Kan. 224, 30 Pac. 411.

51. **Same — Custom.** — American Exch. Nat. Bank *v.* First Nat. Bank, 27 C. C. A. 274, 82 Fed. 961.

52. **Specifying object of meeting.**—Savings Bank *v.* Davis, 8 Conn. 191.

Where a meeting of a board of directors of a bank in New Haven was called by the cashier, in pursuance of instructions from the president, then in New York, by personal notice to the directors in New Haven, without specifying, in such notice, the object

Quorum.—The provisions in the charter of a bank as to what shall constitute a quorum of the directors to do business are directory, and for the security of the stockholders and bill holders; but the bank may endanger its franchises by disregarding them.[53] As a rule, a majority of the directors constitute a quorum, and a majority of the quorum may act.[54] Where the charter requires the presence of a specified number to constitute a board, and declares the president to be entitled to all the powers and privileges of a director, the president and one less than the number specified by the charter constitute a sufficient board to satisfy the requirements of the charter.[55]

Bias or Interest Disqualifying Director.—Although, as between the corporation and the individual, a bank director has no right to vote in a matter in which his interest is concerned, yet, as respects the bona fide contracts of third persons, such vote will be valid.[56]

Minutes of Meeting.—It is unnecessary that the votes or decisions of the directors or agents of a banking corporation should be recorded unless recording is required by the charter or by-laws.[57]

of the meeting, it was held that this was a legal meeting for ordinary transactions, and that the giving of security for a debt of the bank, by a mortgage of its real estate, was of this description. Savings Bank *v.* Davis, 8 Conn. 191.

53. Quorum.—Smith *v.* Bank, 18 Ind. 327.

54. Same—Number required to bind bank.—Leary *v.* Interstate Nat. Bank (Tex. Civ. App.), 63 S. W. 149; Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207; Dickason *v.* Grafton Sav. Bank Co., 27 O. C. C. 357.

The directors of a bank may bind the corporation by a major vote of those present at a regular stated meeting, or at a special meeting of which all have been notified, if a quorum is present. Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207.

Under Rev. St., § 3247, providing that a majority of the trustees or directors shall form a board, three of the five directors of a bank have authority to transact the business of the bank. Dickason *v.* Grafton Sav. Bank Co., 27 O. C. C. 357.

Where only half of the directors of a bank who were qualified to act for it in selling certain property were present at the board meeting, there is no quorum, and their act in making the sale is not binding on the bank. Leary *v.* Interstate Nat. Bank, (Tex. Civ. App.), 63 S. W. 149.

Same—Custom—Discounting paper.—Evidence that a note, which was left with a bank director to be discounted, was discounted the next day; that the rules of the bank required the presence of a majority of the directors or of the finance committee to authorize a discount; but that it was the custom in some cases for the cashier and one director to discount a note; and that, on the day the note in question was discounted, there was no meeting of the directors or of the finance committee—warranted a finding that the cashier, and the director with whom the note was left, acted for the bank in discounting it. National Security Bank *v.* Cushman, 121 Mass. 490.

55. Quorum composed of president and one less than required number of directors.—Bank *v.* Ruff (Md.), 7 Gill & J. 448.

Thus, where the charter required seven directors to make a board, and declared the president to be entitled to all the powers and privileges of a director, the president and six directors constituted a sufficient board to satisfy the requisitions of the charter. Bank *v.* Ruff (Md.), 7 Gill & J. 448.

56. Disqualification of director by bias or interest.—Baird *v.* Bank (Pa.), 11 Serg. & R. 411.

57. Minutes of meeting.—Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207.

The direction of the directors to the president as to the application of moneys received need not be recorded. Stamford Bank *v.* Benedict, 15 Conn. 437.

§ 53. Rights and Liabilities as to Bank and Stockholders—§ 54. —— Nature and Extent—§ 54 (1) In General—§ 54 (1a) Powers, Duties and Liabilities of Directors.—Care and Diligence Required.—The directors and officers of a bank are, in a sense, trustees for the depositors and stockholders, and they can be called upon in a court of equity to account for misfeasance in the management of the business of the bank.[58] They are the agents of the corporation, and are liable for an abuse of their trust wherever the agents of an individual would be.[59] The standard of diligence and prudence by which they should be tried is that which business men have erected for themselves. Reasonable conformity to the customs and methods in vogue among prudent bankers is the degree of diligence required of such officers.[60] As regards directors, the law requires of them the exercise of good faith and ordinary diligence and care, including the duty of reasonable oversight and supervision of the bank's affairs, and they are liable for losses resulting from their negligence or mismanagement of the bank's affairs.[61] The degree of care to which they are bound is that which ordinarily prudent and diligent men would exercise under similar circumstances, and in determining that, the restrictions of statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact, to be determined under all the circumstances.[62] Other cases have held

58. Nature of relation to bank.—Hersey *v.* Veazie, 24 Me. 9, 41 Am. Dec. 364; Smith *v.* Poor, 40 Me. 415, 63 Am. Dec. 672; Robinson *v.* Smith (N. Y.), 3 Paige, 222, 24 Am. Dec. 212; Cunningham *v.* Pitts (N. Y.), 5 Paige 607; Meisse *v.* Loren, 4 N. P. 100, 6 O. D. 258.

59. Same.—Austin *v.* Daniels (N. Y.), 4 Denio 299.

60. Standard of diligence.—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

61. Duties and liabilities—Diligence required.—Briggs *v.* Spaulding, 141 U. S. 132, 152, 35 L. Ed. 662, 11 S. Ct. 924; Trustees *v.* Bosseiux, 3 Fed. 817; Lowndes *v.* City Nat. Bank, 82 Conn. 8, 72 Atl. 150; Dunn *v.* Kyle, 77 Ky. (14 Bush.) 134; Commercial Bank *v.* Chatfield, 121 Mich. 641, 80 N. W. 712; Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Elliott *v.* Farmer's Bank, 61 W. Va. 641, 57 S. E. 242.

62. Same.—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Trustees *v.* Bosseiux, 3 Fed. 817; Dunn *v.* Kyle, 77 Ky. (14 Bush) 134; Commercial Bank *v.* Chatfield, 121 Mich. 641, 80 N. W. 712; Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

A director and officer of a bank is bound to exercise that degree of care in the business affairs of the bank that a careful man would exercise in his own affairs of like importance; and if, by reason of his neglect to exercise such care, the bank loses money, he is liable therefor. Commercial Bank *v.* Chatfield, 121 Mich. 641, 80 N. W. 712; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222; Marshal *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

The director of a bank is only re-

that directors will not be personally liable for losses, except in cases of gross negligence, amounting to active or passive fraud.[63]

Delegation of Duties—Supervision, Inspection, Knowledge of Bank's Affairs.—Directors are not required to devote themselves to the details of the business, which may be left to the clerks and bookkeepers under the supervision of the cashier.[64] They are bound, however, in the exercise of the ordinary diligence required of them by law, to maintain a reasonable oversight and supervision of the bank's affairs, and it is gross negligence for them to commit the entire business of the bank to the cashier and his subordinates without supervision or control on their part, even though he be an entirely competent man.[65] While they are not in-

quired to act in good faith and to exercise such a degree of care as a reasonably prudent man would exercise under the same circumstances; not that which a prudent man would exercise in his own business. Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76.

If by their gross mismanagement and neglect loss is incurred, they will be rendered liable therefor to creditors and stockholders. Elliott *v.* Farmers' Bank, 61 W. Va. 641, 57 S. E. 242.

63. Robinson *v.* Hall, 59 Fed. 648; Mutual, etc., Sav. Bank *v.* Bosseiux, 3 Fed. 817, 4 Hughes 387.

Illness may be sufficient excuse for passive negligence.—A director chosen to fill a vacancy created by death was at the time an invalid, and by reason of his infirmity in health unable to transact business, at least with facility. His codirectors at the time of his election were supposedly conversant with and capable of managing the banks affairs. Held, that while it might be said that he should not have accepted the position of director, and should not have allowed himself to be re-elected, yet upon this question of passive negligence the rule should not be so rigorously applied as to make no allowance for the person charged under such circumstances, and that he should not be held liable therefor. Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

64. Delegation of duties—Supervision and inspection.—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Mason *v.* Moore, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

65. Same.—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Lowndes *v.* City Nat. Bank, 82 Conn. 8, 72 Atl. 150; Bailey *v.* O'Neal, 92 Ark. 327, 122 S. W. 503; Mason *v.* Moore, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222; Lane & Co. *v.* Bank, 56 Tenn. (9 Heisk.) 419; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592; Warren *v.* Robison, 19 Utah 289, 57 Pac. 287, 75 Am. St. Rep. 734; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Wolfe *v.* Second Nat. Bank, 54 W. Va. 689, 47 S. E. 243.

A showing that certain directors of a defunct banking institution were careless and negligent as such; that they exercised no supervision over its affairs, but turned everything over to the executive officers, and allowed loans to be made to the officers of the bank and to others, practically without security; and that these loans resulted in wrecking the bank—is sufficient, in an action on behalf of stockholders and creditors for an accounting and for damages, to establish a prima facie case against such directors. Warren *v.* Robison, 19 Utah, 289, 57 Pac. 287, 75 Am. St. Rep. 734.

Kirby's Dig., §§ 841, 863, 864, providing that the business of every corporation shall be managed by the directors, and making the officers of a corporation who intentionally neglect to comply with the statutes and to perform the duties required of them jointly and severally liable for the debts of the corporation contracted during the period of such negligence, etc., require the directors of a corporation to perform the functions required of them by statute, common usage, and the by-laws. Therefore the directors of a bank who appoint a cashier can not divest themselves of the duty of general supervision and control and can not rely en-

surers of the competency or fidelity of the cashier or his subordinates, nor liable for their acts upon any principle of agency,[66] nor required to look with suspicion upon the conduct of these agents and employees, nor to practice a system of espionage over the cashier or his subordinates, in the absence of circumstances calculated to excite doubt or suspicion,[67] yet they are required to exercise due care in their selection and proper supervision over their actions and conduct of the bank's affairs.[68] While in some corporations directors may constitute merely an advisory body maintaining only a general oversight as to the affairs of the company, it is not so as to the directors of banks. As directors, it is their duty to know the system of management and its daily workings, including the general financial condition of the bank and all important matters in its dealings. They can not escape liability by showing that they were ignorant of the business of the corporation with respect to those matters which it is their duty to know; and if they negligently entrust such matters to others, and loss is thereby incurred, it should fall upon them, and not upon their de-

tirely on the good faith and judgment of the cashier; so that where the directors knowingly allowed the cashier to lend to one man and his various enterprises without substantial security sums largely in excess of the capital stock of the bank and to continue that course of dealing for a period of several years, resulting in the insolvency of the bank, the directors were personally liable to creditors becoming such during such period. Bailey *v.* O'Neal, 92 Ark. 327, 122 S. W. 503.

66. Not insurers of fidelity of employees.—Mason *v.* Moore, 73 O. St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

67. Nor required to look with suspicion on conduct of subordinates.—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Mason *v.* Moore, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597.

68. But held to a proper oversight.—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Lowndes *v.* City Nat. Bank, 82 Conn. 8, 72 Atl. 150; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592; Warren *v.* Robison, 19 Utah 289, 57 Pac. 287, 75 Am. St. Rep. 734; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Zinn *v.* Mendel, 9 W. Va. 580.

In relation to these officers, the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly, must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge, to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible. Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

Although no formal resolution authorized the president to transact the business of the bank, yet in view of the practice of fourteen years or more, it must be held that he was duly authorized to do so. It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them. Whether they were responsible for any neglect of the board as such, or in failing to obtain proper action on its part, is another question. Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

positors and stockholders.[69] They are not required, however, to give their whole time and attention to the performance of these duties, but only so much as, under the special circumstances of each particular case, may be demanded for the reasonable protection of the interests committed to their care.[70] And a mere failure to make or cause an investigation, in a short term of service, nothing appearing to cause suspicion, is not negligence.[71]

69. Same—Can not escape liability by plea of ignorance.—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60; Meisse *v.* Loren, 4 N. P. 100, 6 O. Dec. 258; Lane & Co. *v.* Bank, 56 Tenn. (9 Heisk.) 419; Warren *v.* Robison, 19 Utah 289, 57 Pac. 287, 75 Am. St. Rep. 734; Marshall *v.* Farmers', etc., Sav. Bank, 58 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Zinn *v.* Mendel, 9 W. Va. 580; Wolfe *v.* Second Nat. Bank, 54 W. Va. 689, 47 S. E. 243; Elliott *v.* Farmers' Bank, 61 W. Va. 641, 57 S. E. 242.

Directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and this includes something more than officiating as figureheads. They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they be permitted to be shielded from liability because of want of knowledge of wrong doing, if that ignorance is the result of gross inattention. Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

A bank director is personally responsible to a depositor for loss sustained by him for a dereliction of duty on the part of such director in the following particulars, to wit: Failure to hold weekly meetings as prescribed by the by-laws of the bank, it appearing that they sometimes only met semi-annually and even at greater intervals; allowing a depositing railroad company to overdraw its account to the extent of many thousand dollars, such director being the president of the company part of the time and one of the bank directors being president of the company the other part of the time in question, while the treasurer of the railroad company was the cashier of the savings bank; lending money to friends and relatives without any security; failing to cause the books of the banks to be examined at regular intervals as they were in duty bound to do. These and other facts show such negligence on the part of the directors as will make them personally liable for the losses caused thereby. Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

One who is a director and vice-president of a bank is bound, and conclusively presumed, to know its general financial condition and management, and all important matters in its dealings. He is chargeable with knowledge when his bank is in an embarrassed condition, and the condition of an account which has been overdrawn several months. The fact that from ill health he gives no personal attention to the business of the bank will not exempt him from this obligation and liability. German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60.

Bank directors must be considered as affected with the knowledge of such facts as appear upon the bank books. Zinn *v.* Mendel, 9 W. Va. 580.

The directors of a bank are equally bound with the cashier to constant activity and thorough acquaintance with its daily course of affairs and dealings. They must know its debts and its securities; and, in the absence, illness, or negligence of the cashier, must perfect and collect them; and perform all the duties devolving upon him. Lane & Co. *v.* Bank, 56 Tenn. (9 Heisk.) 419.

A long and systematic violation of the directions of the charter by the president and committeemen is prima facie presumption that such course of misconduct was known to the managers, and the latter can not demur to the bill seeking to charge them with such mismanagement, on the ground that such misconduct is not traced to them. Meisse *v.* Loren, 4 N. P. 100, 6 O. Dec. 258.

70. Not required to give entire time and attention.—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

71. Failure to cause investigation during short term of service.—Briggs

Directors as Trustees—As Agents.—It has been held in a number of cases that the relationship of officers and directors of a corporation and stockholders and creditors is that of trustees and cestuis que trustent, and in the scrutiny of possible breaches of duty the rigid rules which govern trustees have been applied. This has been especially true with regard to banking corporations, where the directors owe an earlier duty to the depositors, and where they are liable for losses incurred through their mismanagement, neglect of duty, or abuse of trust.[72] But while bank directors are often styled trustees, this is not true in any technical sense. They are not express trustees, but the relation is rather that of agents or mandatories, and as such they occupy a fiduciary relation just in the sense that every agent is a trustee for his principal, or in the sense that any person may, under given circumstances and the operation of familiar principles of equity, be held as an implied or constructive trustee for another.[73]

Not to Manage Affairs of Bank for Their Personal and Private Advantage.—The fiduciary character of directors is such that the law will not permit them to manage the affairs of the corporation for their personal

v. Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

Directors should not be subjected to liability upon the ground of want of ordinary care, where the bank became insolvent within ninety days after their election to the board because they did not compel the board of directors to make an investigation and did not themselves individually conduct an examination, during their short period of service; or because they did not happen to go among the clerks and look through the books, or call for and run over the bills receivable, where there was no obvious reason to suspect anything wrong. Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924, affirming Movius *v.* Lee, 30 Fed. 298.

72. Directors as trustees or agents.—Mutual, etc., Sav. Bank *v.* Bosseiux, 3 Fed. 817, 4 Hughes 387; Hersey *v.* Veazie, 24 Me. 9, 41 Am. Dec. 364; Smith *v.* Poor, 40 Me. 415, 63 Am. Dec. 672; Wilkinson *v.* Dodd, 40 N. J. Eq. 123, 3 Atl. 360; Robinson *v.* Smith (N. Y.), 3 Paige 222, 24 Am. Dec. 212; Cunningham *v.* Pitts (N. Y.), 5 Paige 607; Rouse *v.* Merchants Nat. Bank, 46 O. St. 493, 22 N. E. 293, 5 L. R. A. 378, 15 Am. St. Rep. 644; Taylor *v.* Miami Exporting Co., 5 O. 162; Zinn *v.* Baxter, 65 O. St. 341, 62 N. E. 327; Meisse *v.* Loren, 4 N. P. 100, 6 O. Dec. 258; Shea *v.* Mabry, 69 Tenn. (1 Lea) 319; Lane & Co. *v.* Bank, 56 Tenn. (9 Heisk.) 419; Vance *v.* Phœnix Ins. Co., 72 Tenn. (4 Lea) 385; Parker *v.* McKenna, L. R. 10 ch. (Tenn.) 9; Jackson *v.* Ludeling, 21 Wall. 616, 22 L. Ed. 492; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592; Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Elliott *v.* Farmers' Bank, 61 W. Va. 641, 57 S. E. 242.

73. Same—Implied or quasi trustees.—Briggs *v.* Spaulding, 141 U. S. 132, 147, 35 L. Ed. 662, 11 S. Ct. 924; In re Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684; Hughes *v.* Brown, 88 Tenn. 578, 13 S. W. 286, 8 L. R. A. 480; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222; Deadrick *v.* Bank, 100 Tenn. 457, 45 S. W. 786; Seale *v.* Baker, 70 Tex. 283, 294, 7 S. W. 742, 8 Am. St. Rep. 592.

Directors are not express trustees. They do not hold the legal title, and more often than otherwise are not the officers of the corporation having possession of the corporate property. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Deadrick *v.* Bank, 100 Tenn. 457, 45 S. W. 786.

Every director of a bank is its agent; appointed by the bank, and held out to the public as entitled to confidence. Union Bank *v.* Campbell, 23 Tenn. (4 Humph.) 394. See, to the same effect, Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222.

and private advantage, when their duty would require them to work for and use reasonable efforts for the general interest of the corporation and its stockholders and creditors. The confidence thus reposed in them can not be thus abused with impunity; and they can not use their position to promote their own interest in respect to anything thus intrusted to them, to the prejudice of creditors or other members.[74]

Misfeasance and Nonfeasance—Mistake of Judgment.—As agents—an action will lie against directors for malfeasance, misfeasance, nonfeasance, or negligence in office;[75] but they can not, in general, be held liable for loss or depreciation resulting through mere error of judgment.[76] One accepting a director's place, however, must be considered as holding himself out as possessed of ordinary business skill and ability, and if he is not possessed of these qualifications, he should decline to serve, for if he commit an error of judgment through mere recklessness or the want of ordinary prudence and skill, the corporation may hold him responsible for the consequences.[77] They must show reasonable capacity for the position they accept, and use in it their best discretion and industry, and a scrupulous conscientiousness in every matter, and obey accurately the requisitions of the charter and of the general law.[78]

Fraudulent and Illegal Acts.—As agents, directors are of course liable for their fraudulent or illegal acts. If they fraudulently abuse their trust, and misapply the funds of the corporation, they are personally liable to make good that loss.[79] Though to inculpate a director, it is not necessary

74. Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592.

75. **Misfeasance and nonfeasance.**—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Deadrick *v.* Bank, 100 Tenn. 457, 45 S. W. 786; Shea *v.* Knoxville, etc., R. Co., 65 Tenn. (6 Baxt.) 277; Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398; Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592; Warren *v.* Robinson, 25 Utah 205, 70 Pac. 989; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

A liability of this kind should not lightly be imposed upon directors in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part. Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

76. **Mere errors of judgment.**—Dunn *v.* Kyle, 77 Ky. (14 Bush) 134; Warren *v.* Robinson, 25 Utah 205, 70 Pac. 989; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

Directors of a bank are not responsible to the stockholders for loss, unless occasioned by fraud or gross negligence on their part. Dunn *v.* Kyle, 77 Ky. (14 Bush) 134.

77. **Holds himself out as possessed of ordinary qualifications.**—Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

78. **Reasonable capacity—Conscientious discharge of duty.**—Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

79. **Fraudulent and illegal acts.**—Hersey *v.* Veazie, 24 Me. 9, 41 Am. Dec. 364; Smith *v.* Poor, 40 Me. 415, 63 Am. Dec. 672; Robinson *v.* Smith (N. Y.), 3 Paige 222, 24 Am. Dec. 212; Cunningham *v.* Pitts (N. Y.), 5 Paige 607; Mabey *v.* Adams, 16 N. Y. 346; Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728.

that actual dishonesty should be shown, or that it should be proved that he was influenced by interested motives; it is sufficient to show that he has been guilty of a breach of the implied obligations arising out of the nature of his position.[80]

Mistakes of Law.—Directors of banks are not liable for excusable mistakes concerning the law; that is to say, mistakes involving such knowledge as could be reasonably expected only from a professional man;[81] but even in such cases, if the directors feel any doubts, they may be guilty of negligence if they fail to seek and be guided by competent legal advice.[82]

Right to Inspect Books.—A board of directors has no right to pass a resolution excluding one of its members from an inspection of its books, though they deem him hostile to its interests; and a mandamus will lie, commanding that the books be submitted to his examination.[83]

Nominal Directors.—A director in law and fact, who actually assumes the duties of the office, must be held to its responsibilities, and will be bound by the necessary presumptions raised by the facts. The same strict rules are clearly not applicable to nominal directors who have never accepted the office although held out as such. Nor are the defendants estopped to deny that they were stockholders by the fact of having become directors, or held themselves out as such.[84]

§ 54 (1b) President's Powers, Duties and Liabilities.—The president is not only a director but also the chief executive officer of the bank, and from the nature of his office, naturally has great influence upon the policy of the bank and the conduct of the various employees in the

80. **Actual dishonesty not necessary.**—Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

Banking associations organized under the general banking law are within 1 Rev. St. pt. 1, c. 18, tit. 2, art. 1, § 10, to prevent the insolvency of moneyed corporations, and making directors liable to stockholders who suffer an actual loss by the depreciation of the stock in their hands by reason of the fraudulent conduct of the directors. Mabey *v.* Adams, 16 N. Y. 346.

Under the Tennessee Statutes (Code, § 1488, Act of 1860, ch. 27, § 26, Rev. Code, § 1829b) declaring directors individually liable for losses occasioned through fraud and willful mismanagement it is held that the cases provided for are cases of intentional fraud and willful mismanagement. Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728.

Illegal declaration of a dividend.—The illegal declaration of a dividend, where there are no net profits to pay it, may subject the directors to a personal liability to the association or its stockholders for damages suffered in consequence thereof. United States *v.* Britton, 108 U. S. 199, 27 L. Ed. 698, 2 S. Ct. 531; Evans *v.* United States, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934.

81. **Mistakes of law.**—Soloman *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

82. **Failure to seek competent advice.**—Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 683, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

83. **Right to inspect books.**—People *v.* Throop (N. Y.), 12 Wend. 183.

84. **Nominal directors.**—Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728.

discharge of their duties.[85] He may be authorized by the directors to do anything within the authority of the bank's charter.[86] It is his duty to preside, and his other duties may vary according to usage or by-law of the institution, and, while he is usually expected to exercise a more constant, immediate, and personal supervision than an ordinary director, the mere fact that he permits the cashier to have physical control of securities is not necessarily proof of his negligence.[87] He is to be regarded as a trustee bound to exercise such care and prudence in his office as men of common prudence ordinarily show in their own affairs; the measure of his care being dependent on the subject to which it is due and the circumstances of each particular case.[88]

§ 54 (1c) Cashier's Powers, Duties and Liabilities.—The cashier of a bank is its executive officer through whom its financial operations are conducted and by whom its debts are received and paid and its securities taken and transferred.[89] By virtue of his office he is generally entrusted with the bank's funds and securities and charged with the duty of superintending its books, payments and receipts as a moneyed institution.[90] But it does not follow that he is the only officer of the bank whose duty it is to look after the securities of the bank, and to perfect and collect them. It is equally the duty of the president and directors.[91]

An Agent of the Bank.—The cashier of a bank is its agent,[92] and his acts, to be binding upon the bank, must be done within the ordinary course of his duties.[93]

A Quasi Trustee.—Though a cashier is a quasi trustee, and though in his dealings with the public he is the agent of the bank, and is held as to the bank like a trustee, yet he is not strictly speaking, and if he wrongfully acquires its funds and invests them in his own name, it can not fasten a trust or lien on the property, as in case of a real trustee, since the acquisition of the funds

85. President's powers and duties.—Gidding *v.* Baker, 80 Tex. 308, 16 S. W. 33; Brown *v.* Farmers', etc., Nat. Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359, reversing 31 S. W. 216.

86. Same.—Boyd *v.* First Nat. Bank, 32 Ky. L. Rep. 1323, 108 S. W. 360.

87. Same.—Davenport *v.* Prentice, 126 App. Div. 451, 110 N. Y. S. 1056.

88. Same—As a trustee—Diligence required.—Davenport *v.* Prentice, 126 App. Div. 451, 110 N. Y. S. 1056.

89. Cashier's duties—The executive officer.—United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130; Davenport *v.* Prentice, 126 App. Div. 451, 110 N. Y. S. 1056; Sturges & Co. *v.* Bank, 11 O. St. 153; Lane & Co. *v.* Bank, 56 Tenn. (9 Heisk.) 419; First Nat. Bank *v.* Greenville Oil, etc., Co., 24 Tex. Civ. App. 645, 60 S. W. 828. See, also, Rosenberg *v.* First Nat. Bank (Tex. Civ. App.), 27 S. W. 897; First Nat. Bank *v.* Ledbetter (Civ. App.), 34 S. W. 1042.

90. Custodian of funds—Supervision of books—Payments and receipts.—Davenport *v.* Prentice, 126 App. Div. 451, 110 N. Y. S. 1056; Sturges & Co. *v.* Bank, 11 O. St. 153; Durkin *v.* Exchange Bank (Va.), 2 Pat. & H. 277. See, also, Bank *v.* Wetzel, 58 W. Va. 1, 50 S. W. 886.

91. President and directors also required to supervise.—Lane & Co. *v.* Bank, 56 Tenn. (9 Heisk.) 419.

92. Cashier as agent of bank.—Maxwell *v.* Planters' Bank, 29 Tenn. (10 Humph.) 507; Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

93. Same—Power to bind bank.—Bank *v.* Wetzel, 58 W. Va. 1, 5, 50 S. W. 886.

being wrong in such case, the trust does not exist.[93a]

Care and Diligence Required—Duty to Observe By-Laws.—A bank cashier is required to exercise reasonable skill, care and diligence in the discharge of his duties, and is personally liable to the bank for losses resulting from his failure to exercise such care in the discharge of the duties of his office whether it be in the matter of making loans or transacting the other duties of his office;[94] and it does not avail that the directors ordered or authorized him so to act, if they had no authority to do so, nor to do the act themselves which they authorized him to do, and he knew or ought to have known that the act done or authorized was unlawful.[95] He is not responsible for losses resulting through mere errors of judgment.[96] If intrusted with the responsibility of making loans, he will be liable to the bank for improper loans, discounts or overdrafts where he fails to make reasonable inquiry into the financial standing of those to whom such loans, discounts or overdrafts are made or allowed, or if he knowingly or negligently fails to take proper security; but he is not an insurer or guarantor of their solvency or integrity.[97] Nor is the cashier liable merely because he did not observe the by-laws, unless negligent or inexcusable in not doing so.[98] The directors can not, by neglecting to perform any duties, and imposing all on the cashier, make him an absolute insurer of the bank against all loss merely because, to carry on its business successfully, he must ignore or fail to observe the by-laws, or fail to confer with them.[99] Whatever the directors may themselves do, they may authorize the cashier to do, and if he acts under their lawful authority, he is not liable to them or to the bank.[1] Moreover, what the directors may authorize in the first instance, they may also ratify, and stockholders, directors, committees and officers must be pre-

93a. Cashier as a trustee.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

94. Care and diligence required of cashier.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228; Commercial Bank *v.* Ten Eyck, 48 N. Y. 305; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Vance *v.* Mottley, 92 Tenn. 310, 21 S. W. 593.

95. How far protected by order of directors.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

96. Losses through errors of judgment.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228; Commercial Bank *v.* Ten Eyck, 48 N. Y. 305; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

97. Care in making loans.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Commercial Bank *v.* Ten Eyck, 48 N. Y. 305.

98. Failure to observe charter and by-laws.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

99. Same—Not an insurer.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

If directors place on the cashier the duty of carrying on the bank's business, and they as a body, or the committees thereof, fail to meet, or to instruct, help, and supervise him, absenting themselves from the bank and its business, and thus put on him the whole burden, neither they nor the bank can hold him responsible for not consulting with them, as required by the by-laws, as to discounts and loans. Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228; Second Nat. Bank *v.* Burt, 93 N. Y. 233.

1. Authorization and ratification by directors.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

sumed to have known of and consented to a cashier's course of business as to overdrafts, loans and discounts where the same has continued over a course of years without suspicion or complaint, and after allowing it for that period of time and profiting thereby, they must be presumed to have ratified his acts.[2]

Duty of Director Acting as Cashier.—A director appointed as acting cashier and acting in the absence of any regular cashier is held to the same duties and responsibilities, and required to perform whatever duties may be imposed by law upon the cashier, as, for example, the keeping, or causing to be kept, of the list of shareholders and the number of their shares as required by the national banking act.[3]

§ 54 (1d) Wrongful Acts from Which No Loss or Injury Results.—Bank officials, though negligent or guilty of wrongful acts, incur no liability where there is no resulting loss.[4]

§ 54 (1e) Liability for Acts Done during Absence, Sickness, etc.—A teller of a bank can not be held liable for losses incurred during his absence from the bank.[5] The board of directors has power to grant

2. **Same.**—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

3. **Duty of director acting as cashier.**—Finn *v.* Brown, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136.

4. **Where no loss results from wrongful act.**—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228; Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582; Commercial Bank *v.* Ten Eyck, 48 N. Y. 305; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

The directors, having removed a cashier on account of his overdrafts, took his notes, secured by an indorser and mortgage, in settlement, and to reconcile him, and avoid exposure and consequent loss, made him director with a salary. Held, a proper exercise of their discretion, and that, as no damage resulted, the stockholders had no cause of action against them. Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582.

A cashier forwarded certain bonds, pledged to his bank as collateral security, to responsible brokers, for sale, drawing against them for a portion of the value of the bonds. His draft was accepted and paid. He negligently omitted to inquire after the securities, or to collect the balance realized from their sale. The brokers, with knowledge of the interest of the bank, wrongfully applied such balance upon a claim of their own against the pledgor of the bonds to the bank. Held, that as the brokers were liable to the bank for the balance, and were able to respond in damages, the bank had sustained no damage from the cashier's negligence, and he, therefore, was not liable for want of care. Commercial Bank *v.* Ten Eyck, 48 N. Y. 305.

In an action by a shareholder against the directors of a bank, to recover for alleged losses due to their inattention and mismanagement, it appeared that, by resolution of the directors on the formation of the bank, the entire management was given to its cashier, a man of large estate and rare financial ability; that such cashier, without their knowledge or consent, borrowed enormous sums of the bank for a firm of which he was a member; that on discovery of such fact, after several years, he was deposed, and the directors obtained security for his indebtedness, which was thereafter reduced from time to time by payments; and that an action by the trustee of the bank, in insolvency, to recover the balance of $28,000, in which usury was set up in defense, was compromised by leave of court on the payment of $8,000. Held, admitting the negligence of the bank officers, that no such loss was shown as would sustain a recovery. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

5. **Liability for acts during absence or sickness.**—Bank *v.* Johnson, Fed. Cas. No. 919, 3 Cranch C. C. 228.

leave of absence to a director, for good cause such as illness, which will excuse him from all duties for such time,[6] and a director of a bank (national), who has been granted leave of absence by the board on account of illness, is not responsible for what occurs in his absence.[7]

§ 54 (1f) Duty with Respect to Statements of Bank's Condition.—See, also, ante, "Reports and Statements," § 16; post, "Criminal Responsibility," § 60. It is the duty of directors to know the condition of their bank, and to prevent publication of false statements of its condition, and by no private arrangement can they be excused from giving proper attention to such duties because they are nonresidents of the town wherein the bank is located.[8] Where the officers of a bank have represented to the state official, who examined its assets and condition, that certain mortgages held by the bank were valid securities, good morals and public policy will not allow them afterward to change their ground with respect to the validity of the mortgages.[9]

"Knowledge and Belief."—In determining whether a bank president was negligent in making oath that a report to the superintendent of banking was true to the best of his knowledge and belief, the word "knowledge"

6. **Board may grant leave of absence.**—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

7. **Same.**—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924, affirming Movius *v.* Lee, 30 Fed. 298.

Leave of absence absolves from liability.—Where a director (who was also president) of a national bank became seriously ill, it was within the authority of the board to grant him a leave of absence for a year. It can not be contended that the resolution referred to absence as president and not as director, and that no power existed to allow leave of absence to a member of the board, and that the resolution should be limited to excusing him from attendance at the bank, but not as permitting him to leave the city; or that if he wished to be absolved from responsibility while absent in search of health, he should have resigned. He was guilty of no want of ordinary care in acting upon the leave of absence, and was not to be held, because he did not resign, to responsibility for what occurred in his absence. Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

In an action by stockholders of a bank against the directors and officers to recover for depreciation of stock, the court found that a certain loan was made by the general manager surreptitiously and without the knowledge of three of the directors, two of whom were at the time out of the state on important business, and one of whom was sick, and that the loan was for some time concealed by the manager. When the directors discovered that the loan had been made, they made all reasonable efforts to collect it. Held, that these three directors were guilty of no neglect of duty making them liable to stockholders for loss on the loan. Warren *v.* Robinson, 25 Utah 205, 70 Pac. 989.

8. **Duty with respect to statements.**—Houston *v.* Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699.

Where it appears that the affairs of a bank were left in the management of officers thereof, who, by gross frauds extending through a period of several years, ruined the bank, and during which time false statements were published showing the bank to be in a good condition, the fact that the directors resided away from the town where the bank was located will not warrant the assumption that such directors could not, in the proper discharge of their duty, have ascertained that such statements were false. Houston *v.* Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699.

9. **Same—Estoppel with respect to representations.**—White *v.* Leslie (N. Y.), 54 How. Prac. 394.

must be taken in its common, ordinary meaning.[10]

§ 54 (1g) Duty with Respect to Handling and Safe-Keeping of Funds, Securities, etc.—An officer of a bank, who has unfaithfully managed its funds, is liable to the corporation.[11] Such an officer entitled, as against everybody, to the care and control of its assets, and who accepts that service and employment, while he may not be an insurer, yet, when his duties are fixed and determined for him, in the accomplishment of that service, and the manner prescribed, and the place fixed, and the wherewithal provided by which he may safely perform that engagement, is held to the exercise of such care to effect it as an ordinarily prudent man, under the same or similar circumstances, would exercise; and if he fails in this, and loss directly results, he must make good such loss.[12] Reasonable care upon the part of officers having the care of the funds of the bank, in the matter of attending to the vault doors, is to lock them and see that they are locked. Failure of the president of a bank, in caring for its funds, to see that the doors of the vault provided for their safe-keeping are locked, will render him liable for a loss resulting therefrom; and good faith on his part, and a reasonable supposition that other officers of the bank more particularly intrusted with such duty will perform it, is no defense.[13] But while the president is usually expected to exercise a more constant, immediate and personal supervision than an ordinary director, the mere fact that he permits the cashier to have physical control of securities is not necessarily proof of his negligence.[14]

Usage or Custom.—When the question is one of diligence, between a bank and its agent, it is not competent for the latter to protect himself, by proving the custom of another bank, in providing its agents with suitable buildings and iron safes, for the purpose of keeping securely the money

10. **Same—Knowledge and belief.**—Davenport *v.* Prentice, 126 App. Div. 451, 110 N. Y. S. 1056.

11. **Handling and safe keeping of funds.**—Hinsdale *v.* Larned, 16 Mass. 65.

12. **Same.**—Kalb *v.* American Nat. Bank, 21 O. C. C. 1, 11 O. C. D. 437, affirmed in 65 O. St. 566, 63 N. E. 1129.

An unauthorized deposit of securities by the managers of a bank with third parties, when there is a contrary order from the court, is a gross breach of trust, for which the managers are liable. Wilkinson *v.* Dodd, 40 N. J. Eq. 123, 3 Atl. 360.

A president of a bank, who allowed a customer to take a bill of lading which had been deposited as security for an indebtedness to the bank, that the customer might compare it with his books, is liable to the bank for a loss through the customer's failure to return the security, notwithstanding a prevailing custom among banks to allow securities to be taken by customers for inspection and comparison with their books. Citizens' Bank *v.* Wiegand (Pa.), 33 Leg. Int. 100, 11 Phila. 326.

13. **Same—Care in locking vault.**—Kalb *v.* American Nat. Bank, 21 O. C. C. 1, 11 O. C. D. 437.

To instruct the jury, in such case, that if the officers "acted in good faith about the affairs of the bank, and used reasonable diligence in and about the closing and locking of the door," they would be relieved from liability, would have been improper. Kalb *v.* American Nat. Bank, 21 O. C. C. 1, 11 O. C. D. 437, affirmed in 63 O. St. 566, 63 N. E. 1129.

14. **As between president and cashier.**—Davenport *v.* Prentice, 126 App. Div. 451, 110 N. Y. S. 1056.

of the principal. But it is competent for an agent who has been robbed of the money of his principal, to show that banks and other custodians of money, look to their vaults and safes for security, and not to the outside fastenings of the building in which it is kept.[15]

Effect of Resolution Exonerating Officer.—A resolution passed by the board of directors of a banking corporation exonerating an officer of the bank from any liability for the loss of money which was stolen or which disappeared from the bank, does not amount to a relinquishment of the claim or estop the corporation from subsequently bringing suit to recover the money on the ground that it was lost through the negligence of the officials.[16]

Rights of Officers upon Recovery of Lost Securities.—Officers who have been held liable for such losses, and compelled to make the same good to the bank, are entitled, upon the recovery and return of the lost securities to the bank, to be subrogated to the right of the bank in such securities or the proceeds thereof.[17]

§ 54 (2) Misappropriation of Funds.—In General.—Directors and officers who fraudulently abuse their trust and misapply the funds of the corporation are personally liable, as trustees, to make good that loss.[18]

Ultra Vires and Unlawful Investments.—Directors are personally liable to the bank for losses sustained through the investment of the funds of the bank in ultra vires and forbidden enterprises.[19]

Unlawful Disposition of Stock.—Directors of a banking corporation accepting securities in payment of its stock not authorized by its charter, are personally liable for the whole amount so accepted in breach of their trust. While those suffering such securities, however, inferior to those required by the charter, to be lost by the statute of limitations would, a

15. **Usage or custom.**—Wright *v.* Central R., etc., Co., 16 Ga. 38.

16. **Resolution exonerating officer.**—Kalb *v.* American Nat. Bank, 21 O. C. C. 1, 11 O. C. D. 437, affirmed in 65 O. St. 566, 63 N. E. 1129.

17. **Rights upon recovery of lost securities.**—Royce *v.* Bank, 21 Okl. 484, 96 Pac. 640.

Where a territorial bank commissioner required the officers of a bank to repair its assets by a deposit of $2,000 on the erroneous assumption that certain notes were lost, and the officers made such deposit, on the discovery and return to the bank of the said notes, the officers making the deposit were entitled to be subrogated to the rights of the bank in the notes or the proceeds thereof; and it was error to sustain a demurrer to the answer setting up such fact. Royce *v.* Bank, 21 Okl. 484, 96 Pac. 640.

18. **Misappropriation of funds.**—Hersey *v.* Veazie, 24 Me. 9, 41 Am. Dec. 364; Smith *v.* Poor, 40 Me. 415, 63 Am. Dec. 672; Robinson *v.* Smith (N. Y.), 3 Paige 222, 24 Am. Dec. 212; Cunningham *v.* Pitts (N. Y.), 5 Paige 607.

19. **Ultra vires and unlawful investments.**—Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76.

A statute declared that a bank might sell all kinds of property coming into its hands as collateral security for loans, but forbade an investment of funds in trade or commerce. The bank, on a sale of the stock of a corporation which it held as security, purchased the stock, and through its officers ran the company, which traded in coal, for four years at a continual loss. Held, that the directors of the bank were liable for the loss in a suit by the receiver. Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76.

fortiori, be subject to the same liability. Trustees, to whom the management of the bank had been confided, would be similarly liable for losses arising through their laches, especially in a case where the assets had been in their possession for years, and where they had been admonished to diligence and good faith by suits of creditors, to whom they had refused information as to the affairs of the bank.[20]

Failure to Account for Funds.—Officers and agents are bound to account to the bank for moneys and securities belonging to it and shown to have come into their hands.[21] The liability of a cashier for loss of money, based on failure to account for money received as shown by the books, is not affected by the fact that on other occasions there was more cash in the bank than the books called for, when he does not claim that he paid it in.[22] The mere fact, however, that notes taken by the cashier are entered on the books as bills receivable, is not sufficient to render him liable for not accounting for the proceeds, where there is no proof that they were ever paid.[23] And even the appropriation of bills receivable by directors as indemnity for notes issued by them for the accommodation of the bank will not render them liable for either fraud or negligence, where done in good faith and in ignorance of the impending insolvency of the bank.[24] And although the receipt by the director of an insolvent bank of negotiable papers against third persons in payment of a debt due and payable from the bank to such director may be a breach of his duty to the bank, such circumstance constitutes no defense available to the person liable on the papers so long as the stockholders make no complaint of it.[25] A bank agent to collect money is bound to respond instanter. Such agent collecting money in distinct cases against the same individual, although he gives a single receipt for moneys collected, is liable to an action by the bank in each case. The consolidation of the whole amount in his receipt to the

20. Unlawful disposition of stock.—Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

A stockholder released a valid claim for services against the bank, in return for notes given by him in payment for the stock. Held, that the other stockholders had no cause of action against the directors. Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582.

21. Failure to account for funds.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228; Merchants' Bank *v.* Rawls, 21 Ga. 289; McVeigh *v.* Bank, 67 Va. (26 Gratt.) 188; Rio State Bank *v.* Amondson, 141 Wis. 82, 123 N. W. 634.

M. was president of the O. D. Bank, located in the city of Alexandria, and was a member of the firm of B. & Co. of that city. In May, 1861, M. went to Richmond, where he remained during the war; and B. & Co. removed to the same city. In January, 1863, M. collected of the treasurer of the state the interest on state bonds held by the bank, in Confederate money. Held, that after the war the O. D. Bank could maintain an action of assumpsit against M. for the money so collected by him. McVeigh *v.* Bank, 67 Va. (26 Gratt.) 188.

22. Same—Surplus cash at other times.—Rio State Bank *v.* Amondson, 141 Wis. 82, 123 N. W. 634.

23. Accounting for bills receivable—Proof of payment.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

24. Appropriation of bills receivable as indemnity against debts assumed for bank.—In re Warner's Appeal (Pa.) 7 Atl. 216, 1 Sad. 310.

25. Same—No defense to action on bills.—Bruce *v.* Hawley, 31 Vt. 643.

debtor, does not constitute a contract with the bank. The manner of his receipting does not change the nature of his liability.[26]

Applying Funds to Private Use and Benefit.—There is no limit to the various ways in which funds may be misappropriated, and each case must stand upon its own facts to determine whether or not the funds of the bank have been unlawfully applied.[27] Assets of the bank coming into the hands of a director, even after the dissolution of the bank, and at a time when he is the sole surviving director, are still the property of the bank, and he holds them as a trustee for the bank and has no right to apply them in payment of his individual liabilities.[28]

Loans to Officers of Bank.—In the absence of a statute forbidding loans to officers of the bank, there is no moral or legal turpitude involved in a bona fide loan obtained from the bank with the knowledge and consent of the directors.[29]

26. Accounting for moneys collected —Manner of receipting.—Merchants' Bank *v.* Rawls, 21 Ga. 289.

27. Misapplication of funds—Illustrations.—The president of a bank, having placed the money of a depositor to his own credit, instead of the depositor's, and then having allowed the depositor to withdraw, becomes debtor to the bank. In re Boker (Pa.), 7 Phila. 479.

It is an unlawful taking and misappropriation, amounting to a conversion of its funds by the vice president of a bank, whose charter prohibits its officers from borrowing its funds, either directly or indirectly, where he takes checks upon the bank signed by its secretary and president, and uses them in individual stock speculations, and such checks are paid by other checks upon banks where his bank keeps its funds on deposit. Knapp *v.* Roche, 37 N. Y. Super. Ct. 395, judgment reversed in 62 N. Y. 614.

A cashier's brother was his creditor, and agreed that the cashier should deposit to the brother's credit the amount of the indebtedness. The brother gave the cashier receipted bills of the indebtedness, and drew on his own account. The cashier paid the drafts out of the funds of the bank, but did not credit the brother's account, or deposit to that account, the amount of indebtedness receipted for. Held to constitute an appropriation of the bank's funds to the cashier's own use, for which his estate was bound. First Nat. Bank *v.* Briggs, 70 Vt. 599, 41 Atl. 586.

Where money was taken from a bank by the cashier, with the assent of the president, who was the financial officer of the bank, for the purpose of fulfilling an engagement by them, and purporting to bind the bank, to buy state stocks, to carry on a private undertaking of their own, it was held that such assent of the president did not protect the cashier from his liability to the bank to repay the amount. Austin *v.* Daniels (N. Y.), 4 Denio 299.

28. Same—Assets received after dissolution of bank.—New York Life Ins. Co. *v.* Kansas City Bank, 121 Mo. App. 479, 97 S. W. 195.

Where a life policy was assigned to a bank as security for a debt, and, upon the bank's going out of business, passed to a director and trustee, who became the surviving director and trustee, an assignment of such policy by him to a third person in payment of an indebtedness owing by him to such third person was invalid, since he held the policy as a trustee for the shareholders of the bank and had no authority to pledge or assign the assets of the bank. Upon the death of the insured, the director was entitled to the amount of the policy as trustee for the shareholders of the bank. New York Life Ins. Co. *v.* Kansas City Bank, 121 Mo. App. 479, 97 S. W. 195.

29. Same—Loans obtained by officers.—McIlroy Banking Co. *v.* Dickson, 66 Ark. 327, 50 S. W. 868.

A bank cashier obtaining money to build a residence by checks drawn on the bank by his wife, with the knowledge of the other officials, is not guilty of a misuse of trust funds, but simply obtains a loan from the bank in the usual way. McIlroy Banking Co. *v.* Dickson, 66 Ark. 327, 50 S. W. 868.

Use Made of Misappropriated Funds Immaterial.—Where money has been actually misappropriated, it is immaterial to what use it has been applied, whether the defaulting official spent it or lost it in unsuccessful speculations or loaned it to his friends to enable them to prop up insolvent enterprises; and allegations of that character are subject to be stricken from the complaint.[30]

Recovery—Following Funds, etc.—Where the sole surviving director of a bank which has ceased to be a going concern collects an insurance policy belonging to the bank, he holds the proceeds so obtained as a trustee for the bank, and they are entitled to recover them from persons who have received them with notice of the bank's rights.[31] Where the officers of the bank have received stock of a corporation in payment for funds and property fraudulently obtained from the bank, and invested in the corporate property, the bank is not compelled to follow the stock in the hands of the officers of the bank so receiving it, but may, at its option, follow the property so purchased or created with such fraudulently misappropriated bank funds, with the profits thereof, or their proper proportion, where substantially all the property of the defendant corporation has been acquired or created with the misappropriated bank funds, and the profits thereof, under circumstances showing that the defendant received such property with notice of all the facts, and where all the stock of the defendant is held by the bank officers or by parties having notice of all the facts.[32] It has been held, however, that where an officer of a bank fraudulently abstracted the funds and invested them in a mortgage in his own name and on his own account, that the court could not declare him a trustee, and indemnify the bank out of the mortgage.[33]

Defenses.—It is no defense to an action brought by a bank against its late cashier for a wrongful appropriation of moneys, that at the time of such appropriation he was the owner of four-fifths of the stock of the bank, and has since that time sold all of said stock to other parties, who are now the officers and managing authority of the bank.[34] Nor can a ratification of such wrongful use of the bank's funds be established by evidence showing that the various transactions were entered on the books of the bank where it is not shown that the directors had actual knowledge thereof.[35]

30. **Same—Use made of misappropriated funds immaterial.**—First Nat. Bank *v.* Gaddis, 31 Wash. 596, 72 Pac. 460.

31. **Recovery—Following funds, etc.**—New York Life Ins. Co. *v.* Kansas City Bank, 121 Mo. App. 479, 97 S. W. 195.

32. **Same.**—Farmers', etc., Bank *v.* Kimball Milling Co., 1 S. Dak. 388, 47 N. W. 402.

33. **Same.**—Pascoag Bank *v.* Hunt (N. Y.), 3 Edw. Ch. 583.

34. **Defenses—Majority of stock owned by defendant.**—First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

35. **Same—That transactions were entered in books.**—First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

The cashier of a bank, having agreed to discharge his duties without compensation, appropriated funds of the bank for compensation. Knowing that the rules of the bank forbade interest on demand certificates, he issued demand certificates on interest to himself, and took funds of the bank to pay such interest. He also sold bonds

Amount of Recovery.—Where a cashier applies to his own use the notes and other securities of the bank, he is liable for the full nominal amount, and can not show that they were depreciated.[36] But where an officer of the bank collected interest owing the bank in Confederate currency and used the moneys so collected in his private business, it was held that he was liable to account to the bank for the value of the currency so used as of the time at which it was appropriated.[37]

Same—Interest.—When the directors and officers of a bank have misappropriated its funds, they are liable for interest on the amount from the date of the misappropriation, as damages; and no statute is necessary to authorize the allowance of such interest by a court of equity.[38]

Liability of Third Person for Funds Misapplied by Officer.—Third persons colluding with a bank officer in the misappropriation of the bank's funds, or who accept such funds from the guilty official knowing that they are being misapplied, is equally guilty and equally liable with the dishonest official to make good the loss to the bank.[39]

§ 54 (3) Duties and Liabilities with Respect to Loans, Discounts, Overdrafts, etc.—As to the duties of directors, see also, ante,

belonging to the bank to himself for less than their value. These transactions were entered on the bank books, but the directors had no actual knowledge thereof. Held, that a ratification by the bank could not be implied. First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

36. **Amount of recovery.**—Pendleton *v.* Bank (Ky.), 1 T. B. Mon. 171.

M. was president of a bank located in Alexandria, and also a member of a firm of that place. In May, 1861, he went to Richmond, where he remained during the war. The firm also moved to the same city. In 1863 he collected of the Treasurer of the state the interest on state bonds held by the bank in Confederate money. He invested this money, with money of the firm, in tobacco, intending it to be at his own risk, and holding himself bound to pay the bank as on an investment, with interest. The tobacco was destroyed during the war. Held, that M. was responsible to the bank for the value of the Confederate notes at the time they were appropriated by him in the purchase of the tobacco. McVeigh *v.* Bank, 67 Va. (26 Gratt.) 188.

37. **Same—Conversion of confederate currency.**—McVeigh *v.* Bank, 67 Va. (26 Gratt.) 188.

38. **Same—Interest.**—Cooper *v.* Hill, 36 C. C. A. 402, 94 Fed. 582.

39. **Liability of third party for misapplied funds.**—Kissam *v.* Anderson, 145 U. S. 435, 36 L. Ed. 765, 12 S. Ct. 960.

The managing officer of a bank who had practically the entire control of its affairs, being engaged in stock speculations, on his own account, used the funds of the bank on deposit with a correspondent bank, for that purpose, by drawing thereon in favor of his brokers for large sums. In a suit to recover from such brokers funds of the bank so received by them, it was held that though the circumstances were such as to affect them with notice that such funds were being improperly used by the officer for his own purpose and make them liable to refund same, still, if it further approved that the brokers had from time to time deposited with the correspondent bank various sums to the credit of the defrauded bank, thus reducing the net amount of its funds received by them and not so returned, they were entitled to have it submitted to the jury whether the officers of the bank, other than the defaulting officer, in the exercise of reasonable and proper care could have ascertained that these moneys had been deposited to the account of their bank, and would or would not have accepted such deposits as the return of the money to the bank. Kissam *v.* Anderson, 145 U. S. 435, 36 L. Ed. 765, 12 S. Ct. 960.

"Powers, Duties and Liabilities of Directors," § 54 (1a). As to the duties of the president, see also, ante, "President's Powers, Duties and Liabilities," § 54 (1b). As to the duties of the cashier, see also, ante, "Cashier's Powers, Duties and Liabilities," § 54 (1c).

Loans to Officers of the Bank.—There is no question as to the individual liability of directors for losses resulting from loans made to officers of the bank in violation of a statute forbidding such loans to be made; indeed, the statute itself usually prescribes that individual liability shall follow the making of loans in contravention of its provisions.[40] The question most frequently arising is what constitutes a violation of the statute. Where the charter provided that no director should be indebted to the bank, except as therein provided, it was held that a director who was at the same time president of a company which had borrowed money from the bank, and who gave to the bank his draft therefor, drawn upon the treasurer of the company, incurred no liability to the bank by reason of such draft, and that his estate could not be held liable thereon.[41]

Loans to Insolvent or Irresponsible Persons—Inadequate Security.—It is the duty of all officers charged with the responsibility of lending the bank's funds, to inquire with reasonable care and diligence into the solvency and responsibility of persons applying for loans and to see that adequate security is taken when the loan is made.[42] If the bank suffers loss through the negligence of an officer thereof in loaning money to an

40. **Loans to officers of the bank.**—State *v.* Seneca County Bank, 5 O. St. 171; Conant, etc., Co. *v.* Reed, 1 O. St. 298.

Under the "Act to incorporate the State Bank of Ohio and other banking companies," each director of a bank incorporated thereunder who knowingly participated in or assented to a loan to another director before the adoption by the stockholders of by-laws to regulate the liabilities of directors to the bank, was individually liable for all damages which the company or its shareholders sustained in consequence of such violation of the statute. State *v.* Seneca County Bank, 5 O. St. 171; Conant, etc., Co. *v.* Reed, 1 O. St. 298; Arnold *v.* Reid, 1 O. Dec. 347.

41. **Same—What constitutes violation of the statute.**—Penn *v.* Bornman, 102 Ill. 523.

42. **Same—Loans to insolvent and irresponsible persons.**—Commercial Bank *v.* Chatfield, 121 Mich. 641, 80 N. W. 712; Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76.

In a suit by the receiver of a bank, the directors were liable for sums loaned borrowers who were at the time insolvent, to the knowledge of the directors. Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76.

By-laws requiring two indorsers.—A bank cashier is not chargeable with neglect of duty in discounting paper not bearing the names of two firms, as required by a by-law of the bank, where the names of the firms were different, but the members of both were the same. Second Nat. Bank *v.* Burt, 93 N. Y. 233.

Loans to infant.—The president of a bank, who requests the cashier to make advances to a minor, verbally promising that he will see them repaid, is liable to the bank for any loss sustained by reason of said loans, as having been guilty of a breach of trust. Brown *v.* Farmers', etc., Nat. Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359, reversing 31 S. W. 216.

Where the president of a national bank advises and procures a loan to be made by his bank to a minor, payment of which can not be enforced, he is liable for the amount of the loan, with lawful interest, and not for conventional interest or stipulated attorney's fees. Brown *v.* Farmers', etc., Nat. Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359, reversing 31 S. W. 216.

irresponsible person on inadequate security, the mere fact that in doing so he acted in good faith will not relieve him from liability to the bank.[43] It has been held, however, where the president was a mere figure head and the directors received no salary, that in the absence of fraud they were not liable to the stockholders for discounting certain notes believing the makers and indorsers to be solvent when they were in fact worthless.[44] A cashier of a bank authorized to loan the money of the bank without security is liable for losses resulting from loans without security not entered on the books of the bank, and treated in his reports as cash on hand.[45]

Acknowledgment Assuming Responsibility.—Where the directors of a bank, after discounting a note, acknowledged in a writing, signed and sealed by them, that they had transcended their duty in discounting said note, and that they considered themselves individually bound for their equal proportions of said debt, should it, or any portion, under any circumstances, be lost to the bank, and delivered said instrument to the officers of the bank, it was held, that said instrument was neither a suretyship nor a guaranty, but an original contract, upon which said parties were liable to the bank in the event of loss by reason of said discount; and that a release by the bank of one of the endorsers of said note, who was insolvent and largely indebted to the bank on his own account, of all indebtedness, upon his paying a certain sum of money, did not discharge said parties from their liability under said instrument.[46]

Excessive Loans.—While the lending of an amount exceeding the entire capital stock of a bank to a single person would seem to be unwise and hazardous, yet, where such a loan was made to one of the directors, who was the chief merchant of the town, largely while his business and financial standing were good, and afterwards to preserve his credit, and with an entirely honest purpose on the part of the bank officials to enable him to continue business, in the hope that he would finally be able to pay, it was held, that this was not sufficient, at common law, in the absence of any trace of fraud, to render the directors of the bank personally liable to the stockholders (depositors and creditors having been fully paid) for resulting losses.[47]

43. **Good faith in loaning to irresponsible person.**—Commercial Bank *v.* Chatfield, 121 Mich. 641, 80 N. W. 712.

44. **Same—Where president and directors receive no salary.**—Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582.

45. **Loans without security entered as cash.**—San Joaquin Valley Bank *v.* Bours, 65 Cal. 247, 3 Pac. 864.

46. **Acknowledgment assuming responsibility.**—Bank *v.* Barksdale, 37 Tenn. (5 Sneed) 73.

47. **Excessive loans.**—Wheeler *v.* Aiken County, etc., Sav. Bank, 75 Fed. 781.

The making of a loan of bank funds by its president in an amount exceeding one-fifth of its combined surplus and paid-up capital, without taking collateral of a value 10 per cent greater than the sum loaned, while Laws 1893, c. 696, prohibiting a bank from making such loans, was in force, was illegal, and the bank may recover the amount lost by such a loan from the president. Seventeenth Ward Bank *v.* Smith, 51 App. Div. 259, 64 N. Y. S. 883.

Overdrafts.—The question of the liability of bank officials for paying out, or permitting the cashier to pay out, the bank's funds upon the overdrafts of depositors, is one of reasonable care and good faith.[48] Bank directors, even though negligent in their supervision and control of the corporate affairs, are not liable for overchecks permitted by the cashier to a reasonable extent in favor of responsible customers, since the payment of the overdrafts of responsible customers in a reasonable amount is something which they might properly have authorized in the first instance, and the loss resulting therefrom can not be said to have resulted from their negligence even though it be shown to have existed.[49] Indeed, it has been held, that the directors are not responsible in any case for overchecks permitted to customers by the cashier without their authority or knowledge;[50] and that the fact that such overchecks appeared upon the books of the bank was not sufficient to affect the directors with knowledge thereof in a suit between the directors and the bank.[51] Where the president of a bank permits or directs the payment of overdrafts in favor of his friends or members of his family known to be irresponsible or insolvent, he can not be said to have acted in good faith, and he is personally responsible for losses resulting from the payment of such overdrafts; especially where the funds were withdrawn for the purpose of being used in enterprises in which he was interested.[52]

48. Overdrafts.—Oakland Bank *v.* Wilcox, 60 Cal. 126; Western Bank *v.* Coldewey, 120 Ky. 776, 26 Ky. L. Rep. 1247, 83 S. W. 629; First Nat. Bank *v.* Reed, 36 Mich. 263; Cope *v.* Westbay, 188 Mo. 638, 87 S. W. 504; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

The officers of a bank permitted S., who was a reliable man of large means, to overdraw his account to the amount of $3,500, on his agreement to pay interest thereon, after which he sold his business to R., the sale including debts due, which were assumed by R., who executed a deed of trust to S. covering all the property conveyed. The bank, being advised of the transaction, permitted R., who continued the business, to make deposits in the same name as had been previously used by S., and draw checks against the same, which continued until the property conveyed was burned, when there was an overdraft of $4,000, consisting of the $3,500 overdrawn by S. before the sale and the balance afterwards overdrawn by R., which claim, on the insolvency of the bank, was sold for much less than its face. Held, that such facts did not establish mismanagement on the part of the officers of the bank, rendering them personally liable to stockholders. Cope *v.* Westbay, 188 Mo. 638, 87 S. W. 504.

49. Same—Liability of directors for overdrafts permitted by cashier.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228; First Nat. Bank *v.* Reese, 25 Ky. L. Rep. 778, 76 S. W. 384; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

50. Same—Same.—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 629.

51. Same—Knowledge of directors.—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

52. Same—President permitting overchecks to irresponsible persons, members of family, etc.—Oakland Bank *v.* Wilcox, 60 Cal. 126; Western Bank *v.* Coldewey, 120 Ky. 776, 26 Ky. L. Rep. 1247, 83 S. W. 629; First Nat. Bank *v.* Reed, 36 Mich. 263.

Where the rules of a bank required that all applications for loans be brought before the directors or advisory committee for approval, but the president of the bank permitted his insolvent son to overdraw his account without bringing the matter before the directors or advisory committee, the

Directors May Authorize Payment of Overdraft.—The directors of the bank may authorize the cashier to pay the overdrafts of its customers in good credit at the bank;[53] and where the cashier, in accordance with a custom or usage, and by the advice of the president and directors individually, pays the overchecks of such customers, he is not absolutely liable therefor to the bank, but is only required to exercise due care to ascertain the financial standing of the customers.[54] Even in the absence of authority from the directors, it is not negligence per se for the cashier to pay the overdrafts of responsible customers in a reasonable amount, unless there is some by-law or positive order to the contrary.[55] A cashier on whom, by continued absence of the directors, has devolved the duty of making loans and discounts, will be liable for losses through overdrafts and discounts made by him only where it appears that he failed to make reasonable inquiry into the financial standing of those making the overdrafts, and those whose paper was discounted, and failed to exercise the care and discretion which an ordinarily prudent man would exercise in his own business.[56] Of course where the rules or by-laws of the bank require that the cashier shall keep the money of the bank and pay it out only upon the checks of persons entitled to draw upon the funds of the bank, and require that loans and overdrafts shall be brought before the president and directors and passed upon by them, the violation of such rule by the president or cashier is in itself negligence, which in the absence of some special excuse will

president was liable for the loss thereby sustained by the bank. Western Bank *v.* Coldewey, 120 Ky. 776, 26 Ky. L. Rep. 1247, 83 S. W. 629.

A president of a bank who, knowing a customer to be without means, induces him to open an account at the bank, and to overdraw that account, and who, by his orders to the cashier, establishes the custom of paying such overdrafts, may be held liable to the bank for the amount of the overdrafts. Oakland Bank *v.* Wilcox, 60 Cal. 126.

A bank president, while in general charge of the business, with the cashier under his authority, permitted and directed the drawing of moneys from the bank, without security, by one known to be irresponsible, and with whom he was interested in the business for which the money was obtained, and requested the cashier not to say anything to the directors about it. Held, that he was personally liable to the bank for the moneys thus paid out by him in violation of his trust. The fact that they were charged on the books of the bank to the irresponsible borrower would not necessarily determine the transaction as a loan to him by the bank; but the bank, in the absence of any act of ratification or acquiescence on its part, would have a right, under the circumstances, to repudiate it as a transaction with the nominal borrower, and to insist on repayment by its president. First Nat. Bank *v.* Reed, 36 Mich. 263.

53. Directors may authorize payment of overcheck.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

54. Same—Cashier acting under authority of directors.—First Nat. Bank *v.* Reese, 25 Ky. L. Rep. 778, 76 S. W. 384.

55. In absence of authority from directors.—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

56. Same—Care required.—Pryse *v.* Farmers' Bank, 17 Ky. L. Rep. 1056, 33 S. W. 532.

Whether it is negligence in a cashier to pay the overchecks to a reasonable amount of regular customers, who have but little property, but who have credit and are accustomed to pay their debts, quære? Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

render him personally liable to the bank for any resulting loss.[57] The cashier of a bank is not personally liable for permitting an overdraft, where the transaction is in realty a loan upon sufficient security;[58] and where a cashier allows numerous drafts to accumulate, and afterwards closes up the transaction by taking secured notes therefor, the wrong, if any, for which he is liable to the bank was in the original transactions, and not in taking the notes, which could not of itself injure it.[59]

Defenses—Authorization, Ratification, etc.—The cashier can not be held liable for unwise or fraudulent loans where it is provided in his contract of employment that he shall not be charged with the responsibility of making loans or selecting securities, and where in making such loans he acts merely under the instructions of his superior officers whose duty it is to pass upon applications for loans.[60] Where the president of a bank makes a loan of its funds which is illegal because not secured by sufficient collaterals, he is not relieved from liability from the loss resulting therefrom by the ratification of the loan by the directors;[61] and even where a ratification might otherwise avail, it is no defense when the approval of the directors was obtained through misrepresentation as to the sufficiency of the collateral upon which the loan was made.[62] Where the directors know that the cashier is making loans and discounts to certain persons or corporations not entitled to credit in the first instance, and permit such

57. Payment of overcheck in violation of charter or by-law.—Western Bank *v.* Coldewey, 120 Ky. 776, 26 Ky. L. R. 1247, 83 S. W. 629; Bank *v.* Calder (S. C.), 3 Strob. 403; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

58. Where transaction is really a loan.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228; Commercial Bank *v.* Ten Eyck, 48 N. Y. 305.

59. Effect of taking note or security for overdraft.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

60. Defense—Authorization and ratification of overcheck.—Warren *v.* Robinson, 25 Utah 205, 70 Pac. 989.

In an action by stockholders of a bank against the directors and officers to recover for depreciation of stock, it was found that by the cashier's contract of employment it was agreed that he should not be charged with the responsibility of making loans or selecting securities. The vice president and manager of the bank was president of a corporation of a speculative character and financially unsound, to the knowledge of the cashier, who was also an officer of the corporation. Without the knowledge of the cashier, the manager negotiated a loan from the bank to the corporation, on its note indorsed by a solvent firm. The cashier, under the instructions of the manager, entered the amount of the loan to the credit of the corporation, and paid it out on the corporation's checks. Held, that the cashier was not guilty of negligence or of any violation of his duties to the bank, making him liable to the stockholders for any part of the amount lost by the loan. Warren *v.* Robinson, 25 Utah 205, 70 Pac. 989.

61. Same—Ratification of improper loan.—Seventeenth Ward Bank *v.* Smith, 51 App. Div. 259, 64 N. Y. S. 883.

62. Approval obtained through misrepresentation.—Commercial Bank *v.* Chatfield, 127 Mich. 407, 86 N. W. 1015.

An action was brought by a bank against a former president and director to recover for moneys lost by his negligence in permitting the cashier to borrow on inadequate security. Held that, if defendant had no sufficient collateral, the action of the board in approving the loan in reliance on his representation was not such a ratification of the transaction as to estop the bank from holding him accountable for the loss. Commercial Bank *v.* Chatfield, 127 Mich. 407, 86 N. W. 1015.

practice to continue for a great length of time, accepting the profits therefrom so long as profits accrue, they can not, upon such transactions resulting in ultimate loss, repudiate the whole series of dealings and hold the cashier personally responsible.[63]

Same—Compromise and Settlement.—The fact that the bank has compromised or settled with the person to whom loans have been fraudulently or negligently made, or accepted security from him for money wrongfully paid out upon his overdrafts, will not estop it from bringing an action to recover the difference or net loss from the officers guilty of making such loans or of advancing the moneys upon the overdrafts.[64]

Duty of Officers and Agents with Respect to Collection of Debts and Claims Owing to Bank.—It is the duty of the officers and agents of banking institutions to exercise due diligence in the collection of debts and claims owing to the corporation. Where, by the failure of the cashier of a banking firm to demand payment of a note from the maker, the indorser, the only solvent and responsible party to the note, is discharged, the cashier is liable to his employers for the damages arising from such failure, and the subsequent payment of his salary is no waiver or abandonment of their right to reimbursement.[65] The officers of a bank can not consent to any arrangement by which the security of the bank or paper

63. Knowledge of improper loans and accepting profits.—First Nat. Bank *v.* Gaddis, 31 Wash. 596, 72 Pac. 460.

Even if the corporation to which the cashier and assistant cashier of a bank loaned money was of a speculative character, and not entitled to credit in the first instance, and they knew this fact, and even if they were not authorized to extend credit to it, yet when the directors of the bank knew that credit had been extended, and made no objection thereto, the bank could not, after five years' dealings with the corporation, hold the cashier or assistant cashier liable for the amount which the corporation owed it at the end of such time. First Nat. Bank *v.* Gaddis, 31 Wash. 596, 72 Pac. 460.

64. Effect of compromise and settlement by bank.—Western Bank *v.* Coldewey, 120 Ky. 776, 26 Ky. L. Rep. 1247, 83 S. W. 629; Brown *v.* Farmers', etc., Nat. Bank (Civ. App.), 31 S. W. 216, affirmed in 88 Tex. 265.

Where the president of a bank had agreed to answer to a bank for the overdrafts of another person, the fact that the bank, in accordance with its custom, which was well known to the president, required such person to give notes for his overdrafts at different times, which action was explained to the president, and not objected to by him, did not release him from liability for the amounts. Brown *v.* Farmers', etc., Nat. Bank (Civ. App.), 31 S. W. 216, affirmed in 88 Tex. 265.

Where the president of a bank wrongfully permitted his son to overdraw his account, and thereafter the son made a deed of trust for the benefit of his creditors, and the bank, together with other creditors, agreed in consideration of the conveyance to look only to the assets so conveyed for the satisfaction of its claims against the son, the bank was not estopped from bringing an action against the estate of the president for loss sustained by his breach of trust in permitting the overdrafts. Western Bank *v.* Coldewey, 120 Ky. 776, 26 Ky. L. Rep. 1247, 83 S. W. 629.

65. Duty with respect to collection of debts and claims.—Bidwell *v.* Madison, 10 Minn. 13 (Gil. 1).

Bank directors, though negligent in their supervision and control of the corporate affairs, are not responsible for the failure to collect a well-secured debt for the reason that usury was included therein. Wallace *v.* Lincoln Savings Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

due to it will be impaired.[66] Acceptance by the president of a bank of doubtful securities in payment of good debts is negligence charging him with resulting loss.[67]

Collection of Debts Owing by Officers and Agents to Bank.—In cases of this character, in which the element of the personal interest of the officer or agent enters, the circumstances call for the utmost good faith in the settlement of their obligations to the bank, and payment in securities instead of cash, or any other compromise or concession, can be had only with the consent and approval of the governing body of the bank.[68] Of course, where the directors discover that one of the officers has overdrawn his account or misappropriated the funds of the bank they may compromise or settle the claim or take such security therefor as may, under the circumstances, seem best for the interests of the bank, and then, if loss results, they will not, in the absence of negligence and want of good faith, be liable therefor.[69]

Same—Application of Payments.—Where property is turned over by the cashier to the president of the bank, as trustee, to secure to that extent his indebtedness to the bank by reason of his defalcations, without designation as to what part of the indebtedness this credit shall be applied, the law, upon equitable principles, will imply that the debtor intended that it should be used in payment of that part of his indebtedness which was the most precarious.[70]

§ 54 (4) Liability of One Officer for Acts of Another.—Liability of Directors for Acts of Other Directors and Agents.—See, also, ante, "Powers, Duties and Liabilities of Directors," § 54 (1a). A director of a bank undertakes that he possesses at least ordinary knowl-

66. **Same—Consent to impairment of security.**—Gallery *v.* National Bank, 41 Mich. 169, 2 N. W. 193, 32 Am. Rep. 149.

67. **Acceptance of doubtful securities.**—Lawrence *v.* Stearns, 79 Fed. 878.

The purchase of a note by the president and managing officer of a bank, for which he paid from its funds over $20,000, with knowledge that it was burdened with a guaranty made by the payee, which might defeat its collection, is such negligence as renders him liable to account to the bank or its creditors for any loss which resulted, including the expenses of an unsuccessful defense made by the bank to an action by the maker of the note to enforce the condition. Stearns *v.* Lawrence, 28 C. C. A. 66, 83 Fed. 738.

68. **Collection of debts owing by officers and agents of bank.**—First Nat. Bank *v.* Gunhus, 133 Iowa 409, 110 N. W. 611.

The obligation of a cashier to pay his personal indebtedness to the bank can not be satisfied by his acceptance as cashier of the note of a third person, since his obligation is to pay in cash. First Nat. Bank *v.* Gunhus, 133 Iowa 409, 110 N. W. 611.

69. **Compromise and settlement of debt owing by officer or agent.**—Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582.

Directors, having discovered an overdraft by the cashier, took his notes and those of his father-in-law, secured by mortgage, to the full amount of the overdraft. Held that, having done this in good faith, no liability attached to them for lack of the utmost diligence, both they and the stockholders having the greatest confidence in the solvency of both parties. Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582.

70. **Application of payments.**—Fancher *v.* Kaneen (O.), 5 N. P., N. S., 614.

edge and skill, and that he will bring them to bear in the discharge of his duties. If, through recklessness and inattention to the duties confided to him, frauds and misconduct are perpetrated by other officers and agents or codirectors, which ordinary care on his part would have prevented, he is personally liable for the loss resulting.[71] But while to the directors of a bank are committed the general management and supervision of its affairs, they are authorized to appoint a cashier and confer upon him the usual powers pertaining to such an office, and to him may be properly confided the custody of the money, securities and valuable papers of the bank, and the supervision of its books and accounts; and while this does not absolve the directors from the duty of reasonable supervision and the exercise of that degree of care which is exercised by ordinarily careful and prudent men, acting under similar circumstances, yet they are not insurers of the fidelity of the cashier and other agents whom they have appointed; and where such directors act in good faith, and with ordinary care, they are not responsible for losses resulting from the wrongful acts or omissions of such cashier or other agents or other directors, unless the loss is a consequence of their own neglect of duty or negligence in failing to exercise proper care in the selection of such agents in the first instance.[72]

71. **Liability of directors for acts of other directors and officers.**—Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

72. **Same.**—Bank *v.* Bosseiux, 3 Fed. 817; Dunn *v.* Kyle, 77 Ky. (14 Bush) 134; Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. R. 488; Williams *v.* Halliard, 38 N. J. Eq. (11 Stew.) 373; Mason *v.* Moore, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Jones *v.* Clark, 66 Va. (25 Gratt.) 642.

A director of a bank is not liable to it for losses suffered by it through the negligence of his codirectors. Commercial Bank *v.* Chatfield, 121 Mich. 641, 80 N. W. 712.

The directors of a bank are not liable for loss resulting from the frauds of an officer of the bank unless they have been guilty of gross neglect, which means an absence of that diligence that ordinarily prudent men in the conduct of such business would have exercised. Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

In the absence of any showing of fraud or of such gross negligence as would imply bad faith on the part of the directors of a bank, they are to be regarded as gratuitous bailees, and not liable to the stockholders for losses sustained by the bank by the dishonesty or carelessness of the cashier or other persons employed by them. Dunn *v.* Kyle, 77 Ky. (14 Bush) 134.

Such negligence is often of such a character as to amount to fraud. Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84, citing Trustees *v.* Bosseiux, 3 Fed. 817; Jones *v.* Clark, 66 Va. (25 Gratt.) 642.

Corporate managers, who were not on the committees of investments, are not liable, in the absence of cognizance or complicity, for irregular or unsafe investments. Williams *v.* Halliard, 38 N. J. Eq. (11 Stew.) 373.

The directors of a dissolved banking corporation can not be held personally responsible for a loss to the bank by the negligence of its disbursing officers in paying unauthorized checks. Daugherty *v.* Poundstone, 120 Mo. App. 300, 96 S. W. 728.

A bank director is not required to be either an expert or a competent bookkeeper, or do more in the general management of the bank with reference to its cashier and bookkeeper, whom they have used proper care in selecting, than to see that the daily or weekly statements made to the board, as the case may be, correspond with

Liability of the President for Acts of Other Officers and Agents.—See, also, ante, "President's Powers, Duties and Liabilities," § 54 (1b). A bank president is not an insurer of the honesty of the cashier or other agents employed by the bank, and is only required to exercise reasonable care and diligence in the supervision of such subordinates in the performance of their duties.[73]

Liability of Cashier for Acts of His Subordinates.—A bank cashier is not an insurer of the honesty and fidelity of those who occupy subordinate positions in the bank, and is not liable for misappropriations by them, if he exercised reasonable diligence in supervising their work.[74] He need not examine and supervise every act of his subordinates, but as to such acts need only use such care and diligence as an ordinarily prudent man would exercise in his own business affairs.[75] The cashier only undertakes to supervise the acts of his subordinates in their work in the bank in so far as is practicable with reference to the discharge of his other duties.[76]

Same—Assistants Employed by Cashier.—A cashier employing assistants to aid him in the discharge of his duties is held to the exercise of ordinary care and good faith both in their selection and in their subsequent supervision; and if in spite of such care and diligence on his part he discovers that they have been guilty of defalcations or irregularities, it is his duty to report the same to the president and directors at once and to take whatever other steps that may be necessary to protect the interest of the bank and its depositors.[77]

the general balances upon the books; and this, connected with the periodical count of the money, notes, bonds, etc., is all the supervision required, unless there is some reason for suspecting that the cashier is neglecting his duties. Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

Where one bank was merged into another, the president of the new bank was properly selected by the directors to transfer the balances from the books of the old bank to the books of the new, and although the president was at the time a defaulter as an officer in the old bank, but nothing to excite any suspicion as to his honesty, the directors were not guilty of negligence in permitting him to use the books of the old bank for the purposes of the new, instead of making a transfer to a new set of books. Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

A state statute merely forbidding the directors and other officers of a state bank from borrowing any money from the bank, on pain of criminal prosecution (Rev. St. S. C., § 1540), affects only the officer so borrowing, and does not make other directors personally liable to the stockholders for losses resulting therefrom. Wheeler *v.* Aiken County, etc., Sav. Bank, 75 F. 781.

73. Liability of president for acts of other officers and agents.—Davenport *v.* Prentice, 126 App. Div. 451, 110 N. Y. S. 1056.

74. Liability of cashier for acts of subordinates.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228; Batchelor *v.* Planters' Nat. Bank, 78 Ky. 435.

75. Same.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

76. Same.—Pepper *v.* Planters' Nat. Bank, 5 Ky. L. Rep. 85.

77. Same—Where assistant was employed by cashier.—Grant County Deposit Bank *v.* Points, 22 Ky. L. Rep. 105, 56 S. W. 662; Vance *v.* Mottley, 92 Tenn. 310, 21 S. W. 593.

A bank cashier who, without authority or necessity, employs an assistant on his own account, is liable for moneys of the bank fraudulently embezzled by such assistant while thus

Same—Effect of Examination by Directors.—The fact that the board of directors periodically examined into the affairs of the bank, and reported its condition all right, did not estop the bank from holding the cashier liable for any fraud perpetrated by a subordinate, if, on exercising due care and diligence, the cashier could have prevented the fraud.[78]

Liability of Other Officers.—A bank teller who knowingly assists in or connives at the misappropriation of funds of the bank by the cashier or other officer is answerable to the bank so far as it may have sustained a loss by it.[79]

§ 54 (5) Right of Stockholders to Enforce Liability.—A stockholder has a remedy in chancery against the directors of a bank to prevent them from doing acts which would amount to a violation of its charter, or to prevent them from any misapplication of its capital, which might lessen the value of the shares, if the acts intended to be done shall amount to what the law deems a breach of trust.[80] Cases are

employed, upon the suit of the bank, its assignee, or successor when he fraudulently concealed the fact of such embezzlement after it came to his knowledge, and where the successor purchased the bank's entire assets, subject to its liabilities, without knowledge of the embezzlement. Vance *v.* Mottley, 92 Tenn. 310, 21 S. W. 593.

Where F., a bank cashier, who had given bond for the faithful discharge of his duties, though incompetent, by reason of drunkenness, to perform his duties during the last two years of his service, continued to draw his salary, he was responsible for the default of N., a bookkeeper originally employed and paid by him, though the latter was the cashier de facto during that time, and received from the bank additional compensation on account of his increased duties. Grant County Deposit Bank *v.* Points, 22 Ky. L. Rep. 105, 56 S. W. 662.

As the liability of F. for the misconduct of N., under the circumstances, was, in substance, only that of guarantor or surety, he was entitled to at least good faith from the bank; and therefore his estate can not be held liable for an overdraft by a firm of which N. was a member, where the firm continued to do business with the bank for five years after N. succeeded F. as cashier, and, with knowledge of the bank, made and withdrew deposits in the name of another largely in excess of such overdraft; the bank continuing during that time to publish semiannual statements giving assurance that everything was right, and thus lulling the representatives of F. into security until it was too late for them to protect themselves. Grant County Deposit Bank *v.* Points, 22 Ky. Law R. 105, 56 S. W. 662.

By-law making cashier liable for acts of his assistants.—A by-law making the cashier responsible "for all the moneys, funds, and valuables of the bank," in force when defendant was elected cashier, became a part of his contract and made him liable for losses from mistakes or malfeasance of his assistant, liable under another by-law for money coming into his possession. Rio State Bank *v.* Amondson, 141 Wis. 82, 123 N. W. 634.

78 Effect of examination by directors.—Pepper *v.* Farmers' Nat. Bank, 5 Ky. L. Rep. 85.

79. Liability of other officers.—Hobart *v.* Dovell, 38 N. J. Eq. 553; Latimer *v.* Veader, 20 App. Div. 418, 46 N. Y. S. 823.

80. Right of stockholders to enforce liability—Remedy.—Jefferson Branch Bank *v.* Skelly (U. S.), 1 Black 436, 17 L. Ed. 173.

Where the directors of a bank refused to take the proper measures to resist the collection of a tax, which they themselves believed to have been imposed upon them in violation of their charter, this refusal amounted to what is termed in law a breach of trust, and a stockholder had a right to file a bill in chancery asking for such a remedy as the case might require. Dodge *v.* Woolsey (U. S.), 18 How. 331, 15 L. Ed. 401, citing Mechanics' etc., Bank *v.* Debolt (U. S.), 18

numerous, also, where the directors having made themselves personally liable for neglect or breach of duty, and the corporation refusing to proceed against them, a stockholder has been permitted to sue in its behalf. In such cases the corporation is an indispensable party defendant. The refusal to sue must be made distinctly to appear, and the avails of the litigation, if there be any, go to the corporation and are a part of its means, as if it had itself sued and recovered.[81] Though directors are

How. 380, 15 L. Ed. 458; Mechanics', etc., Bank *v.* Thomas (U. S.), 18 How. 384, 15 L. Ed. 460.

If the stockholder be a resident of another state than that in which the bank and persons attempting to violate its charter, or commit a breach of trust or duty, have their domicile, he may file his bill in the courts of the United States. He has this right under the constitution and laws of the United States. Dodge *v.* Woolsey (U. S.), 18 How. 331, 15 L. Ed. 401, citing Mechanics', etc., Bank *v.* Debolt (U. S.), 18 How. 380, 15 L. Ed. 458; Mechanics', etc., Bank *v.* Thomas (U. S.), 18 How. 384, 15 L. Ed. 460. See, also, Jefferson Branch Bank *v.* Skelly (U. S.), 1 Black 436, 17 L. Ed. 173.

81. Same—Remedy.—Carey *v.* Houston, etc., R. Co., 161 U. S. 115, 131, 40 L. Ed. 638, 16 S. Ct. 537, reaffirmed in Murphy *v.* Colorado Paving Co., 166 U. S. 719, 41 L. Ed. 1188; Darragh *v.* Wetter Mfg. Co., 169 U. S. 735, 42 L. Ed. 1216; Blythe Co. *v.* Blythe, 172 U. S. 644, 43 L. Ed. 1183; Mobile Transp. Co. *v.* Mobile, 199 U. S. 604, 50 L. Ed. 330, 26 S. Ct. 751; Greenwood *v.* Freight Co., 105 U. S. 13, 26 L. Ed. 961; Dodge *v.* Woolsey (U. S.), 18 How. 331, 15 L. Ed. 401; Bacon *v.* Robertson (U. S.), 18 How. 480, 15 L. Ed. 499; Memphis *v.* Dean (U. S.), 8 Wall. 64, 19 L. Ed. 326; Trask *v.* Maguire (U. S.), 18 Wall. 391, 21 L. Ed. 938; Davenport *v.* Dows (U. S.), 18 Wall. 626, 21 L. Ed. 938; Dewing *v.* Perdicaries, 96 U. S. 193, 24 L. Ed. 654; Hawes *v.* Oakland, 104 U. S. 450, 26 L. Ed. 827; Detriot *v.* Dean, 106 U. S. 537, 27 L. Ed. 300, 1 S. Ct. 560; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; Cotting *v.* Kansas City Stock Yards Co., 183 U. S. 79, 46 L. Ed. 92, 22 S. Ct. 30; Porter *v.* Sabin, 149 U. S. 473, 37 L. Ed. 815, 13 S. Ct. 1008; Morgan *v.* King, 27 Colo. 539, 63 Pac. 416; Hanna *v.* People's Nat. Bank, 76 App. Div. 224, 78 N. Y. S. 516, modified Hanna *v.* Lyon, 179 N. Y. 107, 71 N. E. 778; Smith *v.* Rathfun (N. Y.), 22 Hun. 150; Butterworth *v.* Fox (N. Y.), 15 How. Prac. 545; Taylor *v.* Miami Exporting Co., 5 O. 162, 22 Am. Dec. 785; Mathews *v.* Bank, 60 S. C. 183, 38 S. E. 437; Deadcrick *v.* Bank, 100 Tenn. 457, 45 S. W. 786; Shea *v.* Knoxville, etc., R. Co., 65 Tenn. (6 Baxt.) 277; Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398; Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728; Tenison *v.* Patton (Tex. Cr. App.), 64 S. W. 810, reversed in 95 Tex. 284, 67 S. W. 92.

A stockholder of a bank who has been injured by fraud, culpable neglect of duty, or a violation of provisions of law by an agent or director of the bank has an ample remedy against the director or agent whose acts or omissions have produced his loss, but he can not sue the bank for the injury suffered. Butterworth *v.* Fox (N. Y.), 15 How. Prac. 545.

It seems that at common law and under the rules of equity a stockholder in an incorporated bank may maintain an action against the directors for such damages as he has individually sustained by reason of the wrongful acts of the directors, even though the same acts damnified all the stockholders in the same degree as they did him, and even though the corporation is a going concern and has not been dissolved. See Zinn *v.* Baxter, 65 O. St. 341, 62 N. E. 327; Taylor *v.* Miami Exporting Co., 5 O. 162, 22 Am. Dec. 785.

Where directors of a bank procured the sale of mining stock owned by the bank to such directors in fraud of stockholders, and in violation of their duties as directors, the fact that the stock had paid dividends exceeding the purchase price which the directors paid to the bank showed a substantial loss of profits to the bank, justifying a stockholder in suing to set aside the sale. Morgan *v.* King, 27 Colo. 539, 63 Pac. 416.

Complainant's bill alleged that three years before, at a meeting of the stockholders of the bank, of which the defendants were directors and complainant a stockholder, it was resolved that the officers of the bank wind up its affairs and return the stock with its profits to the stockholders; that forty

liable to a bank which has suffered loss through their negligence, and any stockholder may prosecute an action for himself and others in a similar situation, where the bank does not bring the action after demand, or without demand when the officers who committed the wrong are still directors, such plaintiff must be a stockholder both at the time of the commission of the acts complained of, and at the time of the commencement of the action.[82] Thus a director of a banking association is not liable to one

per cent of the stock had not been returned; that the officers were still conducting a banking business, and through their deficient business capacity there had been a large loss of assets; that complainant had in vain sought information as to the bank's affairs and a distribution of her stock, and she prayed for an accounting by the directors and the appointment of a receiver. Held, that the bill was not demurrable on the ground that the relief could only be granted in a suit by the corporation. Mathews *v.* Bank, 60 S. C. 183, 38 S. E. 437.

Defendant cashier was authorized by the directors of a bank which had gone into voluntary liquidation to execute a deed of land owned by the bank in compliance with a third person's offer to pay a certain amount for it, provided defendant would take charge of it and resell it. Defendant was to be allowed a share in the profits realized from the resale. He was the only member of the board who knew the value of the land, and, though he informed the board fully on the subject, he expected to make a profit on the sale. The grantee executed a power of attorney to defendant authorizing the sale of the land by him. Defendant surveyed the land, finding it to contain more than was originally estimated, which fact was not reported to the directors. A portion was sold to one party, and a part to another; the second part being taken back by defendant's grantee in default of payment. The bank's stockholders knew nothing of the offer, and the bank refused to sue defendant for his individual profits. Held, that the defendant was not, as a matter of law, liable to the bank for the profits made upon the resale, but that the burden was upon him to show the fairness of the transaction, failing which the stockholders were entitled to recover against him the profits he was entitled to receive. Tenison *v.* Patton, 95 Tex. 284, 67 S. W. 92, reversing (Tex. Civ. App.), 64 S. W. 810.

Contra.—As tending to deny the right of the stockholder to maintain the suit in such case, see Brown *v.* Adams, Fed. Cas. No. 1986, 5 Biss. 181; Smith *v.* Hurd (Mass.), 12 Metc. 371, 46 Am. Dec. 690; Rich *v.* Shaw, 23 Me. 343; Zinn *v.* Baxter, 17 O. C. C. 283, 9 O. C. D. 731; Craig *v.* Gregg, 83 Pa. 19, 22 Pittsb. L. J. 193.

A stockholder of a bank can not maintain an action against the directors for their neglect in so conducting its affairs that its capital is wasted and lost. Rich *v.* Shaw, 23 Me. 343; Smith *v.* Hurd (Mass.), 12 Metc. 371, 46 Am. Dec. 690.

An individual stockholder can not maintain an action against the directors for negligence. Craig *v.* Gregg, 83 Pa. 19, 22 Pittsb. L. J. 193.

Where a shareholder's stock in a national bank was sold to satisfy an assessment by the comptroller, to make good an impairment of its capital caused by the negligence of the officers and directors, such stockholder has no standing to sue such directors and officers to recover the loss so caused. Zinn *v.* Baxter, 17 O. C. C. 283, 9 O. C. D. 731.

A cashier of a bank, who has made sale of his property, and holds a balance in his hands, must be deemed the agent of the board of directors, and not of the respective stockholders, and can not be charged by an individual stockholder as holding such balance for his benefit. Brown *v.* Adams, Fed. Cas. No. 1,986, 5 Biss. 181.

82. Necessity that plaintiff be a stockholder—Time of acquiring stock.—Mabey *v.* Adams, 16 N. Y. Super. Ct. 346; Hanna *v.* Lyon, 179 N. Y. 107, 71 N. E. 778, modifying Hanna *v.* People's Nat. Bank, 76 App. Div. 224, 78 N. Y. S. 516.

It has been held, however, that a stockholder in a bank, who obtained her stock from a director who had knowledge of the prior commission of certain negligent acts by the directors and stockholders, causing depreciation in the value of the stock, was not precluded from recovering for such negligence by reason of her assignor's knowledge. Warren *v.* Robison, 25 Utah 205, 70 Pac. 989.

who becomes a stockholder for false statements in the articles of association respecting the amount of capital actually subscribed and paid in, by which he was induced thereafter to become a stockholder.[83] But although the stockholder suing is not qualified, yet if a qualified stockholder has been permitted by the court to intervene, the complaint should not be dismissed as to such intervening stockholder.[84]

Estoppel of Stockholders to Sue.—If for any reason the corporation is estopped from suing, or its action is barred, the suit of the stockholder or creditor is likewise affected, since the suit is brought to enforce the corporate or collective rights, and not the individual rights of the shareholders.[85] The stockholders may also be estopped to sue the directors upon the ground that they have been guilty of the species of contributory negligence in the election of such directors and in permitting them to continue in office after knowledge of their negligence and inattention to the affairs of the bank; and this is especially true where directors serve without compensation, and with the knowledge of the stockholders give the substantial management of the bank into the hands of salaried officers to whose fraudulent acts great loss is entailed.[86]

§ 54 (6) Individual Interest in Transaction.—Wherever in dealings between an officer or agent and his bank the element of the personal interest of such officer or agent enters, so that he occupies, as regards such personal interest, a position adverse to that of the bank, a situation has arisen calling for the exercise of that degree of fairness and good faith known as uberriemæ fidei. In every such transaction his conduct will be examined with the closest scrutiny, and it is his duty to not only make full disclosures of all material facts within his knowledge, but if, in such transaction, he represents both the bank and his own interests, then it is plainly his duty, as an officer of the bank, to execute his trust with an eye single to the interests of the bank, and, in case of conflict, to guard the interests of the bank even to the loss or destruction of his own.[87] In

83. Same.—Mabey *v.* Adams, 16 N. Y. Super. Ct. 346.

One who purchases stock in a banking association from the association itself can not maintain an action against a director of the association for violations of the statute relating to moneyed corporations, which occurred before he became a stockholder, although the value of the stock is depreciated by reason of such violations of the statute. Mabey *v.* Adams, 16 N. Y. Super. Ct. 346.

84. Same—Intervention by qualified stockholder.—Judgment, Hanna *v.* People's Nat. Bank, 76 App. Div. 224, 78 N. Y. S. 516, modified Hanna *v.* Lyon, 179 N. Y. 107, 71 N. E. 778.

85. Estoppel of stockholder to sue.—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

86. Same.—Brannin *v.* Loving, 82 Ky. 370, 6 Ky. L. Rep. 328; Dunn *v.* Kyle, 77 Ky. (14 Bush) 134; Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

87. Individual interest of officer in transaction.—Hicks *v.* Steel, 126 Mich. 408, 85 N. W. 1121; McDowell *v.* First Nat. Bank, 73 Neb. 307, 102 N. W. 615; Leonhardt *v.* Citizens' Bank, 56 Neb. 38, 76 N. W. 452; Gund *v.* Ballard, 73 Neb. 547, 103 N. W. 309; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Brown *v.* Farmers', etc., Nat. Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359, reversing 31 S. W. 216.

the absence of full knowledge and consent on the part of the directors or managing officers of the bank, it is contrary to the well settled principles of equity and to the policy of the law to permit an officer of a bank to represent both himself and the bank in a transaction in which his personal interest is antagonistic to that of the bank, and in the absence of affirmative proof of full knowledge and consent, ratification or estoppel, such contracts are presumptively void, and are voidable at the option of the bank or its stockholders, and an action will lie to compel restitution or to recover whatever loss the institution may have sustained.[88] The directors of a corporation hold a fiduciary relation to the stockholders, and have been intrusted by them with the management of the corporate property for the common benefit and advantage of each and every stockholder, and by their acceptance of this office they preclude themselves from doing any act, or engaging in any transaction, in which their private interest will conflict with the duty they owe to the stockholders, and from making any use of their power or of the corporate property for their own advantage.[89] It is against public policy to permit persons occupying fiduciary relations to be placed in such a position that the influence of selfish motives may be a temptation so great as to overpower their duty and lead to a betrayal of their trust, and the rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings in the trust property with himself, or acquire any interest therein. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing was for the best interest of the beneficiary, but will set the transaction aside at the mere option of the cestui que trust.[90] There is no limit to the variety of the circumstances under which cases illustrating these principles may arise. A resolution by a board of bank directors intrusting the lending of money and discounting paper to the discretion of the cashier does not authorize him to lend to himself.[91] The president of a bank who has been in the habit of advising and assisting the bank in the matter of loans,

88. Same—Contract voidable at the option of the bank.—West St. Louis Sav. Bank *v.* Parmalee, 95 U. S. 557, 24 L. Ed. 490; Morgan *v.* King, 27 Colo. 539, 63 Pac. 416; Hicks *v.* Steel, 126 Mich. 408, 85 N. W. 1121; Leonhardt *v.* Citizens' Bank, 56 Neb. 38, 76 N. W. 452; Dunn *v.* O'Connor, 25 App. Div. 73, 49 N. Y. S. 270; Northwestern, etc., Ins. Co. *v.* Lough, 13 N. Dak. 601, 102 N. W. 160; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; City Nat. Bank *v.* Merchants', etc., Nat. Bank (Tex. Civ. App.), 105 S. W. 338; Leary *v.* Interstate Nat. Bank (Tex. Civ. App.), 63 S. W. 149.

89. Same—Fiduciary nature of relation.—Coal Co. *v.* Sherman (N. Y.), 30 Barb. 571; Hoyle *v.* Plattsburgh, etc., Co., 54 N. Y. 314, 13 Am. Rep. 595; Barnes *v.* Brown, 80 N. Y. 527; San Diego *v.* San Diego, etc., Co., 44 Cal. 106; Wilbur *v.* Lynde, 49 Cal. 290, 19 Am. Rep. 645; Farmers' Bank *v.* Downey, 53 Cal. 466; Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788.

90. Same.—Davoue *v.* Fanning (N. Y.), 2 Johns. Ch. 252; Taussig *v.* Hart, 58 N. Y. 425; Elevated R. Case, 11 Daily 486; Michoud *v.* Girod (U. S.), 4 How. 503, 11 L. Ed. 1076; Davis *v.* Rock Creek, etc., Min. Co., 55 Cal. 359, 36 Am. Rep. 40; Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788.

91. Cashier lending to himself.—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

discounts and investments, and who presents for sale or discount the paper of third persons which he personally owns, is bound to make full disclosure of whatever knowledge he may possess as to their solvency and responsibility, and for his failure to place the bank in possession of such facts within his knowledge it is entitled to rescind its purchase of the paper and recover the consideration paid therefor; and a fortiori is this true where such officer affirmatively misrepresents the facts within his knowledge affecting the solvency and responsibility of the makers of the paper.[92]

Officer Securing His Debt before That of Bank.—Where the same person is indebted both to the bank and to one of its officers individually, such officer, in adjusting such debts, has no right to secure the debt owing to him as an individual to the exclusion or injury of the debt held by the bank, and upon a readjustment in a court of equity, the court will see that the obligation owing to the bank is satisfied first.[93] But where the president and cashier borrow from their bank and lend the proceeds to a failing debtor of the bank and of the president, taking from him a mortgage with power to sell, and upon the understanding of all parties that the proceeds arising from foreclosure shall be applied to pay the debt owing by the president and cashier to the bank, such officers are entitled to have the proceeds of the foreclosure applied to the payment of their debt to the bank in preference to other indebtedness owing by the mortgagor to the bank.[94]

Right of Officer as Surety for Bank.—Where the general manager of a bank, together with others, became sureties for the repayment of a loan

92. **Personal interest of president in loan or discount.**—Hicks *v.* Steel, 126 Mich. 408, 85 N. W. 1121.

93. **Officer securing his debt before that of bank.**—Brown *v.* Farmers', etc., Nat. Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359, reversing 31 S. W. 216. See, also, McDowell *v.* First Nat. Bank, 73 Neb. 307, 102 N. W. 615.

A minor executed a deed of trust to secure his creditors, among whom were, first, the president of the bank in his individual capacity, and, second, after such payment, the debt to the bank. It appearing that the president had induced the cashier to advance the funds to the minor for which he was still indebted, promising to see it paid, the court, having appointed a receiver for the trust property, will direct the payment of the debt to the bank before that or the president. Brown *v.* Farmers', etc., Nat. Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359, reversing 31 S. W. 216.

94. **Same.**—Apperson *v.* Exchange Bank, 10 Ky. L. Rep. 943, 10 S. W. 801.

The president and cashier borrowed of their bank a sum which they loaned to a failing debtor of the bank and of the president. The debtor gave a mortgage on goods and land, and delivered the property to the mortgagees, with authority to sell and appropriate the proceeds to the mortgage debt, after applying enough of the goods to pay for another tract of land, which was accordingly paid for, and conveyed by the debtor's vendor to the mortgagees. It did not appear that anything more was realized from the goods. The president promised that the debt to the bank would thus be paid, and, relying thereon, the directors made no effort to collect it otherwise. Held, that the president, who controlled the property and received the proceeds, was entitled to have the proceeds of both parcels of land applied, first, to the payment of the loan to him and the cashier, and that the balance should be applied to the debts due to the bank and the president. Apperson *v.* Exchange Bank, 10 Ky. L. Rep 943, 10 S. W. 801.

from the state, obtained for its benefit, it was held that at any time afterwards, while the bank was neither insolvent nor contemplating insolvency, he might use the funds of the bank to buy property in his own name, for the security of himself and his cosureties.[95]

Conflicting Interests in Litigation.—Where the president of a bank engages in litigation in which his individual interests are in conflict with those he represents in a fiduciary capacity, actual fraud is unnecessary to avoid the proceedings thus entered into.[96]

Purchasing Property from Bank.—Where certain directors of a bank are seeking to purchase certain property from it, they are not qualified to participate as directors in consummating the sale;[97] and where directors, by reason of their position as such, effect a sale of property owned by the bank to themselves at figures greatly below its actual value, such transaction is fraudulent as a matter of law, and good faith on their part is no defense to an action to rescind or to recover damages.[98] It has been held in such a case that where a director of an insolvent bank purchased a note from the bank at a large discount, with notice that its transfer had not been authorized by a resolution of the board of directors as required by statute, he was not entitled to set off the price paid against a bill filed by a subsequently appointed receiver to set aside the transfer.[99] On the other hand, where a director had purchased land of the bank at a price far below its value, but without any willfully fraudulent purpose, though knowing that the transaction was probably illegal, it was held that he should be allowed what he had paid for the land, and compelled to make good the difference between that amount and the true value.[1]

Officer Executing Deed to Himself.—A deed executed by the cashier of a bank to himself as an individual is, in the absence of affirmative evidence of authority, presumptively void and of no effect.[2]

Rights of Third Persons—Bona Fide Purchasers.—To the general rule that the acts and contracts of a general agent, within the scope of his powers, are presumed to be lawfully done and made, there is an exception as universal and inflexible as the rule. It is that an act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is notice of the fact that it is, without the scope of his general power, and no one who has notice of its character may safely rely upon it without proof that the agent was expressly and specifically

95. **Rights of officer as surety of bank.**—Smith *v.* Lansing, 22 N. Y. 520.

96. **Conflicting interests in litigation.**—Gund *v.* Ballard, 73 Neb. 547, 103 N. W. 309. See, also, McDowell *v.* First Nat. Bank, 73 Neb. 307, 102 N. W. 615.

97. **Officer purchasing property from bank.**—Leary *v.* Interstate Nat. Bank (Tex. Civ. App.), 63 S. W. 149.

98. **Same.**—Morgan *v.* King, 27 Colo. 539, 63 Pac. 416.

99. **Same—Setting off price paid.**—Gillet *v.* Phillips, 13 N. Y. 114.

1. **Same—Same.**—Millsaps *v.* Chapman, 76 Miss. 942, 26 So. 369, 71 Am. St. Rep. 547.

2. **Officer executing deed to himself.**—West St. Louis Sav. Bank *v.* Parmalee, 95 U. S. 557, 24 L. Ed. 490; Northwestern, etc., Ins. Co. *v.* Lough, 13 N. Dak. 601, 102 N. W. 160.

authorized by his principal to do the act or make the contract.[3] Persons not paying value for the property received by them are not entitled to claim as bona fide purchasers for value. No matter what the facts may be as to notice or the want thereof they stand in no better position than the officials from whom they obtained it.[4]

Avoidance of Contract—Estoppel.—The right to waive such a contract on the ground of fraud and illegality rests with the bank or stockholders as the party whose rights have been violated; it is not available to the director or other officer, when sued thereon, to set up its illegality.[5] And even the objecting party, though otherwise entitled to avoid the contract, will not be entitled to do so after accepting its benefits with full knowledge of the facts.[6]

Same Persons Officers in Both Corporations.—A contract between two banks having a majority of the controlling officers in common is voidable, and, if questioned at the proper time, will be set aside on the appearance of unfairness;[7] but the fact that one person was an officer in

3. Rights of third persons—Bona fide purchasers.—Park Hotel Co. *v.* Fourth Nat. Bank, 86 Fed. 742, 30 C. C. A. 409; Security Bank *v.* Kingsland, 5 N. Dak. 263, 65 N. W. 697; Northwestern, etc., Ins. Co. *v.* Lough, 13 N. Dak. 601, 102 N. W. 160.

4. Same.—Morgan *v.* King, 27 Colo. 539, 63 Pac. 416.

Where the director of a bank transferred mining stock which he had purchased from the bank under an abuse of his office to his wife, the wife was not entitled to hold the same, as against stockholders of the bank, in an action to set aside the sale, since she acquired no better title than her husband possessed. Morgan *v.* King, 27 Colo. 539, 63 Pac. 416.

5. Avoidance of contract, estoppel.—Bank *v.* Triplett (Ky.), 6 J. J. Marsh 549; Dunn *v.* O'Connor, 25 App. Div. 73, 49 N. Y. S. 270.

The president of a bank, who as such made a loan to himself in excess of one-fifth of its capital stock and surplus, in violation of Laws 1892, c. 689, § 25, is estopped to set up the illegality of the loan as a defense to an action to foreclose a mortgage given by him to secure it. Dunn *v.* O'Connor, 25 App. Div. 73, 49 N. Y. S. 270.

In a suit instituted by the president and directors of the bank of the commonwealth, on a promissory note to the bank, a plea by one of defendants that at the time the note sued on was executed he was a director of the bank, and therefore not competent to sign said note as a surety, and that he did sign it as a surety and not as a principal, states no defense. The contract as surety was not void, but was as binding on defendant as it would have been had he not been a director. Bank *v.* Triplett (Ky.), 6 J. J. Marsh. 549.

6. Same—Same.—City Nat. Bank *v.* Merchants', etc., Nat. Bank (Tex. Civ. App.), 105 S. W. 338.

Where one bank accepts a deposit from another bank, agreeing to pay the usual two per cent interest, it may not avoid the contract and refuse to pay the interest after retaining the deposit for several months merely because one of the officers was common to both banks. City Nat. Bank *v.* Merchants', etc., Nat. Bank (Tex. Civ. App.), 105 S. W. 338.

7. Same persons officers in both corporations.—City Nat. Bank *v.* Merchants', etc., Nat. Bank (Tex. Civ. App.), 105 S. W. 338.

Where partners engaged in banking transfer their assets to an incorporated bank, guarantying the paper transferred, and become stockholders of the incorporated bank, and some of them the managers thereof, a compromise and settlement of the liability of the copartnership and the incorporated bank by its managing officers is avoidable at the election of the incorporated bank, unless in such settlement the full amount due on the guaranty is paid, or the settlement is authorized or ratified by the stockholders or board of directors of the bank, the partners not voting as stock-

both corporations does not render the contract void as against public policy.[8]

Duty to Account for Profits—Right to Buy in Property Sold for Banks Debts.—It is a general principle, applicable to the officers and agents of banks as well as to other cases, that where a person is actually or constructively the agent of another, all profits and advantages made by him in the business, beyond his ordinary compensation, is for the benefit of his employer.[9] And it has even been held in such a case that a cashier was estopped from denying his agency and from claiming the profits, notwithstanding the transaction may have been outside of his duties.[10] Profits derived from the use of the bank's money belong to the bank; though there is no principle forbidding the officer or agent of the bank, where not forbidden by law, from obtaining a bona fide loan from his bank and investing it for his own profit.[11] And where a director is charged with the duty of selling property as a trustee for the bank, it is a question depending upon the particular facts of the case whether he is liable to the bank for profits received by him individually for services rendered the purchaser

holders or directors. Leonhardt *v.* Citizens' Bank, 56 Neb. 38, 76 N. W. 452.

8. Same.—City Nat. Bank *v.* Merchants', etc., Nat. Bank (Tex. Civ. App.), 105 S. W. 338.

L. was president of defendant bank and vice president of plaintiff bank. B., cashier of defendant bank, with full authority to make such a contract, solicited plaintiff bank to deposit the money on hand with defendant bank, and with L. agreed to pay the two per cent interest on the deposit. No fraud, deception, or concealment was claimed, and there was no evidence that the contract was made without the consent of defendant's officers, directors, and stockholders. Held, that the contract was not void on the ground of L.'s interest in the plaintiff adverse to the stockholders in defendant. City Nat. Bank *v.* Merchants', etc., Nat. Bank (Tex. Civ. App.), 105 S. W. 338.

9. Duty to account for profits; purchase of property sold for bank's debts.—Pomeroy *v.* Benton, 57 Mo. 531; Murdoch *v.* Milner, 84 Mo. 96; Bent *v.* Priest, 86 Mo. 475; Mt. Vernon Bank *v.* Porter, 148 Mo. 176, 49 S. W. 982; S. C., 52 Mo. App. 244.

Profits derived by a cashier of a bank from a sale of bonds negotiated by him while cashier, and in the discharge of his duties as such cashier, belong to the bank. Judgment (1896) 65 Mo. App. 448, reversed. Mt. Vernon Bank *v.* Porter, 148 Mo. 176, 49 S. W. 982.

10. Same.—Mt. Vernon Bank *v.* Porter, 52 Mo. App. 244.

In an action by a bank against its cashier to recover certain commissions on sale of bonds which the bank was employed to negotiate, which commissions had been retained by the cashier, he is estopped from denying his agency, and from claiming the profits, notwithstanding the transaction may have been outside his duties. Mt. Vernon Bank *v.* Porter, 52 Mo. App. 244.

11. Loans to officers—Profits from use of bank's money.—Lindemann *v.* Rusk, 125 Wis. 210, 104 N. W. 119.

Just before the termination by charter limitation of the existence of a banking corporation, a director obtained from it a sum which he invested in another banking corporation. The director gave his note for the money, secured by collateral and bearing interest, and the amount was less than the director's interest in the assets of the corporation from which the money was obtained. The note was paid. Held that, especially in the absence of any showing that the interest paid by the director did not equal the profits he derived from the use of the money, the court was justified, in a suit to wind up the affairs of the defunct corporation, in treating the transaction as a loan instead of an investment in the new corporation for the benefit of those interested in the old one. Lindemann *v.* Rusk, 125 Wis. 210, 104 N. W. 119.

upon a subsequent division and resale of the same property.[12] A bank officer may buy in, for his own benefit, a pledge held by the bank; and, if he pays enough for it to satisfy the debt to the bank, he will not be held as a trustee for the residue,[13] but if he use the funds or credit of the bank in making the purchase he is bound to account to the bank for any profits arising upon his purchase.[14]

Using Official Position for Private Advantage—Undue Preference of Officers as Depositors and Creditors.—Upon well-settled equitable principles it is not permitted to a director or other officer to use his official position as a means of private advantage to himself, or to take advantage of his inside information in order to obtain any preference for himself as against stockholders or creditors upon the dissolution or insolvency of the bank.[15] It is a gross breach of their duty as trustees and a fraud upon

12. Compensation for services rendered purchaser by bank's agent.—Tenison *v.* Patton, 95 Tex. 284, 67 S. W. 92, reversing 64 S. W. 810.

A bank director who held title to land as trustee for the bank and also as security for advances made by him for the bank, by authority of the directors sold it to a third party for a cash price satisfactory to the directors, which was offered with the understanding, made known to the directors, that the trustee was to take charge of subdividing and reselling the land for the purchaser, and to share in any profits over the purchase price. Held, that the trustee was not, as a matter of law, liable to the bank for the profits gained by them through such resale, but the question was one of fact, the burden being on him to show the fairness of the transaction. Tenison *v.* Patton, 95 Tex. 284, 67 S. W. 92, reversing 64 S. W. 810.

13. Right to buy pledge held by bank.—Smith *v.* Lansing, 22 N. Y. 520.

14. Same—Use of bank's credit or funds in making purchase.—Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

An officer of a bank buying in property at execution sale for the bank debt for which it was sold, will not be permitted to claim the benefit of the purchase for himself where he used the debt for a time to pay his bid, and then without any corporate action to ratify the transactions, settled the debt with the bank. Property so purchased is assets for the benefit of the creditors of the bank, and may be so applied, allowing the bank officer the proper credit for the amount actually paid by him in his settlement with the bank. Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 498.

15. Using official position for private advantage—Preference of officers as creditors and depositors.—German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60; Swentzel *v.* Penn Bank, 147 Pa. 140, 23 Atl. 405, 15 L. R. A. 305, 30 Am. St. R. 718; Lamb *v.* Laughlin, 25 W. Va. 300; Lamb *v.* Cecil, 28 W. Va. 653; Lamb *v.* Pannell, 28 W. Va. 663.

A director of a bank can not, on behalf of a firm of which he is a member, draw the firm's money from the bank, after it has suspended payment. Swentzel *v.* Penn Bank, 147 Pa. 140, 23 Atl. 405, 15 L. R. A. 305, 30 Am. St. Rep. 718.

One who was director, vice president, and stockholder sold his shares in the bank, when it was in an embarrassed condition, to a customer of the bank, who had already overdrawn his account. The purchaser paid for the shares by a check on the bank, by which his account was further overdrawn. The cashier, in breach of his duty to refuse any overdraft, allowed the seller to draw out the money. Held, that the bank could recover it back, on the ground that, as an officer of the bank, the seller of the shares was chargeable with knowledge of its embarrassed condition, and of the state of the purchaser's account. German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60.

W., a director and vice president of a bank, sold his stock while the bank was in an embarrassed condition to H., who had an overdrawn account with the bank of several months standing. W. received in payment for his stock a check for $2,100 drawn by H. on the bank. H. afterwards sold the stock to the cashier of the bank, who purchased it for the bank, but without any

the public for directors, having knowledge of the insolvency of the bank, to permit it to continue to do business and to receive deposits until they have succeeded in withdrawing their own deposits. Any such fraudulent and unlawful preference may be recovered by a receiver or assignee for the benefit of the bank and of all the creditors.[16] And when a director, who is also a depositor, has knowledge that the bank is probably insolvent and that it will likely be unable to continue business or to pay depositors, obtains from the cashier without authority from the board of directors, discounted bills and notes, equal to the amount of his deposits, and for the purpose of avoiding the loss thereof, such transaction will be held invalid, and himself liable to the assignee of the bank for the amount of the securities so obtained.[17] But it has been held that the fact that one is a director of an insolvent bank does not render it illegal for him to receive in good faith from the bank a transfer of negotiable paper against third persons, held by the bank, in payment of a debt due and payable from the bank to him; and if he so receive negotiable paper, before maturity, not payable on its face to the bank, he may collect it of those liable upon it in his own name, and they have no right to pay it in the bills of the bank.[18] Although the receipt by the director of such securities may be a breach of his duty to the bank, such circumstance constitutes no ground of defense for the person liable on the papers so long as the stockholders of the bank do not complain of it.[19] There is no principle which forbids the president of a bank, where he has loaned it funds or advanced it money, in order to tide it over periods of embarrassment, from coming in as any other creditor and having his claim allowed;[20] and where a bank director

authority from it or from any one else to so purchase it, and gave H. credit for $2,100 for such stock on the bank's books. On the same day he gave W. a credit on the bank's books for the same amount, and charged H. with a like amount. Several days afterwards W. drew the $2,100 out of the bank. Held that, as affecting the right of the bank to maintain an action against W. for the amount of money so drawn by him, it was immaterial that such stock in fact belonged to W. and his brother as partners, and that all the transactions in selling such stock, giving such credit, and in drawing out money were done in the name of the firm. German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60.

16. **Same—Continuing to receive deposits in insolvent bank.**—Lamb *v.* Laughlin, 25 W. Va. 300.

17. **Same—Same—Withdrawing securities to amount of deposits in insolvent bank.**—Lamb *v.* Cecil, 28 W. Va. 653; Lamb *v.* Pannell, 28 W. Va. 663.

18. **Same—Same.**—Bruce *v.* Hawley, 31 Vt. 643.

19. **Same.**—Bruce *v.* Hawley, 31 Vt. 643.

20. **Rights of officer who has made advances to bank.** — State Bank Comm'rs *v.* St. Lawrence Bank (N. Y.), 8 Barb. 436.

A banking association, being embarrassed, authorized its president and cashier to raise money to redeem the circulation of the bank. In pursuance of such authority, they purchased a large amount of stocks of the state, and gave notes of the bank, signed by the president and cashier, payable at future periods. The stocks went to the use of the bank. The notes were protested for nonpayment, and the president, on being applied to, paid them. Held, that the president had a valid legal claim against the bank for the amount so paid by him, and, the bank having failed, he was entitled to come in as a creditor thereof, before the receiver, and have his claim allowed. State Bank Comm'rs *v.* St. Lawrence Bank (N. Y.), 8 Barb. 436.

loans money to the bank and takes a mortgage to secure it, he may foreclose his mortgage after the insolvency of the bank.[21] So the appropriation of bills receivable, by directors, as indemnity for notes issued by them for the accommodation of the bank, if done in good faith, in ignorance of the impending insolvency of the bank, does not render them liable either for fraud or negligence.[22]

§ 54 (7) Compensation of Officers.—Compensation of Directors.—A director in a banking corporation is not entitled to compensation for his service as director, in the absence of any agreement in advance that he shall receive such compensation;[23] nor have they any authority to vote salaries to themselves after their election as directors.[24] If, in the course of his office, a director renders to the corporation any unusual services, that may be the basis of a quantum meruit;[25] provided there is no statutory or charter provision prescribing the emoluments to be allowed to directors and either expressly or impliedly forbidding that they shall receive anything additional;[26] but even under such a statute the giving of

21. **Same—Right to foreclose mortgage securing advances.**—Millsaps *v.* Chapman, 76 Miss. 942, 71 Am. St. Rep. 547, 26 So. 369.

22. **Appropriation of bills receivable as indemnity against accommodation notes.**—In re Warner's Appeal (Pa.), 7 Atl. 216, 1 Sad. 310.

23. **Compensation of directors.**—Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788.

24. **Same.**—Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788.

25. **Same—Unusual services.**—Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788; Lowe *v.* Ring, 106 Wis. 647, 82 N. W. 571.

Where by the vote of the directors of a bank the plaintiff was appointed special director, to receive such compensation as "should, in the opinion of the board, be reasonable and fair," and he declared for a reasonable compensation in a quantum meruit count, and the defendants paid into court the amount voted by the directors to be a "reasonable compensation," it was held that, by paying the money into court, the defendant waived this limitation of the contract. Huntington *v.* American Bank (Mass.), 6 Pick. 340.

Fourteen dollars a day for forty-seven days, besides traveling expenses, awarded to a director of a bank by the verdict of a jury, for attending to the collection of a $3,000 note held by the bank, was grossly excessive, where the bank paid all the expenses and disbursements connected with the prosecution of the case, including attorney's fees, and where the necessity of spending fifteen days to watch the assignee of the debtor, twelve days to attend the assignee's sale, and twelve days in connection with the trial was not shown. Forster *v.* Columbia Nat. Bank, 77 Minn. 119, 79 N. W. 605.

26. **Same—Charter provisions.**—Mobile Branch Bank *v.* Collins, 7 Ala. 95; Branch Bank *v.* Scott, 7 Ala. 107.

Under the statute fixing the compensation of directors of the State Bank, a director of a branch bank, receiving the compensation provided by law, can be allowed no compensation by the board for extra services while he continues a director. Mobile Branch Bank *v.* Collins, 7 Ala. 95; Branch Bank *v.* Scott, 7 Ala. 107.

Where work was done by mechanics for the bank, under the superintendence of one of the directors, the board might lawfully direct their compensation to be paid to him for their use. Mobile Branch Bank *v.* Collins, 7 Ala. 95.

A provision in the charter of a bank that "no director shall be entitled to any emolument unless the same shall have been allowed by the stockholders at a general meeting" applies to the directors only in their official capacity, and does not prevent them from taking compensation for services rendered individually by them, as agents of the bank. Chandler *v.* Monmouth, 13 N. J. L. 1 Green 255.

compensation to a member of the board of directors, for extra services as an agent of the bank, though unlawful, is not such an act as will expose the directors to liability, if done in good faith, and with the honest intent of benefiting the bank.[27]

Compensation of the President.—The law raises no implied promise to pay the president of a bank for his official services; nor can he recover pay for such services upon a quantum meruit.[28] Neither is there any implied obligation to pay for extra and unusual services;[29] though where such duties are wholly foreign and outside of his duties as president, it is a question for the jury whether the circumstances are such as to raise an implied contract to pay for the same.[30] His compensation is to be fixed by the directors in such sum as they may think reasonable,[31] or in such sum as they and the president may agree upon;[32] and where such contract re-

27. **Same—Same.**—Godbold *v.* Branch Bank, 11 Ala. 191, 46 Am. Dec. 211.

28. **Compensation of president.**—Sawyer *v.* Pawners' Bank (Mass.), 6 Allen 207; Holland *v.* Lewiston Falls Bank, 52 Me. 564.

There is no implied contract on the part of a banking corporation, whose objects are partly charitable, to pay for official services rendered to it by its president; nor is such contract established by proof that the president informally mentioned to some of its directors that he should expect compensation, and that they made no reply. Sawyer *v.* Pawners' Bank (Mass.) 6 Allen 207.

But see contra Withers *v.* Edwards, 26 Tex. Civ. App. 189, 62 S. W. 795, where it is said that the presumption is that the offices of president and teller are lucrative, and that the law implies that a reasonable compensation will be paid to the persons holding them.

29. **Same—For unusual services.**—Leavitt *v.* Beers (N. Y.), Labor's Supp. (Hill. & Denis) 221; Pew *v.* First Nat. Bank, 130 Mass. 391.

The president of a bank can not maintain any claim for guarantying its paper without proof of a clear and explicit contract to that effect. Leavitt *v.* Beers (N. Y.), Labor's Supp. (Hill & Denis) 221.

30. **Services wholly foreign and outside of duties as president.**—Lowe *v.* Ring, 106 Wis. 647, 82 N. W. 571.

Where the defendant was president of a bank, and was requested by the other directors to administer an estate, so that the bank could realize as much as possible from securities it held against it, and there was no express contract to pay defendant for such services, it was error for the trial court to hold, as a matter of law, that the defendant was entitled to no compensation therefor, since they constituted no part of defendant's duties as president, and whether the circumstances were such as to raise an implied contract to pay for such services should have been left to the jury. Lowe *v.* Ring, 106 Wis. 647, 82 N. W. 571.

31. **Salary fixed by directors.**—Holland *v.* Lewiston Falls Bank, 52 Me. 564.

32. **Or by contract.**—Sawyer *v.* Pawners' Bank (Mass.) 6 Allen 207; Pew *v.* First Nat. Bank, 130 Mass. 391.

The directors of a bank, by vote, fixed the salary of the president at $400 a year, for which he served for four years, then demanded an increase of salary, and verbally resigned his office. A committee of conference reported at a subsequent directors' meeting that he would not serve as president unless his salary was $2,000. After this report, the directors passed a vote fixing the salary at $400; and, at their next meeting, a vote was passed approving the record of the last meeting; and plaintiff, in ignorance of these votes, came into the meeting and presided, saying: "At your request, and upon the assurance that the salary shall be arranged to my satisfaction, I withdraw my resignation." Nothing was said in reply by any of the directors; and plaintiff continued to act as president for four months longer, when, there having been no other vote passed fixing his salary, he resigned, and his resignation was

quires him to render any particular service or to devote a given number of hours to the business of the bank each day, it is a good defense that he has failed to do so.[33] The directors can not in any instance, however, vote a salary to one of their number as president when he takes part in the proceeding or his vote is essential to the adoption of the resolution.[34]

Compensation of Vice-President.—A vice-president of a banking corporation is not entitled to compensation for his services, in the absence of a governing statute, by-law, regulation, or contract to which his own vote was not essential, providing for it.[35]

Cashier and Other Officers.—The salary paid the cashier and other subordinates is fixed by contract, and questions involving the amount agreed to be paid, the mode and medium of payment, etc., are dependent upon the existence and proper construction of the contract.[36]

Waiver or Estoppel to Claim Salary.—Where the officials of a bank, being large stockholders, and desirous of making a good showing, omitted

accepted. Held, that there was no contract, express or implied, to pay him as a salary more than $400 a year. Pew *v.* First Nat. Bank, 130 Mass. 391.

33. Same—Breach of contract.—Lapsley *v.* Merchants' Bank, 105 Mo. App. 98, 78 S. W. 1095; Edwards *v.* Merchants' Bank (Mo.), 78 S. W. 1132.

34. Director—President voting salary to himself.—Butts *v.* Wood, 37 N. Y. 317; Kelsey *v.* Sargent (N. Y.), 40 Hun. 150; Copeland *v.* Johnson Mfg. Co., 47 Hun. 235, 14 N. J. St. Rep. 245; Gardner *v.* Butler, 30 N. J. Eq. 702; Ward *v.* Davidson, 89 Mo. 445, 1 S. W. 846; Chamberlain *v.* Pacific Wool, etc., Co., 54 Cal. 103; Wickersham *v.* Crittenden, 93 Cal. 17, 28 Pac. 788.

The directors of a bank, at a regular meeting, appointed its president, cashier, and a director, a committee on alterations of a building bought by the bank. At a subsequent meeting, complaint being made that nobody was attending to the work, the president, after consultation with the other members of the committee, and with the knowledge of the directors, but without any other vote having been passed upon the subject, devoted all his time, except what was required for his duties as president, to superintending the work for a period of six months. If he had not done so, it would have been necessary to employ a superintendent. Held, that he could not recover for such services. Pew *v.* First Nat. Bank, 130 Mass. 391.

35. Compensation of vice president.—Blue *v.* Capitol Nat. Bank, 145 Ind. 518, 43 N. E. 655.

36. Compensation of cashier and other officers.—State Bank *v.* Crease, 6 Ark. 292; San Joaquin Valley Bank *v.* Bours, 65 Cal. 247, 3 Pac. 864; Regester *v.* Medcalf, 71 Md. 528, 18 Atl. 966.

A bank cashier originally appointed from month to month, at a salary of $200, was at length appointed annually, and continued to draw the same salary for three months, when he drew $300 per month, which amounts were charged in the books of the bank, and reported to the board of trustees. Held, that an implied agreement was created fixing the salary at $300 per month. Jan Joaquin Valley Bank *v.* Bours, 65 Cal. 247, 3 Pac. 864.

In an action on an alleged contract of employment as cashier against the persons who had agreed among themselves to organize a bank, and who had appointed one of their number to make arrangements for carrying out their plan, refusal to charge, as requested by certain defendants, that, if they were not present when the resolution electing plaintiff as cashier was passed, and did not subsequently ratify it, then plaintiff could not recover, was not prejudicial where it appeared that one of the organizers might have been a duly-authorized agent to employ plaintiff. Regester *v.* Medcalf, 71 Md. 528, 18 Atl. 966.

Medium of payment.—The officers of the State Bank were entitled to have their salaries paid in gold and silver; and, notwithstanding the liquidation Act of 1843, they were entitled to continue in office, and to draw their salaries, until the surrender of the assets of the bank to the receivers. State Bank *v.* Crease, 6 Ark. 292.

to draw their salaries for the first year, the sums due being placed to the credit of the bank, and no mention thereof made in the published report required by the statute, it was held, that this omission to publish did not, as against other stockholders (as distinguished from creditors), estop them from claiming their salaries upon the failure of the bank.[37]

§ 54 (8) Power to Close Bank or Decline Deposits.—Unless specially authorized by the board of directors, the president or a director of a bank is not legally authorized to close the bank, or to prevent the reception of deposits so long as the bank continues solvent. He is as devoid of power in this regard as the president or director of a railroad company to stop the operation of trains or other business of the company.[38]

Where Bank Has Become Insolvent.—See post, "Receiving Deposits after Insolvency," § 57 (6); "Receiving Deposits after Knowledge of Insolvency," § 61 (3b).

§ 54 (9) Liability on Bond—§ 54 (9a) Duration of Liability.—Constituting Liability.—A bond conditioned for the faithful discharge of his duties by a director while he shall remain a director extends to his duties as director under successive annual elections, although it be not renewed and approved as required by statute;[39] and a bond given by a cashier to secure the faithful performance of his duties, containing no limits as to its duration, is broad enough to cover a continuing liability under a statute providing that the officers and directors, after the first year, shall be such as may be prescribed by the by-laws and shall be appointed or removed as said by-laws may provide; for the election of a cashier to an office which he already holds, and would hold without election, must be regarded as a manifestation of the will and intent of the directors that he should hold for another year. In such a case the court said that "unless we are to charge these sureties, who were also directors, with a gross violation of duty in not demanding a new bond, they must have construed the bond as continuing."[40] On the contrary, however, under a statute providing that bank officers shall hold their office until others shall be chosen in their stead, it has been held that the term of office of a cash-

37. **Waiver or estoppel to claim salary.**—Wheeler v. Aiken County, etc., Sav. Bank, 75 Fed 781.

38. **Power to close bank.**—Ex parte Smith, 33 Nev. 490, 111 Pac. 938; Ex parte Griffin, 33 Nev. 490, 111 Pac. 939.

39. **Continuing liability on bond in absence of renewal.**—Treasurer v. Mann, 34 Vt. 371, 80 Am. Dec. 688.

M., a bank director elected in 1849, gave a bond conditioned for discharge of his duties "while he should be a director." He was re-elected annually, but never gave any other bond. Held, that notwithstanding the statute forbade any bank director from entering upon the duties of his office until his bond had been executed and approved, and also provided that a director should hold his office until another was appointed and qualified, nevertheless the office was to be considered an annual one, and M. was to be regarded as acting as director each year under his last preceding election. Treasurer v. Mann, 34 Vt. 371, 80 Am. Dec. 688.

40. **Same.**—Elam v. Commercial Bank, 86 Va. 92, 9 S. E. 498.

ier, elected for a year, comes to an end, as to that particular term, upon his re-election at the end of the year to succeed himself, so that his bondsmen for the first year are not liable for defalcations in the second.[41] Where the bond is given by an officer of a bank, appointed by the finance committee to fill a vacancy, its life will be held to cover only the period intervening between such appointment and its confirmation by an election by the board of directors; and the laches and negligence of the directors at the time of such confirmation, in failing to provide for a new bond predicated upon such election, is the misfortune and default of the bank, and can not be charged against the bondsmen.[42]

Same—Renewals of Bond.—An indemnity bond promising "during the term" of one year for which it is executed, "or any subsequent renewal of such term," to reimburse and make good fraudulent and dishonest transactions and losses by a bank cashier, "committed during the continuance of said term, or any renewal thereof, and discovered during said continuance or renewal thereof or within six months thereafter," is a continuous contract extending the indemnity from year to year, as distinguished from separate and distinct contracts for each year, and covers a misappropriation or fraud committed during the first year of the contract of indemnity but not discovered until six months after the bond had been renewed.[43] Where a bank, pursuant to its by-laws, requires the cashier to renew his bond, and the order requiring the renewal provides that the previous bond shall not thereby be impaired until given up to be cancelled, the first bond, remaining uncancelled, continues in force after the second is executed.[44]

Upon Extension of Charter.—Where the charter of a bank is extended, and no new security taken of the cashier, securities under the first charter are not liable for defalcation under the new charter.[45]

Liability after Suspension of Cashier.—The liability of the sureties continues after the cashier's suspension from office by the board until communicated to the cashier and carried into effect, three days later.[46]

41. **Same.**—McIlroy Banking Co. *v.* Dickson, 66 Ark. 327, 50 S. W. 868.

42. **Bond of officer appointed to fill vacancy.**—Fancher *v.* Kaneen, 5 N. P., N. S., 614.

43. **Renewal of bond.**—Cutts *v.* Spear (O.), 8 N. P., N. S., 445, 19 O. D. N. P. 608.

44. **Continuance of former bond uncancelled.**—Pendleton *v.* Bank (Ky.), 1 T. B. Mon. 171.

45. **Effect of extension of charter.**—Thompson *v.* Young, 2 O. 334

46. **Liability after suspension of cashier.**—McGill *v.* Bank (U. S.), 12 Wheat 511, 512, 6 L. Ed. 711.

Termination.—A. W. McG. gave a bond to the Bank of the United States, with sureties, conditioned for the faithful performance of the duties of the office of cashier of one of the offices of discount and deposit, during the term he should hold that office; the president and directors of the bank having discovered that he had been guilty of a gross breach of trust, passed a resolution, at Philadelphia, on the 27th of October, 1820, "that A. W. McG., cashier, etc., be and he is hereby suspended from office, till the further pleasure of the board be known;" and another resolution, "that the president of the office at Middletown, be authorized and requested to receive into his care, from A. W. McG., the cashier, the cash, bills discounted, books, papers and other property in said office, and to take such measures for having the duties of cashier discharged, as he may deem expedient;"

§ 54 (9b) Risks and Delinquencies Covered by Bond.—Construction of Bond in Favor of Liability.—Where a bond given by a surety company to a bank for its cashier is sued on after breach, if, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers or agents of the surety company.[47]

Risks and Delinquencies Covered by Bond.—It obligates not only to honesty, but to reasonable skill and diligence;[48] it covers willful or permissive misapplication of the bank's funds;[49] and default can not be excused by any act or vote of the directors in violation of their duties,[50] such as an attempted sanction of an usage to allow overdrafts,[51] or, in the ab-

these resolutions were immediately transmitted by mail, to the president of the office at Middletown, who received them on the morning of Sunday, the 29th of the same month, but did not communicate them to the cashier, nor carry them into effect, until the afternoon of the 30th, between four and five o'clock. Held, that the sureties continued liable for his defaults until that time. McGill *v.* Bank (U. S.), 12 Wheat. 511, 512, 6 L. Ed. 711.

The resolution was only to suspend, and this implies the right to restore. The cashier's salary went on, and had the board rescinded their resolution, there would have been no necessity for a redelivery of his bond. McGill *v.* Bank (U. S.), 12 Wheat. 511, 514, 6 L. Ed. 711.

47. Construction of bond in favor of liability thereon.—American Surety Co. *v.* Pauly, No. 1, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552; S. C., No. 2, 170 U. S. 160, 42 L. Ed 987, 18 S. Ct. 563. See post, "Supervision and Notice of Default or Loss," IV, B, 2, a, (2), (c).

48. Risks and delinquencies covered by bond—Obligates to reasonable skill and diligence.—The condition of a cashier's bond, "Well and truly to execute the duties of the office," includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskillfully—if they are violated, from want of capacity or want of care—they can never be said to be "well and truly executed." The operations of a bank require diligence, with fitness and capacity, as well as honesty, in its cashier; and the security for the faithful discharge of his duties, would be utterly illusory, if we were to narrow down its import to a guarantee against personal fraud only. Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

49. Willful or permissive misapplication.—The sureties are liable upon the cashier's bond, for any willful or permissive misapplication of the moneys of the bank, which the cashier knowingly made, or suffered, without authority, whereby the same moneys have been lost to the bank. Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

50. Authorization of directors no excuse.—Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

No act or vote of the board of directors of a bank, in violation of their own duties, and in fraud of the rights and interests of the stockholders of the bank, will justify the cashier of the bank in acts which are in violation of the stipulation in his official bond, "well and truly" to execute the duties of his office. Acts done by a cashier, under the authority of such a vote, or of a usage permitted by the directors, in violation of the trusts assumed by them, are on the responsibility of the cashier, and of his sureties. Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

51. Same—With respect to overdrafts.—Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

A usage to allow customers to overdraw, and to have their checks and notes charged up, without present funds in the bank—stripped of all technical disguise, the usage and practice, thus attempted to be sanctioned, is a usage and practice to misapply

sence of express agreement, by the laches or negligence of the directors, not amounting to fraud or bad faith, or by the connivance of ordinary agents or employees.[52]

Construction of Bonds Conditioned against Fraud and Dishonesty.—"Fraud or dishonesty" of a bank cashier "amounting to embezzlement or larceny," for which a fidelity and guaranty company promises "to make good and reimburse," comprehends such dishonest and fraudulent conduct resulting in loss as is equivalent to embezzlement or larceny, and is not confined to the technical offenses mentioned or such misappropriation of funds as would subject the cashier to a conviction for embezzlement or larceny.[53]

Change in Position—Added Duties and Responsibilities.—The official bond of a cashier must be construed to cover all defaults in duty which are annexed to the office, from time to time, by those who are authorized to control the affairs of the bank; and the sureties in the bond are presumed to enter into a contract, with reference to the rights and authorities

the funds of the bank; and to connive at the withdrawal of the same, without any security, in favor of certain privileged persons. Such a usage and practice is surely a manifest departure from the duty, both of the directors and the cashier, and can not receive any countenance in a court of justice. could not be supported by any vote of the directors, however formal; and therefore, whenever done by the cashier, is at his own peril, and upon the responsibility of himself and his sureties. Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

52. Laches or neglect of directors.—Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

It is well settled that, in the absence of express agreement, the surety on a bond given to a bank, conditioned for faithful performance by an employee of his duties, is not relieved from liability for a loss within the condition of the bond by reason of the laches or neglect of the board of directors, not amounting to fraud or bad faith, and that the acts of ordinary agents or employees of the indemnified corporation, conniving at or cooperating with the wrongful act of the bonded employee, will not be imputed to the corporation. Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

It can not be said that if one servant of a bank neglects his duty, and by his carelessness permits another servant of the bank to commit a fraud, the surety of the fraudulent servant shall be thereby discharged. Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

53. Construction of bonds conditioned against fraud and dishonesty.—Cutts *v.* Spear (O.), 8 N. P., N. S., 445, 19 O. D. N. P. 608.

The cashier of a bank, whose bond, with sureties, was conditioned that he would "faithfully and honestly discharge his duties as cashier, and account for all such moneys, funds and valuables" as came into his hands, cashed a draft, payable to his order, amply secured by bills of lading of cotton, and duly forwarded the same, with the bills of lading, to a bank in another city, for collection. The draft and bills of lading were lost in the mail. The cashier's bookkeeper, whose duty it was to check the statements and accounts with other banks, reported the draft as credited on their account with the bank to which they had been forwarded, and his accounts balanced according to his report. The agent of the railroad company, without production of the bills of lading and without the consent of the cashier, delivered the cotton to consignee. Held, that the cashier was not liable on his bond. First Nat. Bank *v.* Still (Civ. App.), 32 S. W. 61.

of the president and directors, under the charter and by-laws;[54] but the liability of the sureties upon a bond given to secure the faithful performance of the duties of a bank official in a given position does not extend to acts of dishonesty committed by him in a higher and more responsible position to which he has been promoted by the bank subsequent to the execution of the bond, unless the bond, fairly construed, was intended to provide for such added responsibility.[55] The obligation is not enlarged to cover the default in such case by reason of a stipulation contained in the bond "and in every way faithfully and honestly administer his duties while in the employ of the aforesaid bank."[56]

Breach of Trust or Theft Outside Scope of Duties.—A bond conditioned upon the faithful performance of the duties assigned to, and the trust reposed in, one of the obligors as an employee of a bank is not to be narrowed by construction into an undertaking to make good only those losses resulting from a failure of the employee to faithfully perform and execute the trust in so far as it relates only to the duties incident strictly to his particular position, but it is an undertaking to stand sponsor for his honesty as an employee of the bank, without regard to whether he

54. **Change in position—Added duties and responsibilities.**—Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

55. **Same.**—Northwestern Nat. Bank *v.* Keen (Pa.), 14 Phila. 7.

It has been held that the official bond of a bank cashier conditioned for the faithful performance of "the duties of the said office of cashier, which may be prescribed by the board of directors," extends to all duties theretofore prescribed, as well as those thereafter to be prescribed; that it is intended to be more comprehensive even than a bond conditioned for good behavior or for the performance of the duties of the office, without saying more; either of which conditions will be sufficient to bind and charge the securities, without any prospective or future prescription of duty. Durkin *v.* Exchange Bank (Va.), 2 Pat. & H. 277.

Under a contract by which a fidelity and casualty company binds itself to make good to a bank, to a specified extent, such pecuniary loss as the latter may sustain by reason of the fraud or dishonesty of a named employee in connection with his duties as receiving teller, "all the duties to which, in the employer's service, he may be consequently appointed or assigned by the employer," it is the right of the bank, without notifying the company, to confer upon this employee the office of assistant cashier in addition to that of receiving teller; and, upon this being done, the company is as much bound to make good to the bank losses occasioned, during the period covered by the contract, by reason of the employee's fraud or dishonesty while acting in the capacity of assistant cashier as in that of receiving teller. Fidelity Trust, etc., Co. *v.* Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. Rep. 440.

A bank was incorporated with the power to appoint necessary officers, to take bonds from them, and to make all necessary by-laws, rules and regulations. By one of the by-laws of such corporation it was provided, that it should be the duty of every officer of the bank, to perform such services as might be required of them, by the president and cashier. In an action against principal and sureties, on a bond given by a bookkeeper of said bank, conditioned for the faithful performance of the duties required of him in said bank, etc., it is held, that the bond was taken in conformity to, and authorized by the charter. And where such bookkeeper, whilst in the discharge of "other duties in said bank," fraudulently took large sums of money therefrom, the securities on his official bond were liable to the amount of their bond. Planters' Bank *v.* Lamkin (Ga.), R. M. Charl. 29.

56. **Same—Stipulation construed.**—Northwestern Nat. Bank *v.* Keen (Pa.), 14 Phila. 7.

purloins the particular money or property entrusted to him by virtue of his position, or whether he misappropriates other funds of the bank which do not, in the ordinary course of business, come into his hands, and with which he officially has nothing to do, but to which his employment enables him to gain access.[57] The contrary doctrine was applied, however, in a Virginia case, in which it was held that the sureties of an accountant were not liable for moneys taken by him out of the teller's drawer, without the teller's knowledge or consent, the accountant not being entrusted with nor put in possession of any moneys of the bank.[58] The majority of the court in that case took the ground that the sureties were not bound for his faithfulness in matters outside the scope of the duties of his position, as that he should commit no theft or other felony against the bank with respect to matters wholly unconnected with the duties of his position. But dishonesty and theft can never be within the scope of an employee's duties, and beyond question the better doctrine is that stated in the New York case, which criticises and refused to follow the Virginia decision.[59]

§ 54 (9c) False Representations in Procuring Bond.—A bank is responsible for the representations of its cashier and its president in procuring these contracts of indemnity. Where the representations made in the certificate or declaration on which the officer's bond was issued were clearly misrepresentations, by such officer, made on behalf of the bank to procure the bond for the bank, and acting for the bank, the bank can not recover on the bond.[60] Thus where a certificate, required by a bonding

57. **Breach of trust or theft outside scope of duties.**—Rochester City Bank *v.* Elwood, 21 N. Y. 88.

A bond conditioned upon the faithful discharge of the trust reposed in one of the obligors as an assistant bookkeeper in a bank is not simply an undertaking that he would keep, with reasonable care and skill, such books of the bank as he might properly be required to keep as assistant bookkeeper, and nothing more, but is an engagement for his honesty and fidelity to his trust as an employee of the bank. Rochester City Bank *v.* Elwood, 21 N. Y. 88.

The surety upon such bond is liable for a loss occasioned by his principal's embezzling the funds of the bank and making false and fraudulent entries in the books of the bank for the purpose of avoiding detention. It is immaterial that the credit journal, in which such false entries were made, was usually kept by the teller when the bookkeeper entered upon his duties. Rochester City Bank *v.* Elwood, 21 N. Y. 88.

58. **Same.**—Allison *v.* Farmers' Bank, 27 Va. (6 Rand.) 204.

59. **Same.**—Rochester City Bank *v.* Elwood, 21 N. Y. 88.

60. **False representations in procuring bond.**—Guarantee Co. *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 46 L. Ed. 253, 22 S. Ct. 124; Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

It was competent for the defendant bonding company to show that the bank had concerned itself in and about the obtaining of the bond and renewals in such manner as to cause the transaction to become in effect the business of the bank. The bank had notice from the terms of the original bond that it was issued in reliance upon statements and representations made on its behalf to the surety company, and that, in the ordinary course, renewals, which were to be optional with the surety company, might also be based upon further statements to be made on behalf of the bank. Thus, in the original bond, it was recited that "The said employer has delivered to the company a certain statement, it being agreed and understood that such

company, that the bonded officer's accounts had been examined and found correct, was false as furnished by the bank, the bond issued thereon is not binding on the company.[61] But where the certifying officer (president) was a confederate in the dishonesty of the bonded officer, and the procuring of the bond was the business of the officer to be bonded and not of the bank, it was held that it was no part of the duties of the president to make such a certificate as to the honesty and fidelity of the applicant, and the bank was not responsible for his misrepresentation so as to bar recovery on the bond.[62] Such a certificate is competent evidence to go to

statement constitutes an essential part of the contract hereinafter expressed." It was a reasonable and proper precaution, in anticipation of a desired renewal, to propound the inquiries which were submitted by the surety company. The inquiry was contained in a written communication, addressed to the bank; it was received by the bank, and it was proper to presume that it was delivered to the official who made reply thereto, by authority of the bank, he being the executive officer who was charged with conducting the correspondence of the bank. The making of the certificate was an act done in the course of the business of the bank, by an agent dealing with the surety company for and on behalf of the bank. It did not purport to be, nor was it designed to be, the mere personal representation of the individual who filled the office of cashier, but it was an official act, performed on behalf of the bank. The information solicited was such as was proper to be asked of and communicated by the bank, and as the renewal was presumably made upon the faith of the statements contained in the certificate, the bank ought not to be heard, while seeking to obtain the benefits of the stipulations agreed to be performed by the surety, to deny the authority of its officer to make the representations which induced the surety to again bind itself to be answerable for the faithful performance by the defaulting officer of the duties of his employment. Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

61. False certificate furnished by bank as a bar to recovery on bond.—Guarantee Co. *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 46 L. Ed. 253, 22 S. Ct. 124, reaffirming in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

Where a bank teller's bond provided that a certificate must be furnished before each renewal every year that the accounts of the teller had been examined by the bank's finance committee and found correct, and when the bond was renewed in January, 1892, the bank's books showed that the employee was a defaulter in the sum of $19,600 understated liabilities, and of $3,765.44 abstracted from bills receivable, both of which could have been detected by the taking of a trial balance as is customary, or a mere comparison between the books kept by teller and the individual ledger, and a correct footing of the notes, the bank had not only failed to comply with its engagements above referred to, and falsely certified to a verification which in fact had not been had, but was guilty of such laches as would of itself defeat a recovery. Guarantee Co. *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 46 L. Ed. 253, 22 S. Ct. 124, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

62. Same—Officer exceeding authority.—Guarantee Co. *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 46 L. Ed. 253, 22 S. Ct. 124, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

American Surety Co. *v.* Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552, distinguished in Guarantee Co. *v.* Merchants' Sav. Bank, etc., Co., 183 U. S. 402, 46 L. Ed. 253, 22 S. Ct. 124, where it was said: "In Pauly's Case, the president and the cashier were confederates in the dishonesty of the cashier, for the purpose of defrauding the bank; and also it was held no part of the duties of the president under the circumstances there disclosed to certify to the integrity of the cashier as he did. In this case the dishonesty was that of the cashier alone; the statements were required to be and were made on behalf of the bank, and the president acted for the bank in so doing; and the bonds were procured

the jury.[63]

§ 54 (9d) Supervision and Notice of Default or Loss.—A stipulation for due supervision, contained in a bank officer's bond, means that it is to be exercised by the bank, and the neglect or omission of a minority of the board or of a subordinate officer or agent, is not a breach thereof.[64]

by the bank, and the bank paid the premiums." Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

There are many acts which the president of a bank may do without express authority of the board of directors, in some cases because the usage of the particular bank impliedly authorized them, in other cases because such acts were fairly within the ordinary routine of his business as president; but the making of a statement, as to the honesty and fidelity of an employee for the benefit of the employee, and to enable the latter to obtain a bond insuring his fidelity, was no part of the ordinary routine business of a bank president, and there was nothing to show that by any usage of this particular bank such function was committed to its president. American Surety Co. *v.* Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552.

The procuring of a bond for the cashier, in order that he might become qualified to act as cashier, was no part of the business of the bank nor within the scope of any duty imposed upon the president of the bank. It was the business of the cashier to obtain and present an acceptable bond. And it was for the bank, by its constituted authorities, to accept or reject the bond so presented. The bank did not authorize its president to give, nor was it aware that he gave, nor was he entitled by virtue of his office as president to sign, any certificate as to the efficiency, fidelity or integrity of the cashier. No relations existed between the bank and the surety company until the cashier presented to the former the bond in suit. What therefore the president assumed in his capacity as president to certify as to the cashier's fidelity or integrity, was not in the course of the business of the bank nor within any authority he possessed. He could not create such authority by simply assuming to have it. American Surety Co. *v.* Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552.

If he gave the certificate that he might, with the aid of the cashier, carry out his purpose to defraud the bank for his personal benefit, the law will not presume that he communicated to the bank what he had done in order to promote the scheme devised by him in hostility to its interests. American Surety Co. *v.* Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552.

As between the bank and the surety company, the former can not be deemed, merely by reason of the president's relation to it, to have had constructive notice that he as president gave the certificate in question. American Surety Co. *v.* Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552.

63. Certificate in evidence.—Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

"As held in First Nat. Bank *v.* Stewart, 114 U. S. 224, 29 L. Ed. 101, 5 S. Ct. 845, a communication which on its face evidences that it was written by the cashier of a bank, should not be excluded from the jury as not being an act of the bank, where 'it appears with reasonable certainty to have regard to the business of the bank.' In the case at bar it is manifest these elements were present, and the exclusion of the certificate, as also of the evidence designed to establish that the giving of the certificate was an act done in the course of the business of the bank, was erroneous." Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

But where the very question which the jury would have been called upon to determine if the certificate had been received in evidence was fully submitted to them and was necessarily negatived by their verdict, no foundation exists for holding that prejudicial error resulted from excluding the certificate. Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

64. Stipulation for due supervision construed.—Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fi-

And where, in addition to the provisions already mentioned, it was agreed "that the employer shall at once notify the company, on his becoming aware of the said employee being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits," and the cashier did become informed of speculation by the teller, and told the president, but on the teller's assurance that he had ceased such practices, did not inform the bonding company, this was a breach of the bank's duty to that company which would defeat recovery on the bond.[65] But notice need not

delity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

A stipulation in a bank officer's bond: "That the employer shall observe, or cause to be observed, due and customary supervision over the employee for the prevention of default, and if the employer shall at any time during the currency of this bond condone any act or default upon the part of the employee which would give the employer the right to claim hereunder, and shall continue the employee in his service without written notice to the company, the company shall not be responsible hereunder for any default of the employee which may occur subsequent to such act or default so condoned," is not fairly subject to the construction that it was the intention that the neglect or omission of a minority in number of the board of directors or the neglect or omission of subordinate officers or agents of the bank should be treated as the neglect or omission of the bank. The provision is not that a minority in number of the board of directors or that subordinate officers or agents would exercise due and customary supervision, and would not condone a default of the bonded employee or retain him in his employment after the commission of a default, but the agreement is that the bank would do or not do these things. Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

"The court rightly refused to instruct the jury that the mere knowledge of one or more directors, less than a majority of the board, and of the vice president of the bank, of the default of the president, was imputable to the bank. Indeed, when the charge which the court gave is considered, it is apparent that the court went quite as far as the law warranted, in favor of the defendant, since the court instructed that knowledge acquired by the cashier in the course of the business of the bank, and not communicated by him to the board of directors, should be regarded as the knowledge of the bank." Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

To instruct the jury in broad terms that if they found that the directors were careless in the management of the bank generally they should find for the defendant bonding company, could only have served to mislead. The court did not err in refusing the requested instructions. Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

65. Speculation and other bad habits—Notice.—Guarantee Co. *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 46 L. Ed. 253, 22 S. Ct. 124, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

Where the officer's bond required notification if the bank were informed of speculation on the officer's part, and the president had heard of such speculation, it was his duty to inform the banking company, not withstanding the second stipulation was that he would inform the company as to matters about which he deemed it advisable for the company to inquire. The word "deem" might be said to give a considerable discretion, but it was not a discretion to be abused. That the company would consider it advisable to make inquiry is too plain for argument, and the bank was responsible for the misrepresentation in the answer. Guarantee Co. *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 46 L. Ed. 253, 22 S. Ct. 124, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

What the company stipulated for was prompt notification of information by the bank in regard to speculation or gambling on the part of the employee. It was entitled to exercise its own judgment on that information and

be given of mere suspicions of an act which may involve a loss; there must be knowledge,[66] and the notice need not be given instantly, but within

had not agreed to rely on the bank's belief in that regard. It had the right to investigate for itself whether the bank did so or not. Notification of the existence of reason for inquiry was exactly what the clause was intended to secure. The bank neither investigated nor gave the company notice of the information it had, and substituted its own judgment as to the value of that information for that of the company. This conduct on its part amounted to a breach of the stipulation. Guarantee Co. *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 46 L. Ed. 253, 22 S. Ct. 124.

It was the duty of this bank to have made prompt investigation, or at all events to have notified the company at once of the information that it had, and the bank's misplaced confidence in its officer affords insufficient ground for enforcing the liability of the surety company on the theory of good faith. The failure of the bank in the particulars adverted to defeats a recovery on the teller's bond for defalcation after information of his being engaged in speculation was received. Guarantee Co. *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 46 L. Ed. 253, 22 S. Ct. 124, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

"Whatever the common-law duty on the part of the employer to notify the guarantor of the fraud or dishonesty of the employee whose fidelity is guaranteed, the parties to this contract undertook to declare the duty of the bank to the company in certain specified particulars. It required that the employee should not have been guilty of previous default or dereliction within the knowledge of the employer. It provided for notification of any act of the employee which might involve a loss without unreasonable delay after the occurrence of the act came to the knowledge of the employer. And it required immediate notification on the employer becoming aware of the employee being engaged in speculation or gambling. The words, 'becoming aware,' were manifestly used as expressive of a different meaning from having 'knowledge.'" Guarantee Co. *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 46 L. Ed. 253, 22 S. Ct. 124, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

66. Same—Mere suspicion without knowledge.—American Surety Co. *v.* Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552.

Where the bond for the cashier required written notice to be given to the company, at its office in New York, of any act on the part of the cashier "which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer," the defendant was entitled to notice in writing of any act of the cashier which came to the knowledge of the plaintiff of a fraudulent or a dishonest character as soon as practicable after the plaintiff acquired knowledge. It is not sufficient to defeat the plaintiff's right of action upon the policy that it be shown that the plaintiff may have had suspicions of dishonest conduct of the cashier; but it was plaintiff's duty under the policy, when it came to his knowledge, when he was satisfied that the cashier had committed acts of dishonesty or fraud likely to involve loss to the defendant under the bond, as soon as was practicable thereafter to give written notice to the defendant. Though he may have had suspicions of irregularities, and of fraud, he was not bound to act until he had acquired knowledge of some specific fraudulent or dishonest act which might involve the defendant in liability for the misconduct. American Surety Co. *v.* Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552.

Where a surety company gave bond for the president of a national bank, which was sued upon by the bank's receiver, it was proper to instruct the jury that the receiver need not have given the required notice on mere suspicion as to acts by the president involving fraud or dishonesty on his part as president of the bank, but was bound to do so only when satisfied that he had committed some specific act of fraud or dishonesty likely to involve loss to the company. American Surety Co. *v.* Pauly, 170 U. S. 160, 42 L. Ed. 987, 18 S. Ct. 563.

The provision in the bond in these words: "Now, therefore, in consideration," etc. "It is hereby declared and agreed, that subject to the provision herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good

a reasonable time under the circumstances.[67]

§ 54 (9e) Filing Claim for Loss.—A requirement in a bank officer's bond that claim of loss be filed "as soon as practicable" after written notice, means that a full statement thereof shall be filed as soon as it can be prepared with reasonable diligence.[68] The period of six months from "the death or dismissal or retirement" of the officer from employment,

and reimburse to the employer all and any pecuniary loss sustained by the employer of moneys, securities or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act of fraud, or dishonesty, on the part of the employee, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employee from the service of the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employee, shall be prima facie evidence thereof"—is so drawn as to leave room for two constructions of its provisions, either of which, it may be conceded, is reasonable, one favorable to the company, and the other favorable to the bank and most likely to subserve the purposes for which the bond was given. In such a case the terms used must be interpreted most strongly against the party who prepared the bond and delivered it to the party for whose protection it was executed. American Surety Co. *v.* Pauly, No. 2, 170 U. S. 160, 42 L. Ed. 987, 18 S. Ct. 563.

67. **"Immediately" not necessarily instantly.**—Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833; American Surety Co. *v.* Pauly, 170 U. S. 160, 42 L. Ed. 987, 18 S. Ct. 563, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

A requirement in the bond of a bank officer "that the employer shall immediately give the company notice in writing of the discovery of any default or loss" ought not to receive the construction that it was intended by the parties that notice of a default should be given instantly on the discovery of a default, but that what was meant was that notice should be given within a reasonable time, having in view all the circumstances of the case. Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833.

The trial court was right in refusing to instruct, as a matter of law, that the notice was not given as soon as reasonably practicable under the circumstances of the case, or without unnecessary delay, and in leaving the jury to determine the question whether the receiver had acted with reasonable promptness in giving the notice, as he did, from ten to seventeen days after the first discovery of a default. Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

It was not error to leave it to the jury to say whether, under the proof, and looking at all the circumstances, a notice given May 23d, of a loss discovered after May 1st, was given with reasonable promptness. American Surety Co. *v.* Pauly, 170 U. S. 160, 42 L. Ed. 987, 18 S. Ct. 563.

68. **Time for filing claim.**—Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

Where the requirement of the bond was that the employer "shall file with the company his or her claim hereunder, with full particulars thereof, as soon as practicable" after the giving of written notice of a default or loss, what was required was not a partial, but a full statement of all the items of claimed misappropriation on which the right to recover upon the bond was based. The investigation to ascertain the various defaults continued after the giving of the preliminary notice of default, and the evidence in the record fails to give any support to the contention that the proof of claim was unreasonably delayed, and was not made as soon as practicable after the full particulars thereof were ascertained. Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct.

within which a bond required that the default be discovered and notice given, did not begin with the suspension of the bank, but only ran from either the officer's death or actual retirement or dismissal, or possibly from his taking service under the receiver.[69]

833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

Evidence of knowledge of defaults.—The court did not err in instructing the jury that the averments contained in a petition filed by the receiver in an action in attachment against the defaulting officer brought to recover various items of alleged indebtedness to the bank, should be given no effect in their deliberations, as but one of said items was embraced in the present action. The petition referred to was presumably introduced in evidence on behalf of the defendant, as tending to establish that the proof of claim was not made by the receiver as soon as practicable after the giving of notice that the officer had been guilty of a default. The petition counted upon various items, a portion only of which were embraced in the petition in the action on trial, and the fact that the petition in the attachment action showed that when filed the receiver knew of some of the misappropriations of the officer, did not tend to prove that he then had knowledge of all of his defaults. Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920.

69. Termination of liability.—American Surety Co. *v.* Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552.

When the bank suspended the business, and the investigation by the examiner commenced, the cashier ceased to perform the ordinary duties of a cashier, but within the meaning of the bond, did not retire from, but remained in, the service of the employer during at least the investigation of the bank's affairs and the custody of its assets by the national bank examiner, which lasted until the appointment of a receiver and his qualification on the 29th day of December, 1891. Certainly, the six months from "the death or dismissal or retirement of the employee from the service of the employer," within which his fraud or dishonesty must have been discovered in order to hold the company liable, did not commence to run prior to the date last named. American Surety Co. *v.* Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552.

Of course the cashier's death would have terminated his employment as cashier. But he was never dismissed, for his dismissal could only have occurred by the act of the bank or of some one who represented it before or after it suspended business. His "retirement," which would arise from his voluntary act, occurred either when he took service under the receiver, or when he voluntarily left that service on the 2nd day of March, 1892. Whether within the meaning of the bond he was in "the service of the employer" while he was in the service of the receiver, or not, it is sufficient for this case to hold that he was in the service of the employer at least up to the time of the receiver's appointment and qualification, which occurred within six months prior to the discovery of his fraud and dishonesty and the giving of notice thereof. American Surety Co. *v.* Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552.

It is sufficient in this case to adjudge that the officer, within the meaning of the bond, was in the service of the bank up at least to the date on which the receiver took possession, and that his fraudulent acts were discovered and notice thereof given within six months after that date. The acts of fraud and dishonesty complained of were discovered a few days prior to May 23, 1892, and notice thereof to the company was given on that day, and was followed by a claim or proof of loss mailed June 24, 1892, and received by the company July 1, 1892. Such are the facts which the verdict of the jury must be taken to have established. And if it be further true, as the verdict imports, that the notice of May 23, 1892, was given as soon as practicable after the occurrence of the alleged fraudulent acts came to the knowledge of the receiver, then the loss was discovered during the continuance of the bond and "within six months from the * * * retirement of the employee from the service of the employer." And if the bond is to be regarded as having expired upon his death, it also results that the claim of loss was made within the time required. American Surety Co. *v.* Pauly, 170 U. S. 160, 42 L. Ed. 987, 18 S. Ct. 563.

§ 54 (9f) Actions on Bonds.—See post, "Actions and Proceedings to Enforce Liability," § 55.

§ 55. Actions and Proceedings to Enforce Liability—§ 55 (1) Nature and Form—Jurisdiction.—The directors of a bank having been guilty of malfeasance, misfeasance or negligence, an action at law lies in favor of the corporation, while a going concern, for the losses so sustained, or to the assignee, trustee, or whatever officers are charged with winding up its affairs, after it has ceased to be a going concern.[70] Upon the refusal of the corporation or its liquidating officers to sue, the stockholders have their remedy by a suit in equity to compel them to make good the loss, but can not sue at law.[71] To enable the stockholders to sue, it must appear either that proper effort has been made to get the corporation to sue, or that efforts of that kind would have been perfunctory and useless, as would be the case where so many of the directors were involved in guilt that it would be idle to expect them to prosecute themselves.[72] The cashier of a bank, intrusted with the control and custody of its funds, will, in a court of equity be held as a trustee for the bank and may be sued by it in such court, and compelled to account for and pay any loss sustained by it, which was caused by any negligence or wrongful conversion or by any misapplication or use of any of its funds by such cashier in violation of the duties of his trust. The relation of cestui and trustee is sufficient to confer jurisdiction.[73] And even a private unchartered company, associated for the purpose of carrying on business as a bank, though such associations are contrary to law, will be entertained in a court of chancery, in a suit against its cashier, for an account of his agency.[74] The cashier of a bank who has sold its assets, and converted them into cash, must be deemed

70. Nature and form of action—Jurisdiction.—Union Nat. Bank *v.* Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; S. C., 155 Mo. 279, 55 S. W. 1133; Higgins *v.* Tefft, 4 App. Div. 62, 38 N. Y. S. 716, 74 N. St. Rep. 100; Paine *v.* Barnum (N. Y.), 59 How. Prac. 303; Wright *v.* Davenport, 66 Pa. 148; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Deaderick *v.* Bank, 100 Tenn. 457, 45 S. W. 786; Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728.

71. Same—Stockholders may sue in equity.—Allen *v.* Curtis, 26 Conn. 456; Smith *v.* Hurd (Mass.), 12 Metc. 371, 46 Am. Dec. 690; Smith *v.* Poor, 40 Me. 415, 63 Am. Dec. 672; Union Nat. Bank *v.* Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; S. C., 155 Mo. 279, 55 S. W. 1133; Winter *v.* Baker (N. Y.), 34 How. Prac. 183; Taylor *v.* Miami Exporting Co., 5 O. 162, 22 Am. Dec. 785; Meisse *v.* Loren, 4 N. P. 100, 6 O. Dec. 258; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Deaderick *v.* Bank, 100 Tenn. 457, 45 S. W. 786; Shea *v.* Maxville, etc., R. Co., 65 Tenn. (6 Baxt.) 277; Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398; Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728; Zinn *v.* Mendel, 9 W. Va. 580. See, also, ante, "Right of Stockholders to Enforce Liability," § 54 (5).

72. Same—Demand and refusal of corporation to sue.—Hersey *v.* Veazie, 24 Me. 9, 41 Am. Dec. 364; Smith *v.* Poor, 40 Me. 415, 63 Am. Dec. 672; Robinson *v.* Smith (N. Y.), 3 Paige 222, 24 Am. Dec. 212; Cunningham *v.* Pitts, 5 Paige (N. Y.) 607; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

73. Cashier may be sued in equity.—Merchants' Bank *v.* Jeffries, 21 W. Va. 504.

74. Same—Suit by unincorporated company.—Berkshire *v.* Evans, 31 Va. (4 Leigh) 223.

the agent of the board of directors for the purpose of dividing the balance in his hands after paying all claims against the bank among its stockholders; and he can not be charged as trustee by an individual stockholder as holding a portion of such balance for his benefit.[75] And in so far as a bill by a bank against the administrator of its deceased cashier seeks an accounting against the agent, it contains equity.[76] The president of a bank is not such a trustee of its funds as to give equity jurisdiction of a suit against him for their misappropriation.[77]

Duty to Exhaust Remedy against Parties Primarily Liable.—An action may be maintained against trustees of a bank for making a loan without authority of law to borrowers alleged to be worthless and insolvent, without first suing such borrowers, and exhausting all remedies against them.[78]

Statutory Requirement as to Report Finding Insolvency to Have Been Fraudulent.—Where a statute requires the appointment of auditors and authorizes an investigation and trial by the court only upon the report of such auditors that the insolvency was caused by the fraudulent conduct of the directors, there can be no procedure under that provision of the act where the auditors do not report that the insolvency is fraudulent.[79]

Asserting Rights by Means of Set-Off, Counterclaim, etc.—The cause of action which a bank has against its cashier for wrongfully permitting a depositor to overdraw his account is a cause of action arising on contract, within the meaning of the statute regulating counterclaims.[80] But the liability of a director of a bank for misfeasance can not be pleaded as a set-off to an action by him to foreclose a mortgage given by the bank to secure money actually loaned to it.[81]

§ 55 (2) Limitations and Laches.—While the directors are some-

75. Cashier not chargeable by individual stockholder, when.—Brown *v.* Adams, Fed. Cas. No. 1986, 5 Biss. 181.

76. Accounting against estate of cashier.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

77. Suit against president as trustee.—In re McMullins' Appeal, 131 Pa. 370, 18 Atl 1056.

78. Duty to exhaust remedies against parties primarily liable.—Paine *v.* Barnum (N. Y.), 59 How. Prac. 303.

79. Statutory requirement as to report finding insolvency to have been fraudulent.—Wright *v.* Davenport, 66 Pa. 148.

Act April 16, 1850, § 40, provides that, if the insolvency of a bank be occasioned by the fraudulent conduct of the directors, they shall be liable to the stockholders. Section 42 provides that upon assignment the directors shall file with the prothonotary a statement of the affairs of the bank. Sections 43 and 44 provide that the court shall thereupon appoint auditors to investigate and report, and, in case they report that the insolvency was fraudulent, it shall be their duty to ascertain and report the amount due from the several directors. Section 45 provides that the court shall thereupon investigate the report, and shall determine whether the insolvency was fraudulent or otherwise; or they may direct an issue to try the fact of fraudulent insolvency. Held that, where the auditors do not report that the insolvency is fraudulent, and the amount due from the directors, the court has no power to proceed under § 45. Wright *v.* Davenport, 66 Pa. 148.

80. Asserting rights by means of counterclaim or set-off.—Board *v.* Estate, 12 Mo. App. 104.

81. Using director's liability for misfeasance as an off-set against him.—Ahl *v.* Rhoads, 84 Pa. 319.

times said to be trustees, so far as the statute of limitations is concerned they can not be held to be more than implied trustees, and the statutes of limitation run in their favor, the limitation applicable to the suit of the corporation at law being equally applicable to the suit of the stockholder upon the corporate right of action in equity.[82] In Ohio, however, it is held that the managers of a savings bank stand in the relationship of trustees to the depositors, so that the statute of limitations will not be a bar against a charge of mismanagement on their part.[83] In the case of fraud, the cause of action accrues and limitations and laches begin to run only from the time of its discovery.[84] Where a stockholder of a bank

82. Limitations and laches.—Godbold *v.* Branch Bank, 11 Ala. 191, 46 Am. Dec. 211; Neal *v.* Moultrie, 12 Ga. 104; Williams *v.* Halliard, 38 N. J. Eq. 373; Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 1 N. E. 663; In re Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684; Hughes *v.* Brown, 88 Tenn. 578, 13 S. W. 286, 8 L. R. A. 480; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

An action by a shareholder of a bank against its directors, to recover for inattention and mismanagement, resulting in alleged losses from loans made by the cashier to a firm of which he is a member, though brought in equity, is to enforce a legal right, and is subject to the operation of the statute of limitations. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

The liabilities of the directors of the Commercial Bank at Macon, created by the eighth rule of the bank charter, which limits the amount of indebtedness the incorporation may incur, being statutory, are not barred until after 20 years. Neal *v.* Moultrie, 12 Ga. 104.

A complaint for the benefit of the stockholders of an insolvent bank, against the directors, charging them with liability for property of the bank lost and stolen through their misconduct, is in the nature of an equitable action, calling them to account as trustees, and the limitation of such an action is ten years, under Code N. Y., § 388. Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 1 N. E. 663.

83. Same—In Ohio.—Meisse *v.* Loren, 4 N. P. 100, 6 O. Dec. 258.

84. When statute begins to run—Accrual of action.—McGregor *v.* Witham, 126 Ga. 702, 56 S. E. 55; First Nat. Bank *v.* Strait, 75 Minn. 396, 78 N. W. 101.

An instruction that it is a constructive fraud on a bank for its cashier, president, or any director having knowledge of a cause of action or a demand in its favor, against himself, not to make known the existence of such cause of action to the governing body of the bank, and that the duty of such bank officer requires, in the present case, that he communicate to such body the facts relating to the demand or cause of action, and, if he fails to do so, the right of action of the bank does not accrue, so as to start limitations in motion, until such information is obtained by the governing body, while perhaps too broad as an abstract proposition of law, is correct as applied to a case where the president and the cashier of a national bank were jointly liable to the bank on a firm note which, it was understood between themselves, the cashier should take care of, where the only way it was paid was by the individual note of the cashier, of which the president did not notify the board of directors, the governing body. First Nat. Bank *v.* Strait, 75 Minn. 396, 78 N. W. 101.

Where the president of a bank, who has been in the habit of helping the bank to make loans, knowing that it relied on his advise, sold it a note with knowledge that the maker was embarrassed, if not insolvent, and that the indorsers were not financially strong, but representing to the bank that he believed both maker and indorsers to have the best of credit, the bank is not guilty of laches in not tendering a return of the note for one and one-half years after it was due and unpaid, where it did not know of the insolvency of the maker and indorsers, or have reason to suppose that defendant knew of it, until shortly before the tender was made. Hicks *v.* Steel, 126 Mich. 408, 85 N. W. 1121.

sues to set aside a sale of mining stock by the bank's trustee to some of its directors, for fraud, laches on the part of the plaintiff in not discovering the fraud by examination of the bank's books can not be set up by the directors, who have purchased the stock and received the dividends therefrom equal to the purchase price, since they occupy a fiduciary relation towards the plaintiff, and are in no way injured by his delay in discovering such facts.[85] And where there is a conspiracy upon the part of a president and a cashier to defraud the bank and misappropriate its funds, an action instituted within the statutory period from the time of the actual misappropriation of the funds and carrying out of the conspiracy is well brought, notwithstanding it would be barred counting the time elapsed since the conspiracy was formed.[86] Where in an action to recover the penalty of an official bond given by the cashier the question arises as to which of two statutes of limitation is applicable, such question becomes immaterial upon its being made to appear that the misappropriation occurred within less than the shorter period next preceding the institution of the suit.[87]

§ 55 (3) Parties.—Parties Plaintiff.—The bank is a proper party to bring an action against its president for damages resulting from his making an illegal loan of its funds.[88] Where loss has resulted from the negligence of the directors of a bank, the bank or its assignee, and not the depositors, is the proper party plaintiff, unless it plainly appears that a cause of action exists and that the bank refuses to bring the action.[89] For losses resulting from the malfeasance, misfeasance, or negligence of directors, it has been seen that the bank or its assignee may maintain an action at law, and that upon the refusal of the bank or its assignee to sue, the stockholders have their remedy by suit in equity;[90] and in such a bill they may join individual stockholders with the corporation, may pray for an account of stock and funds, and for restoration of whatever may have been fraudulently withdrawn from the common stock.[91]

Parties Defendant.—Where several officers of a bank wrongfully permit certain overdrafts, the bank may maintain an action for loss so sustained against all of them, or against one or more.[92] The president of a bank is not a necessary party defendant to an action against two of its directors to recover damages for the misappropriation of the bank's funds

85. Laches not available to directors making fraudulent purchase of stock.—Morgan *v.* King, 27 Colo. 539, 63 Pac. 416.

86. Running of time against action for conspiracy.—McGregor *v.* Witham, 126 Ga. 702, 56 S. E. 55.

87. Which of two statutes applicable.—Elam *v.* Commercial Bank, 86 Va. 92, 9 S. E. 498.

88. Bank the proper party plaintiff.—Seventeenth Ward Bank *v.* Smith, 51 App. Div. 259, 64 N. Y. S. 888.

89. Same—Where bank refuses to sue.—Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

90. Stockholders sue in equity.—See ante, "Nature and Form," § 55 (1). See, also, Deaderick *v.* Bank, 100 Tenn. 457, 45 S. W. 786.

91. Same—Joinder of other parties.—Taylor *v.* Miami Exporting Co., 15 O. 162, 22 Am. Dec. 785.

92. Joint and several liability of parties defendant.—Western Bank *v.* Coldewey, 120 Ky. 776, 26 Ky. L. Rep. 1247, 83 S. W. 629.

by the president, of which such directors had knowledge, and might have prevented, but which they negligently permitted, aided, and assisted, concealing the same from the stockholders.[93] Upon a bill by a stockholder the corporation itself should in all cases be made a party defendant, together with the delinquent officials and any objecting or nonconsenting stockholders.[94] Where a director of an insolvent bank has been appointed receiver, and stockholders obtain leave to sue the directors for misconduct, it is proper to allow such action to be brought, joining the receiver and the corporation as parties defendant.[95]

§ 55 (4) Pleadings.—Action for Conversion of Funds.—In a suit by a bank against its cashiers for conversion of its funds, the allegation that the money was converted to the use of the defendants is sufficient to warrant the introduction of evidence showing the purpose for which the money was used.[96] It is immaterial to whom the cashier and assistant cashier of a bank gave money belonging to it, which they are sued for converting to their own use, or for what they spent it, or whether they loaned it to an insolvent or a going corporation or to a private person, and allegations of that character are subject to be stricken from the complaint.[97]

Failure to Safely Keep Funds.—A petition in an action by a banking corporation against its officers, the vice president and cashier, setting forth the character of the plaintiff and its business, that it made ample provisions for the safe keeping of its funds, by vault and safe locks and time locks, of approved strength and pattern, the official character and employment of defendants, and the acceptance of the duties and responsibilities by each of his respective office, that it was their duty, and the duty of each of them, to have charge of and keep the money of the bank, and to see to it that at proper times it was kept in the safe and vault and behind the locks and bolts and bars provided for its reception, and averring that they failed in this, that they did not use the equipment provided for the safety of the money and by the use of which it would have been preserved, and that by reason of this neglect to do so the money disappeared, and has never been returned or its loss made good, states a cause of action against such officers.[98]

93. **President actually misappropriating funds need not be joined in action against directors.**—Smith *v.* Rathbun (N. Y.), 22 Hun 150.

94. **Corporation should be made defendant upon bill in equity.**—Hersey *v.* Veazie, 24 Me. 9, 41 Am. Dec. 364; Smith *v.* Poor, 40 Me. 415, 63 Am. Dec. 672; Robinson *v.* Smith (N. Y.), 3 Paige 222, 24 Am. Dec. 212; Cunningham *v.* Pitts (N. Y.), 5 Paige 607; Taylor *v.* Miami Exporting Co., 5 O. 162, 22 Am. Dec. 785; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625. See ante, "Right of Stockholders to Enforce Liability," § 54 (5).

95. **Joinder of receiver and corporation.**—Weslosky *v.* Quarterman, 123 Ga. 312, 51 S. E. 426.

96. **Petition in action for conversion of funds.**—First Nat. Bank *v.* Gaddis, 31 Wash. 596, 72 Pac. 469.

97. **Allegations as to use to which misappropriated funds applied.**—First Nat. Bank *v.* Gaddis, 31 Wash. 596, 72 Pac. 460.

98. **Alleging failure to safely keep funds.**—Kalb *v.* American Nat. Bank, 11 O. C. D. 437, 21 O. C. C. 1, affirmed in 65 O. St. 566, 63 N. E. 1129.

For Making Loans on Insufficient Security.—An allegation, in an action against directors of a bank, that, contrary to the statute requiring them not to make loans on realty for over half its value, they loaned money on land which, on foreclosure, brought less than half the loan, is insufficient. It should state the land was worth less than twice the loan when the loan was made.[99]

Refusing to Permit Revenue Agent to Examine Checks.—The declaration, in an action against a cashier for refusing to allow a collector to examine its paid bank checks, must allege that the checks were not duly stamped when made, signed and issued.[1]

Action on Official Bond.—In actions to recover the penalty of official bonds given by bank officers to secure the faithful performance of their duties, where there has been a misappropriation or misapplication of the funds of the bank, the evidence must of necessity be general; therefore, an attempt to state the breaches of the condition contained in the bond with exactness of detail would lead to great prolixity of pleading, and so some generality of statement, in the interest of justice, must be permitted.[2] A demurrer to the declaration will not be sustained on the ground that the assignment of breaches is not specific enough, where it appears that most of the books and papers which could shed light upon the transactions under investigation have been destroyed, and whatever information existed outside of these sources is in the possession of the adverse party. In such case the assignment of breaches is as specific as practicable under the circumstances.[3] The declaration need not set forth the particular persons from whom money was received, nor the sums received from each, nor the time when the breaches were committed, if it appears that they occurred during the continuance of the defendant in his office.[4]

99. **Alleging loan on insufficient security.**—Colorado Sav. Bank *v.* Evans, 12 Colo. App. 334, 56 Pac. 981.

1. **Refusal to permit revenue agent to examine books.**—United States *v.* Mann, 95 U. S. 580, 24 L. Ed. 531.

Under § 3177 of the Revised Statutes, authorizing any collector, deputy collector, or inspector, to enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, within his district, so far as it may be necessary for the purpose of examining said articles or objects, the United States brought suit against the cashier of a national bank, having charge of its place of business, where were kept checks drawn upon and paid by it, who refused to permit the collector of the proper district to examine said bank checks. Held, that the declaration was bad in not alleging that the paid checks on the bank remaining in its possession were not duly stamped at the time they were made, signed, and issued. United States *v.* Mann, 95 U. S. 580, 24 L. Ed. 531.

2. **Alleging breaches of bond.**—Allison *v.* Farmers' Bank, 27 Va. (6 Rand.) 204; Caldwell *v.* Farmers' Bank, 27 Va. (6 Rand.) 241; Elam *v.* Commercial Bank, 86 Va. 92, 9 S. E. 498. See, also, Durkin *v.* Exchange Bank (Va.), 2 Pat. & H. 277.

3. **Same—Where books destroyed—Evidence in possession of adverse party.**—Elam *v.* Commercial Bank, 86 Va. 92, 9 S. E. 498; Allison *v.* Farmers' Bank, 27 Va. (6 Rand.) 204; Caldwell *v.* Farmers' Bank, 27 Va. (6 Rand.) 241.

4. **Averments as to time, amount of funds received, etc.**—Allison *v.* Farmers' Bank, 27 Va. (6 Rand.) 204.

In an action of debt upon an official bond of a bank accountant, a demurrer to the declaration was overruled although it did not state in a single instance the time or place, names or

Same—Allegation of Damage.—In an action for the penalty of an official bond of a bank accountant conditioned for the faithful discharge of the duties of his office, it is not necessary to state that in consequence of the refusal of the defendant to pay, the plaintiff sustained damages. In actions of debt, and particularly for the penalty of a bond, the damages are, in general, nominal, and none need be stated unless the plaintiff goes for damages beyond the penalty. It is sufficient if it is stated that an action has accrued to the plaintiffs to demand and have the penalty of the bond. The declaration, in stating the bond, the condition, and the breaches, states all that is necessary to entitle them to their action for the penalty. For the law implies damage from the breach; and it is not incumbent on the party to state what the law implies.[5]

Bill for Accounting.—A bill filed by a bank against its cashier for a settlement of his accounts as such which only alleges that the defendant was such cashier; "that during his term as cashier he lent sundry sums of money to sundry irresponsible persons without the consent of the board of directors of said bank, for which he is liable personally; and that the books and papers and cash items show a large deficiency in the assets of said bank during the said cashier's term" of office; but which contains no averments that the bank sustained any loss by such unauthorized loans; or that the moneys so lent have not been repaid; or that said deficiency in its assets was caused by any act or negligence of such cashier, is clearly insufficient; and a demurrer thereto ought to be sustained, because it presents no cause of action against said defendant.[6] A bill by a bank against an administrator of a deceased cashier for an accounting which avers various claims and demands covering transactions extending over more than seven years, but which does not inform the court or respondent as to the time a liability accrued, except that it was within such period, and which, as to many transactions, gives no other description of the liability or demand than that it was for allowing an overdraft, or for taking insufficient security for a loan, or for making a loan in violation of the by-laws, or without consulting the board of directors, is not sufficiently specific.[7]

Stockholder's Bill.—An action brought by a stockholder of a bank on behalf of himself and other stockholders against his directors, to call them to account for losses and damages sustained by the bank because of misconduct and negligence on their part in the discharge of their duties, is an equitable action wherein the defendants are not entitled, as matter of right, to a trial of the whole issues by jury, and plaintiff need not sepa-

sums of the money which had been misappropriated. Allison *v.* Farmers' Bank, 27 Va. (6 Rand.) 204, cited with approval in Elam *v.* Commercial Bank, 86 Va. 92, 9 S. E. 498.

5. **Averments as to damage.**—Allison *v.* Farmers' Bank, 27 Va. (6 Rand.) 204, followed in Caldwell *v.* Farmers' Bank, 27 Va. (6 Rand.) 241.

6. **Bill for an accounting.**—Merchants' Bank *v.* Jeffries, 21 W. Va. 504.

7. **Same—Description of claims and demands.**—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

rately state and number his causes of action.[8] And in a suit against the president and directors of a bank for negligence in conducting the business of the bank, it is not necessary to allege what particular loss was occasioned by the negligence of a particular officer, or to state who were on the managing board at the time of the particular loss, or to allege all the losses complained of.[9]

Same—Amendments.—While a stockholder of a bank can not maintain an action in his own name against its directors for negligence and malfeasance, without alleging that the bank had refused to bring it, yet an amended complaint, in an action so brought, making the bank a party plaintiff, and alleging that it had been ordered and allowed by the court to be so joined, is not subject to demurrer; since, by demurring, defendant admitted the making of the order, the validity of which could not be determined on demurrer.[10] Where a petition by stockholders against the officers of a bank charges the defendants with embezzlement of the funds of the bank, an amendment, which describes the transaction as a loan, and alleges that it was fraudulent and illegal because one of the defendants left worthless and uncollectible paper in lieu of the money of the bank, and because the loan to said officer exceeded half the capital stock of the bank, contrary to law, does not change the cause of action, but sets forth a cause of action in favor of the receiver of the bank against such officers since the defendants were liable to the bank for money fraudulently appropriated to their own use, if the bank thereby sustained a loss.[11]

Misjoinder of Causes.—In a suit in equity against directors to recover damages for the waste and loss of the corporate assets, caused by the negligence of the directors in the discharge of their official duties, a complaint alleging, as the result of defendant's negligence, that plaintiff's stock became worthless, and that they had also been obliged to pay an assessment imposed by the comptroller of the currency under the national bank act,

8. **Stockholders' bill — Separately stating and numbering causes of action.**—Meisse *v.* Loren (O.), 4 N. P. 100, 6 O. Dec. 258.

9. **Certainty of allegations as to loss.**—Sigwald *v.* City Bank, 74 S. Car. 473, 55 S. E. 109.

In an action by a stockholder under Comp. St. 84, § 56, against directors for losses sustained in consequence of the violation of the banking laws providing that no individual shall be indebted to the bank in a greater amount than ten per cent of its paid-up stock, except for deposits made by the bank, and for indebtedness arising from the purchase of bills of exchange, a declaration alleging that the capital stock of the bank was $150,000, that the directors permitted the bank to advance money to one individual to the amount of $25,000 beyond the sum of $15,000, for which sum he was indebted to the bank at the time, and that by reason thereof the bank did advance to the individual on his obligation $25,000 in excess of ten per cent of the paid-in capital stock, which said indebtedness was not for deposits made by the bank, nor for the purchase of bills of exchange, is sufficient. Buell *v.* Warner, 33 Vt. 570.

10. **Amendment of complaint—Alleging order permitting suit—Demurrer.**—Smith *v.* Rathbun (N. Y.), 22 Hun 150.

11. **Amendment charging fraudulent loan held not to state a new cause of action.**—McGregor *v.* Witham, 126 Ga. 702, 56 S. E. 55.

in order to pay the debts of the bank, is not demurrable on the ground that several causes of action have been improperly united, as special elements of damage are alleged, but only one cause of action.[12] A complaint against two directors to recover damages for the misappropriation of the funds of a national bank by its president, which states that defendants knew of the president's acts, and might have prevented them, but negligently permitted, aided, and assisted him in doing them, is not subject to demurrer on the ground that two causes of action are improperly joined, viz. one for malfeasance, and one for negligence, but states only one cause of action; since it is impracticable to clearly distinguish between the acts which defendants permitted merely and those which aided the president in his wrongdoing.[13]

Motions and Objections to Pleadings.—Where an action by stockholders of a bank against the directors and the receivers, who was one of them, for misconduct, is permitted by the court, and the petition is good against a general demurrer, a motion to vacate permission to sue is properly refused, irrespective of the question whether plaintiff's pleadings are open to objections where that question can be raised by special demurrer.[14] Where the claim upon the bond arises out of the wrongful act of the cashier in certifying his personal check to pay his personal indebtedness to another bank, and the refusal of the other bank to refund the money, the complaint is demurrable, since it shows upon its face that the other bank, in accepting the check, was put upon inquiry as to the authority of the cashier to certify his own check, and that it had no right to charge it against the balance in its hands standing to the credit of the bank on which drawn, and that the right of the drawee bank to recover such balance was not thereby impaired.[15]

12. **Misjoinder of causes.**—Hand *v.* Atlantic Nat. Bank (N. Y.), 55 How. Prac. 231, 9 Abb. N. C. 287.

13. **Same—Alleging malfeasance and negligence.**—Smith *v.* Rathbun (N. Y.), 22 Hun 150.

14. **Motion to vacate permission to sue.**—Weslosky *v.* Quarterman, 123 Ga. 312, 51 S. E. 426.

15. **Complaint showing rights of bank to be unimpaired, demurrable.**—Rankin *v.* Bush, 93 App. Div. 181, 87 N. Y. S. 539.

Plaintiff's complaint alleged that he was receiver of the E. Bank, which had a deposit account with the C. Bank, to which defendant, who was cashier of plaintiff's bank, was indebted on May 5, 1893, in the sum of $15,000 and interest; that on that day defendant gave to the C. Bank his personal check on the E. Bank for the amount of his indebtedness, and wrongfully certified the same as its cashier, his deposit account therein having been overdrawn; that the C. Bank charged the amount of the check to the E. Bank's account, credited it to defendant, and had refused to repay to the E. Bank the sum of $8,000 thereof and interest. Held, that since, if such facts were true, the C. Bank, at the time of accepting the check, was put on inquiry as to defendant's authority to certify the same, and his act in so doing being wrongful and without authority, the E. Bank's title to the deposit against which the check was charged was not impaired thereby, and hence a demurrer to the complaint against defendant and his sureties on his bond for the faithful performance of his duties as cashier, for want of facts, was not frivolous. Rankin *v.* Bush, 93 App. Div. 181, 87 N. Y. S. 539.

§ 55 (5) Evidence, Issues, etc.—Issues.—Where negligence of directors in permitting a false and fraudulent statement of the condition of a bank is the basis of an action against the directors, the plaintiff's right to recover should not be restricted to one instance of negligence, where there are many others in evidence.[16]

Presumption and Burden of Proof.—A director, in a suit between himself and the corporation, or those suing upon the corporate right of action for losses resulting from his alleged negligence, is not presumed to have knowledge of all that is shown by the books of the company. Such presumption applies only to suits between the bank and a stranger.[17] And in an action by a shareholder of a bank against its directors, to recover alleged losses caused by their inattention and mismanagement, the burden is on complainant, not only to prove the losses, but that such losses were the consequence of defendants' negligence.[18] But willful waste or misapplication may be presumed from a failure to pay over and account for funds, rebuttable by evidence of loss by negligence or accident.[19] And where it is conceded in an action on the bond of a bank cashier that certain collateral was embezzled during the term covered by his bond, the burden is on the sureties to show that any part of said collateral was subsequently returned and placed in the files of the bank.[20]

Competency of Witness.—The teller of the bank is competent to testify concerning the handwriting of the president or cashier of such bank.[21]

Admissibility.—In an action against a defaulting president, his ledger account and proof of alleged prior frauds, as well as evidence showing the

16. Issues, restricting grounds of recovery.—Houston *v.* Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699.

17. Presumption of notice or knowledge.—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

The presumption of knowledge attaching to a director which is referred to in the case of Lane & Co. *v.* Bank, 56 Tenn. (9 Heisk.) 419, applies only in suits between the bank and a stranger. The doctrine has never been extended to suits between the bank and its directors. Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Clews *v.* Bardon, 36 Fed. 617; In re Dunham, 25 Ch. Div. 725. The doctrine of the Lane case is carefully limited in Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 28 Am. St. Rep. 625.

18. Burden of proving loss to be due to negligence.—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

19. Waste and loss presumed from failure to account.—Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

The presumption of a willful waste or misapplication of the funds of the bank by the cashier, was a natural conclusion from his failure to pay over or account for the same, and an instruction to that effect is proper, if it is not put to the jury as a presumption incapable of being rebutted by evidence showing a loss by negligence or accident. If such a loss actually occurred, it was incumbent on the cashier to prove it, and his total omission to offer any such proof, which, from the nature of the case, must be more within his own power, than that of the bank, ought to lead the jury to the presumption of the nonexistence of any such negligence, or accidental loss. Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

20. Burden of proving return of embezzled funds.—Fancher *v.* Kaneen (O.), 5 N. P., N. S., 614.

21. Competency of witness.—Hess *v.* State, 5 O. 5, 22 Am. Dec. 767.

extent of his indebtedness to the bank, are all admissible, and objections based upon their admission are not well taken.[22] And where, in an action by a bank against its president to recover damages resulting from his making a loan of bank funds without the collateral required by law, the negligence of the president in making the loan is in issue, and it is error to refuse to admit testimony showing the standing of the securities taken.[23] Where the action is against the estate of the president for negligence in making the loan on worthless collateral, evidence that such collateral, together with other securities, had been accepted by various other bankers as security for loans to the same person, is inadmissible, in the absence of proof as to what estimate was placed on the questionable collaterals, apart from the other securities, in such transactions.[24] Neither is it permissible to show that other banks had made loans to the same party where it is not apparent that any of the collaterals in question were accepted as security for such loans.[25] Where the action is by the bank against a former president and director to recover for moneys lost by his negligence in permitting the cashier to borrow money on inadequate security, the admission of testimony that the loans to the cashier were not read off at meetings of directors subsequent to the loans, and to show that the notes given by the cashier were not reported to the committee on such matters, is proper.[26] It is competent, however, in order to establish a lack of ratification, or to establish negligence on the part of the directors, to show that when they learned of the loan they relied on a statement in the note given by the cashier to the effect that the collateral securing the note was in the hands of defendant.[27] Testimony that the cashier informed the president that he wanted the money to invest in a mining venture is also competent as bearing on the question of the defendant's good faith.[28] Where the charge is that the president or cashier has been guilty of a conversion or misappropriation of the funds, and the issue is whether the transaction whereby the funds were obtained amounted to a conversion or misappropriation, it is error to instruct the jury to consider the fact that the defendant's indebtedness to the bank exceeded ten per cent of its capital;[29] neither is it permissible to show that the corporation to which the defendants loaned the

22. **Admissibility of evidence.**—American Surety Co. *v.* Pauly, 170 U. S. 160, 42 L. Ed. 987, 18 S. Ct. 563.

23. **As to standing of securities taken for loans.**—Seventeenth Ward Bank *v.* Smith, 51 App. Div. 259, 64 N. Y. S. 888.

24. **That securities were accepted by other banks.**—Seventeenth Ward Bank *v.* Smith, 83 App. Div. 64, 82 N. Y. S. 529.

25. **Loans by other banks to the same party.**—Seventeenth Ward Bank *v.* Smith, 83 App. Div. 64, 82 N. Y. S. 529.

26. **As to improper loans permitted by president to cashier.**—Commercial Bank *v.* Chatfield, 127 Mich. 407, 86 N. W. 1015.

27. **Same—Negligence on part of directors.**—Commercial Bank *v.* Chatfield, 127 Mich. 407, 86 N. W. 1015.

28. **Same—Statements by cashier as to purpose for which money wanted.**—Commercial Bank *v.* Chatfield, 121 Mich. 641, 80 N. W. 712.

29. **Amount of defendant's indebtedness to bank as evidence of conversion, bad faith, misappropriation, etc.**—Mohrenstecher *v.* Westervelt, 30 C. C. A. 584, 87 Fed. 157.

money which they are charged with converting to their own use was of a speculative character and without property and unworthy of credit.[30]

Weight and Sufficiency—To Show Mismanagement, Negligence in Supervision and Inspection.—Evidence that a bank's directors, through their committee, examined it twice a year, in the way in which such banks are usually examined, in addition to the examinations by the bank examiner, without discovering the cashier's defalcations, extending over ten years, during all of which time he had an excellent reputation for honesty, was sufficient to sustain a finding that they exercised due care in the management of the bank, though they knew he lost $4,000 in stock speculations four years before they elected him.[31] Nor can the directors of a bank be held liable at the suit of a shareholder for losses alleged to have been caused by their inattention and mismanagement, on proof merely of a large deficit —the difference between the liabilities of the bank including capital stock and the nominal value of all assets, good and bad; especially where it appears that large dividends were paid by carrying large amounts of paper which subsequently turned out as worthless, and real estate taken for debts, which had depreciated in value.[32]

Same—To Prove Negligence in Care and Keeping of Funds.—Where the evidence showed that money disappeared from the vaults of a bank on a certain date, and it appears that the combinations and time locks were not broken or disturbed, and it was also shown that if said locks and combinations had been set, as it was the duty of the officers to set them, it would have been a physical impossibility to secure the money without destroying or breaking the lock, was sufficient, as against the mere assertion of the officers that the doors were closed and the locks adjusted, to sustain a verdict based upon the conclusion that the officers negligently failed to perform that duty.[33] And evidence that the books of a bank kept by the cashier and subordinates showed that a specified amount had been received and had not been accounted for was, in the absence of expiration, prima facie proof that the money to that amount was missing, making the cashier liable therefor under a by-law making him responsible for the moneys of the bank.[34]

Same—Fraud or Negligence with Respect to Loans, Discounts and Overdrafts.—In an action by a bank against one who, when vice president and director, made false representations as to a certain note discounted for his benefit, evidence that defendant represented the maker of

30. **Same—Character of corporation to which funds loaned.**—First Nat. Bank *v.* Gaddis, 31 Wash. 596, 72 Pac. 460.

31. **Sufficiency to show due care in selection and supervision of cashier.**—Ricker *v.* Hall, 69 N. H. 592, 45 Atl. 556.

32. **Inattention and negligence not shown by mere proof of deficit.**—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

33. **To show negligence in care and handling of funds.**—Kalb *v.* American Nat. Bank, 11 O. C. D. 437, 21 O. C. C. 1, affirmed in 65 O. St. 566, 63 N. E. 1129.

34. **Same.**—Rio State Bank *v.* Amondson, 141 Wis. 82, 123 N. W. 634.

the note to be good and the indorser worth $75,000, whereas correspondence between the indorser and defendant tended to show the financial embarrassment of both maker and indorser, was sufficient to call for the submission of plaintiff's case to the jury.[35]

Same—To Show Misappropriation or Conversion.—In an action by a bank to recover money fraudulently paid out by its president by means of drafts, a finding that the president was not a depositor, and that such wrongful appropriation constituted embezzlement, was not nullified by the fact that it was also found that the entries on the bank's books tended to show that the bank was paid for the drafts so drawn.[36] And in an action by a stockholder of a bank to compel an accounting of money received by defendant's intestate, as cashier and liquidator of the bank, the mere fact that a note discounted by the bank appears on its bills receivable book is wholly insufficient to create a personal liability upon intestate, especially after a lapse of ten years from the last payment to the stockholders.[37]

Same—False and Fraudulent Reports and Statements.—Alleged fraud of bank directors in their report of the financial condition of the bank, inducing a sale of the stock thereof, is not proved by the appearance in such report, placed there for the purpose of making it balance, of such items as "unadjusted errors in stocks," etc., "unadjusted errors in loans," etc., "unadjusted errors in cash paid," etc., "unadjusted errors in real estate," which items the commissioner of banking mistakenly treated as assets and reported the bank sound, when in fact the statement of the directors showed that its capital was impaired.[38]

Variance.—In a suit for an accounting against the administrator of a deceased cashier, based on wrongful acts as to loans, discounts, and overdrafts, it was alleged that a great number were made or allowed by him to certain parties named, for certain amounts, without fixing any dates or otherwise identifying them, while the proof showed losses, discounts, overdrafts, etc., of different amounts, and several times to different parties, and in a number of instances the wrongful act alleged was the making of a loan to a certain person, and the taking of notes therefor without sufficient security, while the proof showed that the transactions alleged were not a

35. **False representations as to securities for loans.**—St. Johns Nat. Bank *v.* Steel, 135 Mich. 165, 97 N. W. 704.

Evidence held to conclusively show that a loss to a bank on account of overdrafts allowed by its deceased cashier, whose administrator was sued therefor, was the fault of the bank or its officers after his death. Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

36. **To show misappropriation and embezzlement.**—Lamson *v.* Beard, 36 C. C. A. 56, 94 Fed. 30, 45 L. R. A. 822.

37. **Bills receivable as evidence of misappropriation.**—Kelley *v.* Foster, 55 Hun 611, 8 N. Y. S. 901, 30 N. Y. St. Rep. 353, 5 Silvermail 476, affirmed in 132 N. Y. 546, 30 N. E. 370.

Evidence examined, and held insufficient to show either a wrongful taking or a conversion of the funds of a bank by its cashier and assistant cashier. First Nat. Bank *v.* Gaddis, 31 Wash. 596, 72 Pac. 460.

38. **Sufficiency to show false and fraudulent report.**—Penfold *v.* Charlevoix Sav. Bank, 140 Mich. 126, 103 N. W. 572.

loan, but the closing up of a previous indebtedness of such person to the bank, by notes and security, or making a past-due and existing indebtedness more secure, by extending the time of payment and taking notes and collateral security. It was held, that the variances were material, though a mere difference in the amount in any transaction would not be if it was shown to be the same.[39]

§ 55 (6) Trial.—Province of Court and Jury.—In an action against a bank president for negligence in verifying a false report to the superintendent of banking, it is a question for the jury whether he was negligent in failing to see for himself the securities listed therein at the time he made the verification.[40] And where a bank president, who, while in general charge of the bank business, has permitted moneys to be drawn from the bank without security by a person known by him to be irresponsible, and with whom the president was interested in the business for which the money was obtained, is sought to be held personally responsible to the bank for such moneys on the ground of a breach of trust, the question as to the effect to be given the long silence of the directors of the bank after the entry upon the bank books of a charge to the nominal borrower is one of ratification, which should be submitted to the jury.[41]

Instructions.—Instructions in this class of cases are subject to the principles applicable to instructions in general. They should be applicable to the pleadings and evidence, and in addition to stating the applicable principles in a correct manner they should present the issues and the contentions of each party based thereon fairly and without omitting any that may be material to the cause of either party.[42]

39. **Variance, as to amounts of loans, discounts and overdrafts.**—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

40. **Province of court and jury.**—Davenport *v.* Prentice, 126 App. Div. 451, 110 N. Y. S. 1056.

41. **Same—Knowledge of directors—Ratification.**—First Nat. Bank *v.* Reed, 36 Mich. 263.

42. **Instructions.**—Commercial Bank *v.* Chatfield, 121 Mich. 641, 80 N. W. 712; S. C., 127 Mich. 407, 86 N. W. 1015.

Where defendant, in an action by a bank against one who had been its president to recover for money lost by reason of loans negligently made to the cashier, claims that the loans were made in the usual course of business, and were known to the other directors, and that they made no dissent, and that he acted in good faith, a requested instruction that, if the president consented to the cashier's taking the money on his note, with certain collateral, and that such collateral was not, in the exercise of ordinary judgment, believed by the president to be good security for the amount of the loan, then they should find a verdict for plaintiff, is properly refused, as it ignores defendant's claim that the loan was made in the usual course of business, and that the other directors also knew of the loan, and were as negligent as defendant. Commercial Bank *v.* Chatfield, 121 Mich. 641, 80 N. W. 712.

In an action by a bank against a former president and director to recover for moneys lost by his negligence in permitting the cashier to borrow on inadequate security, the court charged that the facts that the notes were read off at meetings of the directors, and the statement made that defendant held the collateral, and defendant sat by, and said nothing, did not render him liable for the money taken on the loan, but that, if defendant had no valid security, or none at all, and gave the board no information in regard to it, but allowed them to

Judgment—Amount of Recovery.—On a cashier's bond, the recovery against the sureties is limited to the penalty.[43]

Same—Application of Payments—Interest.—Partial payment having been made by the sureties (subject to all questions), the application of these payments was made by deducting them from the penalty of the bond, and allowing interest on the balance thus relating from the commencement of the suit, there having been no previous demand of the penalty, or acknowledgment that the whole was due. But interest was refused to the sureties on the payment.[44]

§ 56. Liability of Directors and Officers to Third Persons—§ 57. —— Nature and Extent—§ 57 (1) In General—§ 57 (1a) Affirmative View.—Appointment of receiver to enforce liability, see post, "Appointment and Removal of Receiver," § 77 (1). As to stockholders in general, see ante, "Liability for Debts and Acts of Bank," § 46, et seq.

Fiduciary Relation of Directors—Quasi Trustees.—Upon the question of the personal liability of the directors of a bank to depositors and creditors for losses resulting from their negligence and mismanagement of the bank's affairs, there is a direct conflict, not to say confusion, of authority. According to the one view the relation of the directors of a bank to its depositors and creditors is confidential and fiduciary,[45] or that of trustees to cestuis que trustent,[46] at least, in the sense that every agent entrusted

believe he had collateral, which they had a right from the statement made in the board to believe proper collateral, then he might be liable; that when the statement was made to the board by the cashier that the collateral was in the hands of the president, and the president assented, it was not unreasonable for the members to assume that he held proper collateral. Held, that the instruction was proper. Commercial Bank *v.* Chatfield, 127 Mich. 407, 86 N. W. 1015.

43. **Recovery limited to penalty.**—McGill *v.* Bank (U. S.), 12 Wheat. 511, 6 L. Ed. 711; Farrar *v.* United States (U. S.), 5 Pet. 373, 8 L. Ed. 159; Leggett *v.* Humphreys (U. S.), 21 How. 66, 16 L. Ed. 50.

44. **Application of payments—Interest.**—McGill *v.* Bank (U. S.), 12 Wheat. 511, 6 L. Ed. 711.

45. **Fiduciary relation of directors.**—Cassidy *v.* Uhlmann, 27 App. Div. 80, 50 N. Y. S. 318, judgment reversed in 163 N. Y. 380, 57 N. E. 620, 79 Am. St. Rep. 596.

46. **Same.**—Trustees *v.* Bosseiux, in 4 Hughes 387, 3 Fed. 817; Delano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Elliott *v.* Farmers' Bank, 61 W. Va. 641, 57 S. E. 242; Lamb *v.* Laughlin, 25 W. Va. 300; Lamb *v.* Cecil, 28 W. Va. 653; Lamb *v.* Pannell, 28 W. Va. 663.

"Bank directors are not mere agents like cashiers, tellers and clerks. They are trustees for the stockholders, and as to their dealings with the bank, they not only act for it and in its name, but in a qualified sense, are the bank itself. It is the duty of the board to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. The community have the right to assume that the directory does its duty, and to hold them personally liable for neglecting it. Their contract is not alone with the bank. They invite the public to deal with the corporation, and when any one accepts their invitation he has the right to expect reasonable diligence and good faith at their hands; and if they fail in either, they violate a duty they owe not only to the stockholders, but to the creditors and patrons of the corporation." Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592.

with the management of the affairs of another is a mandatory or trustee for such other.[47]

Errors of Judgment and Mistakes of Fact.—As such agents or trustees, directors are not chargeable with losses resulting from any mere errors of judgment or mistakes of fact, committed in good faith while in the performance of their duties, unless such errors and mistakes result from the want of reasonable and ordinary care in forming their judgment, or from ignorance of facts of which they could not have been ignorant had they exercised ordinary care in discharging the functions of their office.[48]

Held to Reasonable Capacity—Ordinary Care and Diligence.—But while directors are not responsible for losses resulting from mistakes of fact and mere errors of judgment, they owe to the corporation reasonable capacity, scrupulous good faith, and the exercise of their best judgment; and in accepting positions as directors they must be taken as holding themselves out as possessed in a fair degree of the knowledge requisite for the performance of the duties which they have assumed, and as undertaking to discharge those duties with ordinary care and diligence. They are not mere figure heads but must attend to the duties incident to their position, and for a failure to do so, they may render themselves personally liable to third persons, not only for acts and omissions so grossly wrong as to evidence a want of the necessary knowledge for the performance of their duties, or to warrant the imputation of fraud and deceit or gross negligence, but for losses resulting from the failure to exercise that degree of care and diligence which men of ordinary prudence would exercise in like concerns of their own.[49] In some few cases it has been held that inasmuch as directors ren-

47. **Same.**—Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866; In re Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684.

48. **Errors of judgment and mistakes of fact.**—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Witters *v.* Sowles, 31 Fed. 1; Godbold *v.* Branch Bank, 11 Ala. 191, 46 Am. Dec. 211; Smith *v.* Prattville Mfg. Co., 29 Ala. 503; Neall *v.* Hill, 16 Cal. 146; Percy *v.* Millaudon (La.), 8 Mart. (N. S.) 68; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Caldwell *v.* Bates, 118 N. C. 323, 24 S. E. 481; Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866; Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; North Hudson, etc., Ass'n *v.* Childs, 82 Wis. 460, 52 N. W. 600; Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

The officers of an insolvent national bank can not be held personally responsible for losses on loans and discounts made in good faith simply because in the light of subsequent events what then seemed to be a good loan turns out to have been an error of judgment. Witters *v.* Sowles, 31 Fed. 1.

49. **Reasonable capacity—Ordinary care and diligence.**—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Corbett *v.* Woodward, Fed. Cas. No. 3223, 5 Sawy. 403; Trustees *v.* Bosseiux, 4 Hughes 387, 3 Fed. 817; Wheeler *v.* Aiken County, etc., Sav. Bank, 75 Fed. 781; Foster *v.* Bank, 88 Fed. 604; Godbold *v.* Branch Bank, 11 Ala. 191, 46 Am. Dec. 211; Delano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81; S. C., 17 Ill. App. 531; Brannin *v.* Loving, 82 Ky. 370, 6 Ky. L. Rep. 328; Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Dunn *v.* Kyle, 77 Ky. (14 Bush.) 134; Percy *v.* Millaudon (La.), 8 Mart. (N. S.) 68; Bank *v.* Hill, 56 Me. 385, 96 Am. Dec. 470; Baxter *v.* Coughlan, 70 Minn. 1, 72 N. E. 797; Wolf *v.* Simmons, 75 Miss.

der their services gratuitously, they are not to be held to that degree of responsibility which is exacted of bailees for hire; in other words, that they are held to the exercise of only slight care, and are responsible for only gross negligence.[50] On principle as well as authority, however, there can be no doubt that directors are held to the exercise of ordinary care and diligence, and that they are responsible for losses resulting from their failure to exercise that degree of care, which may be defined to be such diligence as ordinarily prudent men would exercise in conducting the affairs of a moneyed institution of like character;[51] and even in some of the cases holding that they are responsible only for fraud or gross negligence, it is

539, 23 So. 586; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Caldwell *v.* Bates, 118 N. C. 323, 24 S. E. 481; Williams *v.* Halliard, 38 N. J. Eq. 373; Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866; Cassidy *v.* Uhlmann, 170 N. Y. 505, 63 N. E. 554; Hun *v.* Carey, 82 N. Y. 65, 59 How. Prac. 439, 37 Am. Rep. 546; Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Scott *v.* Depeyster (N. Y.), 1 Edw. Ch. 513; Robinson *v.* Smith (N. Y.), 3 Paige 222, 24 Am. Dec. 212; Conant, etc., Co. *v.* Reed, 1 O. St. 298; In re Spering's Appeal, 71 Pa. 11, 10 Am. Rep. 684; Swentzel *v.* Penn Bank, 147 Pa. 140, 23 Atl. 405, 15 L. R. A. 305; 30 Am. St. Rep. 718; In re Warner's Appeal (Pa.), 7 Atl. 216, 1 Sad. 310; Shea *v.* Mabry, 69 Tenn. (1 Lea) 319; Vance *v.* Phœnix Ins. Co., 72 Tenn. (4 Lea) 385; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Elliott *v.* Farmers' Bank, 61 W. Va. 641, 57 S. E. 242.

50. Cases holding directors to exercise of only slight care.—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Union Nat. Bank *v.* Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; S. C., 155 Mo. 279, 55 S. W. 1133; Swentzel *v.* Penn Bank, 147 Pa. 140, 23 Atl. 405, 15 L. R. A. 305, 30 Am. St. Rep. 718; In re Warner's Appeal, 147 Pa. 140, 23 Atl. 405, 15 L. R. A. 305, 30 Am. St. Rep. 718; North Hudson, etc., Ass'n *v.* Childs, 82 Wis. 460, 52 N. W. 600; Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

There is no doubt that trustees are liable for gross negligence and inattention of their duties. Williams *v.* Halliard, 38 N. J. Eq. 373; Robinson *v.* Smith (N. Y.), 3 Paige 322, 24 Am. Dec. 212.

For the mere failure of bank directors to exercise ordinary care in managing the bank's affairs, whereby the bank sustains loss and becomes insolvent, such directors are not liable to general creditors of the bank in a suit by them. Union Nat. Bank *v.* Hill, 148 Mo. 380, 71 Am. St. Rep. 615, 49 S. W. 1012; S. C., 155 Mo. 279, 55 S. W. 1133.

A director of a bank, whose services are gratuitous, and whose duties are to attend the bank once or twice a week to assist in discounting paper, to see how much money there is to loan, and once or twice a year to count the cash on hand, and examine the bills receivable and securities to see whether they correspond with the statement furnished by the officers, does not owe the creditors of the bank such care as a reasonably prudent man exercises in his own business, but is amenable only for fraud, or for such gross negligence as amounts to fraud. Swentzel *v.* Penn Bank, 147 Pa. 140, 23 Atl. 405, 15 L. R. A. 305, 30 Am. St. Rep. 718.

Directors of banks and other moneyed corporations hold the relation to stockholders, depositors, and creditors of trustees to cestuis que trustent, and as such are personally responsible for frauds and losses resulting from gross negligence and inattention to the duties of their trust. Mutual, etc., Sav. Bank *v.* Bosseiux, 4 Hughes 387, 3 Fed. 817.

51. On principle and authority.—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Percy *v.* Millaudon (La.), 8 Mart. (N. S.) 68; Bank *v.* Hill, 56 Me. 385, 96 Am. Dec. 470; Williams *v.* Halliard, 38 N. J. Eq. 373; Hun *v.* Carey, 82 N. Y. 65, 59 How. Prac. 439, 37 Am. Rep. 546; Scott *v.* Depeyster (N. Y.), 1 Edw. Ch. 513; Robinson *v.* Smith (N. Y.), 3 Paige 222, 24 Am. Dec. 212.

stated that gross negligence consists in the failure to exercise ordinary care and diligence, or the absence of that diligence which ordinarily prudent men would exercise in the conduct of a like business.[52]

Same—What Constitutes Ordinary Care and Diligence, or the Want Thereof.—As to what constitutes ordinary care and diligence or the want thereof depends upon the subject to which the doctrine is applied, and each case must, generally, be determined in view of all the circumstances,[53] and a few illustrations are given in the footnotes.[54] Still there

52. Failure to exercise ordinary care held to be gross negligence.—Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Dunn *v.* Kyle, 77 Ky. (14 Bush) 134; Hun *v.* Carey, 82 N. Y. 65, 59 How. Prac. 439, 37 Am. Rep. 546.

53. Want of ordinary care and diligence—How determined.—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Percy *v.* Millaudon (La.), 8 Mart. (N. S.) 68; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725.

54. Illustrations.—Where the bank was run in two departments, as a savings bank and a commercial bank, the directors were not guilty of negligence in placing certain bonds belonging to the savings side with a New York bank to enable the bank to draw on New York when necessary, which bonds the defaulting cashier afterwards pledged to raise money. Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

In an action by depositors against the directors personally for loss occasioned by a defaulting cashier, who owned a one-fifth interest, and was the leading spirit, of recognized ability, and as was supposed of the highest integrity, it appeared that for nine years he had been making false entries, and had embezzled a large amount; that the services of the directors were gratuitous; that, at the merger of an old bank in a new one, no new books had been opened, so that the cashier was able to conceal his former defalcations; but there was nothing to excite suspicion, the frauds being perpetrated by false entries, which made the weekly statements apparently correct; that the duties of cashier, bookkeeper, and teller were all performed by the cashier. Held, that the directors were not liable. Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

A bank president, abetted by the cashier and several clerks, embezzled almost all the funds of the bank, and concealed the fraud by false entries in the books. His statements to the directors from time to time showed the bank to be in good condition. No fraud was discoverable in any of the books except the individual ledger, which, by a rule of the bank conforming to a custom largely prevalent, the directors were not allowed to see. The directors were among the heaviest stockholders, and at the first suspension they raised nearly $300,000 on their individual credit to enable the bank to resume payment. Held, that the directors were not guilty of gross negligence. Swentzel *v.* Penn Bank, 147 Pa. 140, 23 Atl. 405, 15 L. R. A. 305, 30 Am. St. Rep. 718.

The president of a bank misappropriated its funds, and overdrew his accounts, and a brother of the president, and corporations of which the officers and directors were also officers, largely overdrew their accounts, and were loaned large sums by the bank with little or no security, though such borrowers were irresponsible, and another borrower was permitted to withdraw his security. The directors, though required to meet weekly, met but two or three times a year, and never caused the books to be examined, nor called for statements of accounts with other banks. The capital of the bank was small, and much of it was not paid up, and the paid-up portion was treated as a loan. The bank, on suspension, was able to pay but ten per cent on the deposits. Held, that though the directors were ignorant of the affairs of the bank, and were not guilty of bad faith, they were guilty of such negligence as rendered them liable to the depositors. Marshall *v.* Farmers', etc. Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

An insolvent bank's charter directed that its affairs be managed by directors, who should make quarterly statements of the bank's actual condition; and the by-laws required them to ex-

are a few general principles particularly applicable to cases of this character. Thus it may be quite true that since directors receive no compensation for their services, and since the benefits derived by them from the profits of the bank benefit them only in their capacity as stockholders, their liability is not to be measured by that imposed upon the president and cashier or other salaried officers who receive compensation for their services and who are charged with conducting the actual details of the business. The degree of care is the same in each case, but ordinary care does not require a director to give as much time and attention to the business of the bank as the same degree of care would require of the president and other salaried officers.[55] The customs and methods of the community in which a banking business is done may be, for such community, a standard of prudence and diligence by which the responsibility of the bank officers and directors at common law is to be tested; and if there has been a reasonable conformity to these, and absolute good faith and honesty of purpose, it would be unjust to hold them to a personal accountability for losses sustained through loans and investments which time has shown to have been imprudent and ill-advised.[56]

Same—Same—Leaving Management to Officers and Agents—Knowledge of Irregularities.—Directors can not, however, escape responsibility by negligently entrusting to others matters which it is their duty to perform in person, or concerning which it is their duty to be informed. Ordinary care and prudence in the administration of the affairs of the bank includes something more than officiating as mere figure heads; and while under the law they are entitled to commit the banking business to duly

amine the bank every three months. The insolvent bank had a correspondent bank, from which the former's cashier abstracted large sums by drawing checks, and entering them on the insolvent's books for less amounts, by drafts which were never credited, and by overcharges and false charges against the correspondent bank. Such peculations continued for several years without detection. The directors trusted the correctness of the correspondent's accounts entirely to the cashier, and no inquiry was made as to any possible discrepancy. An examination and comparison of the accounts with the correspondent would have revealed the defalcations. Held, sufficient to show that the perpetration of such frauds was the consequence of the directors' neglect, rendering them liable in an action by the bank's receiver. Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120.

The duties of trustees of an unincorporated bank organized under an agreement that the affairs should be under the control of a board of trustees, who pledged themselves to an upright discharge of their duties without being responsible for any loss, except from willful misconduct, and requiring the investment of deposits, partake more of the character of ordinary trustees than of bank directors, and where they for over two years paid no attention to the business, and failed to invest the deposits, but deposited them with a banking firm, known by a trustee to have gone into the stock brokerage business, and the depositors sustained a loss in consequence, the trustees were liable. Holmes *v.* McDonald, 226 Ill. 169, 80 N. E. 714, reversing judgment in McDonald *v.* Holmes, 128 Ill. App. 560.

55. Applicable principles.—Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

56. Local customs and methods.—Wheeler *v.* Aiken County, etc., Bank, 75 Fed. 781.

authorized and salaried officers, this does not absolve them from the exercise of due care in the selection of such officers, nor from the duty of reasonable supervision after their selection, and if a loss is sustained through their negligence in failing to select competent officials or because of want of knowledge of wrong doing, such ignorance being the result of negligence and inattention, such loss should fall upon them and not upon confiding creditors and depositors.[57]

57. Leaving management to officers and agents—Knowledge of irregularities.—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Corbett *v.* Woodward, Fed. Cas. No. 3,223, 5 Sawy. 403; Trustees *v.* Bosseiux, 4 Hughes 387, 3 Fed. 817; Robinson *v.* Hall, 12 C. C. A. 674, 63 Fed. 222; Wheeler *v.* Aiken County, etc., Sav. Bank, 75 Fed. 781; Gibbons *v.* Anderson, 80 Fed. 345; Delano *v.* Case, 17 Ill. App. 531; Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Bank *v.* Hill, 56 Me. 385, 96 Am. Dec. 470; Ackerman *v.* Halsey, 37 N. J. Eq. 356; Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866; Hun *v.* Carey, 82 N. Y. 65, 59 How. Prac. 439, 37 Am. Rep. 546; Elliott *v.* Farmers' Bank, 61 W. Va. 641, 57 S. E. 242; Land Credit Co. *v.* Lord Fermary, L. R. A. Ch. 768.

A director can not excuse himself on the ground that a loan made upon property not worth at least double the amount of the loan was made at the solicitation of the president and for the alleged benefit of the bank, when, as a manager, director, and member of the finance committee he was charged with the duty of ascertaining the facts himself. Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866.

The duty of the board of directors is not discharged by merely selecting officers of good reputation for ability and integrity, and then leaving the affairs of the bank in their hands, without any other supervision or examination than mere inquiry of such officers, and relying upon their statements until some cause for suspicion attracts their attention. The board is bound to maintain a supervision of the bank's affairs, to have a general knowledge of the character of the business and the manner in which it is conducted, and to know at least on what security its large lines of credit are given. Gibbons *v.* Anderson, 80 Fed. 345.

A receiver of a national bank may sue the directors to hold them responsible for the malfeasance of the managing officer, when it appears that they were so negligent as to make practically no examination of its books or affairs, and held meetings only at rare intervals, and then limited their business almost wholly to the election of directors and the declaration of dividends. In such case, their liability for losses should begin at a time when they ceased to discharge the duty of giving proper supervision to the conduct of the bank's affairs. In the circumstances of the present case, they were held liable from the time when, by reason of the failure to earn dividends for more than a year, their attention should have been drawn to the necessity of making a thorough examination. Gibbons *v.* Anderson, 80 Fed. 345.

Directors of a national bank left its management for more than three years almost wholly to its cashier, who had but little property, and of whom they required no bond; and they knowingly permitted loans to be made to individuals and firms largely in excess of the amounts allowed by law. They also failed to record mortgages given to secure large debts due the bank, even after they were aware of its insolvency, and erroneously advised an examiner who had taken charge of the bank that it was not necessary to record them. Held, that the directors were personally liable for the losses caused by such neglect and mismanagement, and the fraud and defalcations of the cashier. Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924, distinguished. Robinson *v.* Hall, 59 Fed. 648, reversed in 12 C. C. A. 674, 63 Fed. 222.

In an action by a bank's receiver against its directors for losses alleged to have been occasioned by their negligence in examining the cashier's accounts, a defendant can not urge his personal ignorance that the accounts were incorrect, arising from his reliance on statements made by the officers, and examinations made from

Actual Knowledge Not Essential to Liability.—Actual knowledge of irregularities, however, is not necessary, since it is the duty of bank directors to use ordinary diligence in acquiring knowledge of the business of the bank, and they can not be heard to say that they were not apprised of facts the existence of which is shown by the books, accounts and correspondence of the bank, and which the use of ordinary diligence in the supervision of the bank's affairs would have made known to them.[58]

Doctrine Dependent upon Negligence.—This principle, however, is dependent upon negligence, or the want of ordinary diligence in the selection of officers and in the supervision of the affairs of the bank. Directors are not insurers of the fidelity of the agents whom they appoint, nor can they be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty.[59] Neither are they held as a matter of law

time to time by the state officials. Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120.

In an action by a bank's receiver against the directors for losses caused by the cashier's abstractions during several years, which it was alleged they negligently failed to sooner discover, defendants can not claim that to hold them responsible for failure to discover such defalcations would require of them too high a degree of care and attention, where the examination necessary to discover the frauds required merely an adjustment of accounts. Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120.

58. Actual knowledge not essential.—Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428; Trustees *v.* Bosseiux, 4 Hughes 387, 3 Fed. 817; Wheeler *v.* Aiken County, etc., Sav. Bank, 75 Fed. 781; Gibbons *v.* Anderson, 80 Fed. 345; United Society *v.* Underwood (Ky.), 9 Bush 609, 15 Am. Rep. 731; McDaniel *v.* Harvey, 51 Mo. App. 198; Ackerman *v.* Halsey, 37 N. J. Eq. 356; Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120; Hun *v.* Carey, 82 N. Y. 65, 59 How. Prac. 439, 37 Am. Rep. 546; Empire State Sav. Bank *v.* Beard, 81 Hun 184, 30 N. Y. S. 756, 62 N. Y. St. Rep. 701; Roberts *v.* Washington Nat. Bank, 11 Wash. 550, 40 Pac. 225; Elliott *v.* Farmers' Bank, 61 W. Va. 641, 57 S. E. 242.

Where the books and papers of the bank show that special deposits were being wrongfully disposed of by the bank, actual knowledge on the part of the directors must be presumed. United Society *v.* Underwood (Ky.), 9 Bush 609, 15 Am. Rep. 731.

Directors can not absolve themselves from liability by committing the management of the affairs of the bank to the cashier or president, or other officer, or to a committee of the directors, and thereafter take no steps to keep themselves informed of what is being done with the assets of the corporation and the money of the depositors, and in such case they are liable for loss sustained through the fraud or misconduct of such officers and which reasonable care and attention on the part of the directors would have prevented. Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Hun *v.* Carey, 82 N. Y. 65, 59 How. Prac. 439, 37 Am. Rep. 546; Ackerman *v.* Halsey, 37 N. J. Eq. 356; Trustees *v.* Bosseiux, 4 Hughes 387, 3 Fed. 817.

59. Doctrine dependent upon negligence.—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Corbett *v.* Woodward, Fed. Cas. No. 3,223, 5 Sawy. 403; Delano *v.* Case, 17 Ill. App. 531; Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Bank *v.* Hill, 56 Me. 385, 96 Am. Dec. 470; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Wheeler *v.* Aiken County, etc., Sav. Bank, 75 Fed. 781; Land Credit Co. *v.* Lord Fermory, L. R. A. Ch. 768.

The directors of a bank who serve without compensation are not liable personally for the defalcation of the person chosen as cashier, teller, and bookkeeper, in the absence of any reason for suspecting his honesty, or any gross neglect on their part, and when they have exercised such reasonable

to a knowledge of all the affairs of the bank, nor all that its books and papers would show, and such knowledge can not be imputed to them absolutely and as a matter of law for the purpose of charging them with liability.[60] A bank director is not required to be an expert nor even a competent bookkeeper, nor to do more in the general management of the bank, with reference to its cashier and bookkeeper, than to see, in the absence of any reason for doubting his fidelity to the trust confided to him, that the weekly, daily, or monthly statements made to the board correspond with the general balances upon the books;[61] nor can directors be charged with gross negligence merely because of a single act of the president, not brought to their actual knowledge, in incurring liabilities in excess of those authorized.[62]

Frauds Committed during Director's Sickness or Absence.—If a director of a bank is seriously ill, it is within the power of the other directors to give him leave of absence for a term of one year, instead of requiring him to resign, and if frauds are committed during his absence and without his knowledge, whereby the bank suffers loss, he is not responsible for them.[63] A mere plea of ill-health, however, is no sufficient defense.[64]

Defendants Not Directors at Time of Acts of Mismanagement.—That certain of the defendants were not directors at the time some of the acts of mismanagement occurred will not exempt them from liability to depositors for the wrongful practices of which they were guilty after they became directors.[65]

diligence and ordinary care with reference to the affairs of the bank as ordinarily prudent men would exercise in reference to such business affairs. Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

The fact that bonds belonging to a director were used, in his absence, by the cashier, in his statement, as bank assets, the bank being accustomed to invest in like bonds, does not indicate negligence of the directors in failing to examine the books to see to whom the bonds had been charged, there being no suspicion of the cashier's integrity. Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

60. Not held to knowledge as a matter of law.—Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Mason *v.* Moore, 73 O. St. 275, 4 L. R. A., N. S., 597, 76 N. E. 932.

The only question presented in such a case is, whether the directors acted in good faith and with ordinary care and diligence in conducting the affairs of the bank, or such diligence as ordinarily prudent men would have exercised with reference to the conduct of such a moneyed institution. It is not a question as to how the frauds of the cashier might have been discovered, but were these directors guilty of gross neglect, which means an absence of that diligence that ordinarily prudent men in the conduct of such business would have exercised. Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

61. Directors not required to be expert accountants.—Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

62. Single act not brought to knowledge of directors.—Brannin *v.* Loving, 82 Ky. 370, 6 Ky. L. Rep. 328.

63. Frauds during director's sickness or absence.—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

64. Plea of ill health.—German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60.

65. Defendants not directors at time of acts of mismanagement.—Boyd *v.*

Assignment of Liability.—It is almost unnecessary to state that directors and stockholders can not, by making an assignment to which the creditors of the bank are not parties, and to which they have not consented, deprive such creditors of their remedies against them for a breach of duties.[66]

Distinction as to Action against Bank and Action against Directors.—Where the action is against the bank, it will not be heard to say that it was ignorant of frauds and thefts committed by the cashier, for in such a case the law presumes that the directors know every entry made by its subordinate officers in the bank books, and the misappropriation of funds, by the cashier, unknown to the directors, constitutes no defense to the bank; but in an action against the bank to make them personally liable, no such presumption exists, and the burden is on the creditor of the bank to show want of diligence on the part of the directors in discovering or preventing the fraud.[67]

Violation of Law or Charter.—Where a statute prohibits the doing of an act, or imposes a duty for the benefit and protection of individuals, persons who disobey the prohibition or neglect to perform the duty render themselves liable to those for whose protection the statute was enacted for any damage or loss proximately resulting from such disobedience or neglect.[68] Restrictions contained in statutes regulating the business of banking are, generally, of this character, and for violations of the charter or general statutes, directors may render themselves personally responsible to creditors and depositors who sustain loss thereby;[69] as, for example, for waste of the corporate funds and property by loaning money without security in cases where security is required to be taken, or investing the money of the bank in speculative enterprises forbidden by law, or accepting securities in payment of subscriptions to the capital stock when it is required by law that such payments shall be in cash, or who otherwise commit violations of the charter or general law whereby the money or

Schneider, 65 C. C. A. 209, 131 Fed. 223.

That certain of the defendants sued were not directors of an insolvent bank at the time acts of mismanagement complained of occurred, did not exempt them from liability to depositors, where it appeared that during their term of office dividends were paid from the capital, which was also alleged as a ground of action. Boyd *v.* Schneider, 65 C. C. A. 209, 131 Fed. 223.

66. **Assignment of liability.**—Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

67. **Distinction between action against bank and action against directors.**—Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

68. **Violation of law or charter.**—Bott *v.* Pratt, 33 Minn. 323, 23 N. W. 237; Osborne *v.* McMasters, 40 Minn. 103, 41 N. W. 543, 12 Am. St. Rep. 698; Baxter *v.* Coughlan, 70 Minn. 1, 72 N. W. 797.

69. **Same.**—Baxter *v.* Coughlan, 70 Minn. 1, 72 N. W. 797; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Citizens' Loan Ass'n *v.* Lyon, 29 N. J. Eq. 110; Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Hun *v.* Carey, 82 N. Y. 65, 59 How. Prac. 439, 37 Am. Rep. 546; Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Robinson *v.* Smith (N. Y.), 3 Paige 222, 24 Am. Dec. 212; Conant, etc., Co. *v.* Reed, 1 O. St. 298; Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624; Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

property of the corporation is lost or wasted.[70] But while directors are bound to exercise ordinary skill, and to possess reasonable capacity, they are not held to a technical or special knowledge of the law, such as could be expected only from persons learned in the profession; and for mistakes concerning the law with regard to matters involving special or technical knowledge thereof, they are liable, if at all, not for their mistakes, but for negligence in failing to seek competent legal advice.[71]

Violation of By-Laws of Bank.—Failure to comply with the by-laws of the bank is negligence in itself, and directors can not excuse themselves for losses resulting from such failure upon the plea that they were ignorant of their existence;[72] and in a suit by a bank's receiver against its directors for losses occasioned by alleged neglect of duty, the fact that a by-law relied on by the receiver, failure to comply with which probably led to the loss, had been disregarded for so long a time that its repeal might be presumed, can not avail the defendants as a defense.[73]

Good Faith as a Defense; Liability of Bank—Fraud or Negligence Proximate Cause of Loss.—Where fraud or culpable negligence is shown, the directors can not excuse themselves by pleading mere honesty of intention. Good faith alone will not excuse them when there has been that lack of care, attention, and circumspection in their management of the affairs of the corporation which is exacted of them as quasi trustees;[74] nor is it any defense that their principal is also liable,[75] though in order that the creditors may hold them personally responsible, the fraud or negligence of the directors must have been the proximate cause of their loss.[76]

70. Same.—Citizens' Loan Ass'n *v.* Lyon, 29 N. J. Eq. 110; Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Robinson *v.* Smith (N. Y.), 3 Paige 222, 24 Am. Dec. 212; Hun *v.* Carey, 82 N. Y. 65, 59 How. Prac. 439, 37 Am. Rep. 546; Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624; Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

71. Same—Ignorance or mistake of law.—Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

72. Violation of by-laws of bank.—Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120.

Personal liability of directors who sanction violations of the charter or by-laws of the bank may be provided by statute or charter. Johnson *v.* Churchwell, 38 Tenn. (1 Head) 146.

73. Same.—Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120.

Where a bank's by-laws require its directors to appoint a committee every three months for an examination of the bank's condition, the fact that examinations were occasionally made by the state examiner can not relieve the directors from loss occasioned by their failure to comply with such requirement. Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120.

74. Good faith and honesty of intention as a defense.—Townsend *v.* Williams, 117 N. C. 330, 23 S. E. 461; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Shea *v.* Mabry, 69 Tenn. (1 Lea) 319; Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866; Mason *v.* Moore, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597.

75. That principal is also liable.—Delano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725.

76. Fraud or negligence must have been proximate cause of loss.—Delano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2

Liability of President and Other Officers.—The same liability attaches to the president or other officers as to the directors in like cases.[77] A president serving upon only a nominal salary is held to the exercise of only ordinary care in managing the affairs of the bank.[78]

Misappropriation, Embezzlement or Theft.—All officers are personally liable to creditors or to a receiver for funds which they have misappropriated, embezzled, or stolen.[79]

§ 57 (1b) Negative View.—According to the negative view of the liability of directors and officers to third persons, the directors are the agents of the bank, and the only trust or fiduciary relation which they sustain is to the bank, and not to depositors or creditors: while as between the bank and third persons, the relation is said to be merely that of debtor and creditor dealing at arms length. In these jurisdictions what is known as the "trust fund" doctrine does not prevail; hence, no action as for a breach of trust will lie; there is no contractual relation between the directors and third persons, hence, no action ex contractu can be maintained; while as agents of the bank they are, in so far as loss or damage resulting from mere nonfeasance or ordinary negligence is concerned, amenable only to the bank as their principal, and liable to third persons in an action ex delicto only when, as regards such third persons, they have been guilty of actionable fraud or deceit.[80] Under this view it

Am. St. Rep. 81; United Society *v.* Underwood (Ky.), 9 Bush 609, 15 Am. Rep. 731; Percy *v.* Millaudon, 3 La. 568; Hart *v.* Evanson, 14 N. S. 570, 105 N. W. 942, 3 L. R. A., N. S., 438; Hodges *v.* New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624; Zinn *v.* Mendel, 9 W. Va. 580

77. **Liability of president and other officers.**—Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Caldwell *v.* Bates, 118 N. C. 323, 24 S. E. 481.

The liability of the president and vice president to depositors and other creditors for losses sustained by them in dealing with the corporation on the faith of misrepresentations by such officers as to its financial condition, or other facts forming a material inducement to the deposit or contract, is the same as that of directors. Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725.

78. **Where president receives only nominal salary.**—Dunn *v.* Kyle, 77 Ky. (14 Bush) 134.

79. **Misappropriation, embezzlement or theft.**—Austin *v.* Daniels (N. Y.), 4 Denio 299.

Where the officers of a bank purchased state stocks, to carry on a private undertaking in which they were engaged, and signed a contract obliging the bank to pay for the same, and then took money from the bank to fulfill such engagement, it was held that they were liable for the money so taken to the receiver appointed to close up the concerns of the bank. Austin *v.* Daniels (N. Y.), 4 Denio 299.

80. **Negative view of liability of directors and officers to third persons.**—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Hollins *v.* Brierfield, etc., Iron Co., 150 U. S. 371, 37 L. Ed. 1113, 14 S. Ct. 127; National Exch. Bank *v.* Peters, 44 Fed. 13; Howe *v.* Barney, 45 Fed. 668; Bailey *v.* Mosher, 11 C. C. A. 304, 63 Fed. 488; Andrews *v.* Foster, 76 Iowa 535, 41 N. W. 212; Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Vose *v.* Grant, 15 Mass. 505; Abbott *v.* Merriam (Mass.), 8 Cush 588; Fusz *v.* Spaunhorst, 67 Mo. 256; Union Nat. Bank *v.* Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; Mabey *v.* Adams, 16 N. Y. Super. Ct. 346; Hart *v.* Evanson, 14 N. D. 570, 105 N. W. 942, 3 L. R. A., N. S., 438; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222; Deaderick

has been held that nothing short of intentional, willful and affirmative wrongdoing will suffice to confer a right of action upon third persons, and that it is a contradiction in terms to say that negligence may be so gross as to amount to willful fraud and intentional injury, since negligence, whether slight, ordinary or gross, consists of the want of care, and implies the absence of intentional wrongdoing.[81] There must not only be a loss, it is said, but the loss must be proximately traceable to the defendant's breach of a legal obligation owing to the plaintiff, which obligation, as here defined, is to refrain from willful and intentional wrongdoing.[82] Other authorities, while upholding, in the main, the doctrine that no right of action will lie in favor of third persons for losses resulting from the want of ordinary care and diligence, hold that negligence may be so gross as to amount to fraud, and that recovery may be had for losses so sustained.[83] In still other cases it is held that whatever the plaintiff's rights against the delinquent directors may be, they can not be enforced in an action at law, it being variously objected that the directors owe no duty in a legal sense to the creditors or to the public, that an action at law must be brought by the person having the title or right to the thing demanded, or to the damages sought to be recovered, that there is no legal privity between creditors and directors, that creditors have no right or power to intermeddle with the property or concerns of the bank, or to call

v. Bank, 100 Tenn. 457, 45 S. W. 786; Zinn v. Mendel, 9 W. Va. 580; Slack v. Northwestern Nat. Bank, 103 Wis. 57, 79 N. W. 51, 74 Am. St. Rep. 841; Killen v. State Bank, 106 Wis. 546, 82 N. W. 536.

"The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to account for fraud, or sometimes even mere mismanagement, in respect thereto; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor." Hollins v. Brierfield, etc., Iron Co, 150 U. S. 371, 37 L. Ed. 1113, 14 S. Ct. 127.

Directors of such institutions may make themselves liable in an action at law for loss and damages for false representations made or caused to be made by them, with intent thereby to deceive and defraud the plaintiff, and which had the designed effect and caused loss and damage to the plaintiff. Zinn v. Mendel, 9 W. Va. 580.

The case of Abbott v. Merriam (Mass.), 8 Cush. 588, was a bill in chancery against the treasurer and secretary of a corporation, charging mismanagement of its affairs. The bill was demurred to, and the demurrer sustained. C. J. Shaw, in delivering the opinion of the court, says: "They (the plaintiffs) have no right, by any direct suit, legal or equitable, to call the directors, or other officers of the corporation, to an account for mismanagement. * * * The directors, and other officers, and agents, are amenable only to the corporation; and to give every individual stockholder a right of action would lead to a multiplicity of suits." Zinn v. Mendel, 9 W. Va. 580.

81. Fraud must be willful and intentional.—Briggs v. Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Hart v. Evanson, 14 N. D. 570, 105 N. W. 942, 3 L. R. A., N. S., 438; Minton v. Stahlman, 96 Tenn. 98, 34 S. W. 222; Deaderick v. Bank, 100 Tenn. 457, 45 S. W. 786.

82. Loss must result from breach of legal obligation.—Hart v. Evanson, 14 N. D., 570, 105 N. W. 942, 3 L. R. A., N. S., 438.

83. Liability in case of gross negligence.—Union Nat. Bank v. Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; S. C., 155 Mo. 279, 55 S. W. 1133; Swentzel v. Penn Bank, 147 Pa. 140, 23 Atl. 405, 15 L. R. A. 305, 30 Am. St. Rep. 718.

any officer, agent, or servant to account, and that to permit them to do so would result in a multiplicity of actions, since if one creditor may sue all may sue.[84] It will be noticed that the authorities opposed to the right of depositors and creditors to hold the directors personally responsible for losses resulting from their negligence and mismanagement not only admit of various exceptions to their position, such as the right to sue where the directors have been guilty of actionable fraud or deceit,[85] or where their negligence has been so gross as to amount to fraud,[86] but that the reasons advanced in support of most of the objections urged by them go not so much to the existence of the right as to the difficulty of enforcing it. Not only so, but to hold, as some of the cases do, that the directors are amenable solely to the bank, and that whatever right of action exists is in the bank as a separate corporate and legal entity, is to overlook the fact that, however it may be in theory and in contemplation of law, the directors are in fact the moving and life-giving spirits of the bank, and that as a separate legal entity, it remains inert and inanimate until they act, and that to say to the creditors who have placed their confidence in the bank upon the strength of the names appearing in the list of the directory, and who have suffered loss through their inattention and mismanagement of the affairs of the corporation, that their dealing is with the bank, and that they must depend upon the bank to call the guilty directors to account, is, in its practical effect, to tell them that they must depend upon the guilty parties bringing themselves to account. The mere statement of such a proposition demonstrates its absurdity and carries with it its own refutation. Accordingly, it has been stated in some of the strongest cases opposing the right of the creditor to hold the directors

84. Cases holding no action at law.—Allen *v.* Curtis, 26 Conn. 456; Smith *v.* Hurd (Miss.), 12 Metc. 371, 46 Am. Dec. 690; Smith *v.* Poor, 40 Me. 415, 63 Am. Dec. 672; Fusz *v.* Spaunhorst, 67 Mo. 256; Hart *v.* Evanson, 14 N. D. 570, 105 N. W. 942, 3 L. R. A., N. S., 438; Winter *v.* Baker (N. Y.), 34 How. Prac. 183; Gardiner *v.* Pollard, 23 N. Y. Super. Ct. 674; Deaderick *v.* Bank, 100 Tenn. 457, 45 S. W. 786; Zinn *v.* Mendel, 9 W. Va. 580.

Except under statutory or constitutional provisions, a director or officer of a bank is not individually responsible in an action at law for injury resulting to a creditor or depositor from the management of the bank, unless the injury is occasioned by his malicious or fraudulent act. Fusz *v.* Spaunhorst, 67 Mo. 256.

A creditor of a corporation can not maintain an action at law against the director of a corporation for willful and fraudulent mismanagement of its affairs, whereby the property of the corporation was wholly wasted, lost and embezzled, and the corporation rendered wholly insolvent, and the plaintiff's claims against the corporation rendered wholly worthless. Winter *v.* Baker (N. Y.), 34 How. Prac. 183; Affirming Gardiner *v.* Pollard, 23 N. Y. Super. Ct. 674; Smith *v.* Poor, 40 Maine 415, 63 Am. Dec. 672; Smith *v.* Hurd (Mass.), 12 Metc. 371, 46 Am. Dec. 690; Allen *v.* Curtis, 26 Conn. 456.

85. Exception in case of actionable fraud and deceit.—Hart *v.* Evanson, 14 N. D. 570, 105 N. W. 942, 3 L. R. A., N. S., 438; Zinn *v.* Mendel, 9 W. Va. 580; Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

86. Exception as to gross negligence.—Union Nat. Bank *v.* Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; S. C., 155 Mo. 279, 55 S. W. 1133; Swentzel *v.* Penn Bank, 147 Pa. 140, 23 Atl. 405, 15 L. R. A. 305, 30 Am. St. Rep. 718.

personally responsible, that where the necessities of the case so require the creditor may enforce his claim in the right of the corporation or its representative; that is, through the agency of an assignee or a receiver.[87]

§ 57 (1c) Constitutional and Statutory Provisions.—By statutes enacted in various states it is provided that directors may be held personally responsible for losses resulting from their negligence and mismanagement. The language of these statutes is not always harmonious, but they usually provide that personal liability shall follow gross negligence or willful or fraudulent misconduct. Thus, under the Indiana statutes,[88] defining the powers and duties of directors, they are held to be the agents of the corporation, having the general custody, control and management of its property and affairs, and, as such, liable for losses and waste of money and property occurring through their gross inattention to the business of the bank, or their willful violation of their duties.[89] In Tennessee it is provided[90] that, if directors of any bank in the state shall be guilty of any fraud or willful mismanagement of its affairs, by which loss is occasioned to creditors, they shall be individually liable for such loss. Under this statute the directors are not personally liable upon the insolvency of the bank resulting from inattention, imprudence and want of care in making loans and managing the business of the bank, but the evidence must show intentional fraud or willful mismanagement, and this must be distinctly alleged in the pleadings.[91] In Arkansas, under a statute declaring that if the directors intentionally neglect their statutory duties they shall be liable for all debts contracted during such neglect,[92] it

87. **Enforcement of claim through assignee or receiver.**—Hart *v.* Evanson, 14 N. Dak. 570, 105 N. W. 942, 3 L. R. A., N. S., 438; Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536. See, also, Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; South Bend Chilled Plow Co. *v.* Cribb Co., 97 Wis. 230, 72 N. W. 749; Gores *v.* Day, 99 Wis. 276, 74 N. W. 787; Gager *v.* Bank, 101 Wis. 593, 77 N. W. 920; Gager *v.* Marsden, 101 Wis. 598, 77 N. W. 922.

In Hart *v.* Evanson, 14 N. Dak. 570, 105 N. W. 942, 3 L. R. A., N. S., 438, the court says: "If he violated his obligation to the bank, or neglected his duty to it, redress must be sought by the corporation itself or its representatives for the common benefit of all creditors and stockholders."

And even in Zinn *v.* Mendel, 9 W. Va. 580, it is said (p. 599) "It is unnecessary to ascertain in this case what remedy, or remedies, creditors of an incorporated moneyed institution may have against the bank and its directors, or stockholders, in a court of equity, in any given state of facts or circumstances, as this is a case at law, and not a case on the equity side of the courts."

88. **Indiana statute.**—Burns Rev. Stats. 1894, §§ 2922, 2925, 2927, 2929, 2934.

89. **Same—Liable for gross negligence and inattention.**—Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567.

90. **Tennessee statute.**—Shannon's Code, § 3242.

91. **Same—Must show intentional fraud or willful mismanagement.**—Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222; Deaderick *v.* Bank, 100 Tenn. 457, 45 S. W. 786; Hume *v.* Commercial Bank, 77 Tenn. (9 Lea.) 728.

By the charter of the Bank of East Tennessee, the directors of the institution, who might sanction certain violations of the charter specified therein, could be held liable in their individual property, for any loss or damage thereby, to the creditors of the bank. Johnson *v.* Churchwell, 38 Tenn. (1 Head) 146.

92. **Arkansas statute.**—Kirby's Dig., § 863.

is no defense to an action brought under the statute, for loss caused by the president's mismanagement, that the directors had good reason to believe and did believe the president to be honest and competent, and so committed the management of the bank to him.[93] Under the Wisconsin statute,[94] the creditor has not the absolute right to maintain such an action, and where the title to the claim for damages is in an assignee for the benefit of creditors, he is the person who should invoke the jurisdiction of the court, and a creditor can not take his place in the matter unless the necessities of the case so require or the court so direct; and the facts in that regard, according to the settled practice, must be made to appear on the face of the complaint.[95] Under the Maine statute,[96] authorizing a creditor who has suffered loss through the official mismanagement of directors to maintain a bill in equity against them, directors are only personally responsible for the official mismanagement which occurred during the year for which they were chosen, and during which they acted.[97]

Same—Stipulation in Articles against Personal Liability.—A provision in the articles of a banking association that any person dealing with them disavows having recourse on any pretense whatever to the person or separate property of any present or future member of the company, does not prevent the recovery of a judgment against the individual members brought by a laborer employed by such members and with whom he contracted.[98]

§ 57 (2) Individual Liability upon Obligations of Bank.—Officers and agents of corporations acting within the scope of their authority are not individually liable upon the contracts and obligations of the bank where, from the manner in which the instrument is executed, it is made to appear that it is the obligation of the bank and that the bank is the contracting party; but it is otherwise where the instrument is executed in the names of the officers and agents of the bank; and it is not sufficient that they describe themselves as officers or agents of the bank, since such words will be taken to be merely descriptio personæ, and are not sufficient to relieve them from personal liability upon an agreement into which they

93. **Same—Committing management to president.**—Fletcher *v.* Eagle, 74 Ark. 585, 86 S. W. 810, 109 Am. St. Rep. 100.

94. **Wisconsin statute.**—Rev. Stats. Wis., §§ 3237, 3239.

95. **Same—Suit by assignee or creditor.**—Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

The right to maintain such an action was sustained in South Bend Chilled Plow Co. *v.* Cribb Co., 97 Wis. 230, 72 N. W. 749, and Gores *v.* Day, 99 Wis. 276, 74 N. W. 787; Gager *v.* Bank, 101 Wis. 593, 77 N. W. 920; Gager *v.* Marsden, 101 Wis. 598, 77 N. W. 922. The complaint in each case showed that the person in whom the title to the cause of action was vested was hostile to its enforcement, therefore the creditor was permitted to stand in the place of such hostile party and enforce the claim in his right. Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

96. **Maine statute.**—Rev. Stat. c. 47, §§ 43, 47.

97. **Same—Duration of responsibility.**—Bank *v.* Hill, 56 Me. 385, 96 Am. Dec. 470.

98. **Stipulation against individual liability of directors and officers.**—Davis *v.* Beverly, 2 Cranch C. C. 35, Fed. Cas. No. 3,627.

have entered over their own signature. In other words, if they wish to escape personal liability, they must make it appear, either expressly or by necessary implication, that the obligation is that of the bank and not of themselves.[99] Irrespective of the question as to the manner of form in which an obligation was executed, directors may render themselves personally liable upon the obligations of the bank by reason of fraud, illegality or gross negligence.[1] And one contracting in the name of the bank, but without authority to do so, thereby binds himself upon his implied warranty of authority, unless the other party knows or is held to a knowledge of his want of authority.[2]

Statutory Liability on Insolvency.—By statutory provision in some jurisdictions directors are made individually responsible for the debts of the bank on its becoming insolvent, and it has been held under such a statute that they are liable for debts contracted before the law took effect where the bank became insolvent thereafter.[3] It is no defense to an action

99. Personal liability upon obligation of the bank.—United States *v.* Robertson (U. S.), 5 Pet. 641, 8 L. Ed. 257; Taylor *v.* Williams (Ky.) 17 B. Mon. 489; Lawler *v.* Burt, 7 O. St. 340; Medill *v.* Collier, 16 O. St. 599; In re International Contract Co., L. R. Ch. 525.

An agreement executed by the president and directors of a bank as such is the agreement of the bank alone. The president and directors must have signed as individuals had they intended to bind themselves individually by that agreement for a bond. As an official act, it was sufficient that it be entered on their journals; as an undertaking of individuals, it ought to be signed by them. It is referred to in the recital of the condition, in these words: "and whereas, an agreement has this day been entered into between the United States on the one part, and the president and directors of the said Bank of Somerset of the other part, in these words," etc. This language indicates an agreement by the president and directors, in the corporate character in which they are mentioned, rather than in their individual characters in which they are not mentioned. United States *v.* Robertson (U. S.), 5 Pet. 641, 8 L. Ed. 257.

1. Same—By reason of fraud, illegality or gross negligence.—Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121; Brannin *v.* Loving, 82 Ky. 370, 6 Ky. L. Rep. 328.

Directors can not be held personally liable for debts of the bank, unless they are guilty of gross negligence. Brannin *v.* Loving, 82 Ky. 370, 6 Ky. L. Rep. 328.

Where the directors of a bank, contrary to their charter, issue bills before a certain portion of their capital is subscribed and paid in, they are liable for all the consequences to persons injured by their misconduct. Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

The directors of a bank falsely reported that twenty-five per cent of its capital stock had been paid in, as required by law. After failure of the bank, suit was brought against the directors, to charge them personally with the debts of the bank. Held, that the fact that certain directors having knowledge of the fraud were not the original incorporators did not relieve them. Schley *v.* Dixon, 24 Ga. 273, 71 Am. Dec. 121.

2. Same—Implied warranty of authority.—Frost Mfg. Co. *v.* Foster, 76 Iowa 535, 41 N. W. 212; Watson *v.* Bennett (N. Y.), 12 Barb. 196; Baltzen *v.* Nicolay, 53 N. Y. (8 Sickles) 467; Dung *v.* Parker, 52 N. Y. 494; White *v.* Madison, 26 N. Y. 117, 26 How. Prac. 481.

A cashier executing an indemnity bond to the sheriff, and directing a sale of property levied on under an execution in favor of the bank, is not personally liable when he acted under special direction of the directors, though otherwise if acting merely within his general authority. Watson *v.* Bennett (N. Y.), 12 Barb. 196.

3. Statutory liability on insolvency—Debts contracted before law took effect.—White *v.* How, Fed. Cas. No. 17,548, 3 McLean 111.

brought under such a statute that there has been a judgment of forfeiture against the bank. Such a judgment does not discharge the liability of the directors.[4] Neither are the directors released from liability by reason of the waste or destruction of the assets of the bank in the hands of the assignee.[5] And it is immaterial that the notes upon which the action is brought were fraudulently put into circulation. A plea setting up such fact constitutes no answer to the declaration.[6]

§ 57 (3) Liability for Ultra Vires Acts.—It is not disputed that the officers and agents of corporations are protected from private liability while acting within the scope of corporate powers; but how far such protection is extended when they transcend the corporate authority is not clearly defined. The existence of a personal liability in such case has been recognized in many cases.[7] It is not always true that directors who fail to bind the bank, because of the ultra vires character of their contract, bind themselves, since there are exceptions to the rule that an agent who goes beyond his authority binds himself. Thus if the directors make no representations as to the powers of themselves or of the bank, and are guilty of no fraud, and the other party's means and sources of knowledge are equivalent to their own, and both believe the contract to be a valid agreement of the bank, the directors can not be held personally liable thereon, since the credit was extended and the contract made in the belief that the bank would be responsible therefor, and the parties having thus made their own contract, the law will not create a new and different one holding the directors personally liable.[8] Where, however, the officer or agent con-

4. Directors not discharged by judgment of forfeiture against bank.—Hargrove *v.* Chambers, 30 Ga. 580.

5. Waste or destruction of assets in hands of assignee no defense.—Hargroves *v.* Chambers, 30 Ga. 580.

6. No defense that notes were fraudulently put into circulation.—White *v.* How, Fed. Cas. No. 17,549, 3 McLean, 291.

In a suit by the receiver of a bank against an ex-president and director, the complainant averred that the defendant used fictitious notes in lieu of money of the bank, which was fraudulently used and disposed of by the bank; that such notes were among the assets of the bank. Held, that these facts, if proven, would be sufficient to put the defendant on his defense; that the claim was one which would belong to the receiver, and might be collected by him. Butterworth *v.* O'Brien (N. Y.), 39 Barb. 192, 24 How. Prac. § 438.

7. Liability for ultra vires acts.—Taylor *v.* Williams (Ky.), 17 B. Mon. 489; Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 29; Kearny *v.* Buttles, 1 O. St. 362; Lawler *v.* Burt, 7 O. St. 340; Medill *v.* Collier, 16 O. St. 599; Lawler *v.* Walker, 18 O. 151.

8. Same—When not liable for ultra vires contracts.—Frost Mfg. Co. *v.* Foster, 76 Iowa 535, 41 N. W. 212; Abeles *v.* Cochran, 22 Kan. 405, 31 Am. Rep. 194; Sandford *v.* McAuthur (Ky.), 18 B. Mon. 411; Fidelity, etc., Co. *v.* National Bank, 48 Tex. Civ. App. 301, 106 S. W. 782, citing First Nat. Bank *v.* Commercial Nat. Bank, 99 Tex. 118, 87 S. W. 1032.

Thus, where the directors made an ultra vires contract for the purchase of stock from a third person which was of no value to the bank, and from which the bank received no benefit and repudiated the purchase and both directors and the seller of the stock believed the contract to be good, and the seller's means of knowledge were equal with that of the directors, it was held they could not be held personally liable on the contract. Abeles *v.* Cochran, 22 Kan. 405, 31 Am. Rep. 194.

Where the directors ordered an

tracts or undertakes personally to do that which is beyond the powers of his bank, he will be held to be personally bound on his undertaking;[9] and if the bank receives and retains the benefit of an ultra vires contract, it may be compelled to account or make restitution.[10] Where the directors or trustees, after their election and qualification, do nothing whatever in the execution of corporate power, the mere fact of the existence of the corporate agency will not shield them from individual liability in an action based solely on a contract entered into by them in conducting a business wholly foreign to the objects and purposes of the incorporation, though such business was conducted and such contract entered into in an associate name which could properly be used in corporate as well as private business.[11] Where a charter makes the individual directors personally responsible for all or any particular debts contracted by the corporation, in violation of the charter, the inhibited contracts of the corporation become, in general, by force of the charter, the contracts of such directors; and the creditors may sue the latter and recover from them as if the contracts were in fact made by them. The liability in such case, and the action, is upon the contract, and the creditor is limited by the terms of the contract, and recovers the amount of the debt remaining unpaid.[12]

Liability for Torts.—The liability of directors, officers and agents for torts rests upon different principles. Torts are always ultra vires and personal, in the sense that the perpetration of fraud or deceit or other actionable wrong is never within the legitimate corporate powers, and in the sense that every person is liable in an action ex delicto for his actionable wrongs, and it is no defense that he was acting as the agent of another or in a representative capacity.[13] The liability of the bank for the tortious acts of its directors, officers and agents is a question depending upon other principles not now under consideration, which will be fully treated elsewhere.[14]

issue of notes in excess of the amount authorized by the law of the bank's incorporation, they were not personally responsible therefor, since persons dealing with the bank were bound to take knowledge of the limitations contained in its charter and of the powers granted by law to its agents. Sandford *v.* McArthur (Ky.), 18 B. Mon. 411.

9. Same—Where officer or agent contracts personally.—Abeles *v.* Cochran, 22 Kan. 405, 31 Am. Rep. 194.

10. Same—Liability of bank retaining benefit of ultra vires contract.—Abeles *v.* Cochran, 22 Kan. 405, 31 Am. Rep. 194.

11. Personal liability in ultra vires business carried on by directors.—Ridenour *v.* Mayo, 40 O. St. 9.

12. Personal liability under charter.—Sturges *v.* Burton, 8 O. St. 215, 72 Am. Dec. 582.

13. Personal liability for torts.—National Bank *v.* Graham, 100 U. S. 699, 25 L. Ed. 750; First Nat. Bank *v.* Anderson, 172 U. S. 573, 43 L. Ed. 558, 19 S. Ct. 284; Salmon *v.* Richardson, 30 Conn. 360, 79 Am. Dec. 255; Phelps *v.* Wait, 30 N. Y. 78; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30; Bruff *v.* Mali, 36 N. Y. 200, 34 How. Prac. 338; Suydam *v.* Moore (N. Y.), 8 Barb. 358; Hart *v.* Evanson, 14 N. Dak. 570, 105 N. W. 942, 3 L. R. A., N. S., 438; Zinn *v.* Mendel, 9 W. Va. 580; Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

14. Liability of bank for torts of officers, agents, etc.—See post, "Torts," § 100; "Wrongful Acts," § 112.

Fraud of Third Person.—Where the president or director of a bank undertakes, at the request of another bank or of a third party, to perform a service which is confessedly not within the powers of his bank, such as effecting the execution of a certain obligation, and in performing such service he acts in entire good faith and uses ordinary care, neither he nor his bank can be held responsible for a loss which results from the fraudulent act of the maker in forging the name of a third person as surety.[15]

§ 57 (4) For Incurring Excessive Indebtedness.—It is a common provision found in the charters of banking corporations and in the statutes of many states that such institutions shall not become indebted in excess of a certain sum, such sum usually being fixed at a certain ratio to the amount of the capital stock; and for a violation of such inhibition it is usually provided that the directors and officers guilty thereof shall be personally liable, either for the excess above the statutory limit, or for some specified proportion thereof. The first question that naturally presents itself in this connection is, how far a director must have participated in bringing about the excessive indebtedness in order to incur personal liability, and upon this point the decisions are not in harmony. In Georgia, it is held that the personal liability of the directors created by the statute of that state is joint, and that no one director can defend an action to enforce the same by showing that he was absent at the time the indebted-

15. **Neither officer nor bank liable for fraud of third person.**—First Nat. Bank *v.* Commercial Nat. Bank, 99 Tex. 118, 87 S. W. 1032, reversing 97 Tex. 629, 77 S. W. 239, no op. See, also, Commercial Nat. Bank *v.* First Nat. Bank, 97 Tex. 536, 80 S. W. 601, 89 S. W. 418.

S., desiring to borrow $2,000 from appellant, First National Bank of Cuero, Texas, offered as his security therefor, R., one of the vice-presidents of the Commercial National Bank of Beeville. The appellant, having upon inquiry become satisfied as to R.'s financial standing, mailed to the Commercial National Bank of Beeville, a letter asking them to hand the enclosed note to Mr. R. for signature of himself and S. R. was not then in Beeville and F., the president of the Commercial National Bank, mailed the note to S., who after he had signed it and also forged the name of R. thereto, returned the same. F. returned the note to the First National Bank of Cuero in a letter signed as president in which he said the note was "properly signed up." When the note became due appellant sued S. and R. thereon and recovered judgment against the former, but R., having pleaded by oath and proved that the note as to him was a forgery, judgment was returned in his favor. In an action by the First National Bank of Cuero against the Commercial National Bank of Beeville, and its president personally, to recover the amount, it was held that these facts established conclusively that there was no relation of principal and agent between F. and the Cuero Bank and no liability could be predicated upon the fact of agency. F., as president of the Beeville Bank, performed an act which the corporation had no power to perform; he did not bind the bank and there being nothing to show that his statement made to the bank with reference to the note was made without belief in its truth, or was made recklessly and without regard to whether it was true or not and having made no representations with regard to the authority of the bank to perform the acts, or with regard to the genuineness of R.'s signature, he did not bind himself. First Nat. Bank *v.* Commercial Nat. Bank, 99 Tex. 118, 87 S. W. 1032, reversing 97 Tex. 629, 77 S. W. 239, no op. See, also, Commercial Nat. Bank *v.* First Nat. Bank, 97 Tex. 536, 80 S. W. 601, 89 S. W. 418.

ness was created, nor by showing that he dissented from the action of the other directors in creating the indebtedness.[16] In Michigan, a director who objects to the action of the board in incurring the debt is not subject to the personal liability imposed by statute; at least, it was so held in the federal court sitting in that state;[17] while under the Pennsylvania statute directors are held to be personally liable only when they participate in or assent to the wrong.[18] And in Kentucky it was held that directors who did not participate in creating the excessive debt and who had no knowledge that one of their number, who was also president of the bank, was endorsing the bank's name upon business paper to such an extent as to involve it beyond the legal limit of its indebtedness, could not be held liable therefor unless they were negligent in not discovering and preventing such action, and that as the transaction was isolated the exercise of ordinary care on their part did not afford them notice, and it would not be presumed that they had notice simply because they were directors; but that it was otherwise as to the president and director who indorsed the bank's name upon the paper, since as to him it was not a question of negligence but an actual breach of trust and violation of duty.[19] In Ohio, the statute makes special provision whereby absent or dissenting directors may exonerate themselves by having their dissent or absence entered upon the records of the bank and by giving notice to the stockholders and to the auditor of the state.[20]

Effect of Insolvency, Loss of Assets, etc.—Under the Michigan act,[21] providing that the debts of the bank shall not exceed three times the amount of the capital stock actually paid in and possessed, and that the directors shall be individually liable for all excess and for all deficits occasioned by the insolvency of such bank, the directors are liable for all excess of debts above the amount authorized without regard to the insolvency of the bank, and they are responsible for all deficits, in case of insolvency, without reference to excess of debts incurred.[22] Under the Georgia statute making the directors liable for the excess of the bank's debts above a certain amount, they can not escape liability because of the loss of the assets of the bank in the hands of the assignee, and because of his neglect and waste. Such loss is the loss of the bank, and not of the creditors.[23]

16. **Liability under Georgia statute.**—Banks *v.* Darden, 18 Ga. 318.

17. **Michigan statute—Objection of director to incurring of debt.**—White *v.* Howe, Fed. Cas. No. 17,548, 3 McLeon 111.

18. **Pennsylvania statute.**—Stephens *v.* Monongahela Nat. Bank, 88 Pa. 157, 32 Am. Rep. 438.

19. **Kentucky statute—Participation—Negligence—Notice.**—Brannin *v.* Loving, 82 Ky. 370, 6 Ky. L. Rep. 328.

20. **Special provisions under Ohio statute.**—Sturges *v.* Burton, 8 O. St. 215, 72 Am. Dec. 582.

21. **Effect of insolvency and loss of assets.**—Act Mich. March 15, 1837, § 25.

22. **Same—Michigan statute.**—White *v.* How, Fed. Cas. No. 17,548, 3 McLean 111.

23. **Same—Georgia statute.**—Hargroves *v.* Chambers, 30 Ga. 580.

Nature of Liability as Joint or Several, Penal or Remedial.—Under the Georgia statute declaring that the directors shall be liable in their private and individual capacities for the excess of debts over and above the statutory limit, it is held that their liability is not penal but remedial, joint and not several; and that neither absence at the time the debt was created nor dissent from its creation will relieve a director from liability.[24] Under the Ohio statute it is held: 1. The section does not make the directors personally liable on the contracts of indebtedness which created the excess, but solely for the excess itself. 2. The liability of the directors for the amount of this excess is not to persons who hold the contracts of indebtedness created in excess of the limitation, but to any creditor or creditors of the bank. Hence the ground of the action is not the original contracts with the creditors; those contracts simply give any of them the right or title to sue as plaintiff. 3. The amount of the recovery by any creditor does not depend upon the amount the bank owes him, nor upon the nature of the debt due to him; under the statute the creditor who sues recovers the amount of the excess, and that, too, whether the debt due the plaintiff forms a part of the excess or not. 4. The liability of the directors is provided for as in penal statutes, to vindicate a violation of law. 5. The action provided is the usual action prescribed by penal statutes to recover a penalty. 6. The action of the creditor must be debt, whether his contracts with the bank be such as to authorize such a form of action or not.[25] In other words, it is held that the statute provides for a penal action, and not an action ex contractu; and that since all creditors are equally injured by a violation of the statute, it is given to any creditor for the benefit of all and to create a fund for the indemnity of all, and that the amount of the recovery is measured by the amount of excess of liability created by the directors.[26]

Obligations within the Inhibition.—Certificates of deposit are debts, within the meaning of an act which makes the directors liable when the amount of debts which the corporation shall at any time owe, whether by bond, bill, note, or other security, shall exceed three times the amount of their capital stock.[27]

Duration of Liability.—In Georgia it has been held that since the obligation of the director is statutory, the limitation with respect to penalties and forfeitures has no application and that such obligation is not barred until after the lapse of twenty years;[28] also that it is not extinguished by the expiration of the charter of the bank by its own limitation.[29]

24. **Liability joint or several—Penal or remedial.**—Banks *v.* Darden, 18 Ga. 318; Robinson *v.* Bealle, 20 Ga. 275.

25. **Same—Under the Ohio statute.**—Sturges *v.* Burton, 8 O. St. 215, 72 Am. Dec. 582.

26. **Same—Same.**—Sturges *v.* Burton, 8 O. St. 215, 72 Am. Dec. 582.

27. **Obligations within the inhibition.**—Hargroves *v.* Chambers, 30 Ga. 580.

28. **Duration of liability.**—Neal *v.* Moultrie, 12 Ga. 104.

29. **Same—Effect of expiration of charter.**—Hargroves *v.* Chambers, 30 Ga. 580. But see contra, under the

Fraud as a Defense.—Under the Michigan Act of March 15, 1837, § 25, making bank directors personally liable for the bank's debts if at any time such debts exceeded three times its capital paid in, directors can not escape liability in an action on the bank's bills on the ground that such bills were fraudulently put in circulation, unless the plaintiff was connected with or had notice of the fraud.[30]

Release.—Under a charter provision making the directors liable to the stockholders for bills redeemed by the stockholders if they be bills issued in "excess" of the quantity of bills which the charter authorizes to be issued, a release of the directors by the holders of such bills is a release of the stockholders also.[31]

§ 57 (5) Liability with Respect to Reports, Statements, and Representations.—Failure to Make and Publish Statements.—Under a statute, providing that if any banking association neglects to make a semi-annual statement, within a certain time, of the condition of the bank to the state treasurer, "the directors shall be personally liable for all debts of said association contracted previous to and during the period of such neglect," the liability of the directors is primarily and directly imposed on failure to comply with the law, and may be enforced regardless of any proceeding against the corporation.[32]

False Reports and Statements.—If the common-law liability of directors be looked to, it is found that actions for damages against them founded on a published false report of the bank, which they attested, are actions for deceit, and they are controlled by the law governing actions of that character.[33] In other words, in order to hold them to a personal accountability, it is not necessary that they should have known such statement to be false, nor even that they should have made it without knowledge of its truth or falsity, yet believing it to be true. They are conclusively presumed to know the condition of the bank, and it is their duty to know that statements put forth under their authority are true, and they are liable for damages sustained by any one dealing with the corporation relying upon the truth of such official reports.[34] If this were not so, the

charter of the C., Moultrie *v.* Hoge, 21 Ga. 513.

30. Fraud as a defense.—White *v.* How, Fed. Cas. No. 17,549, 3 McLean 291.

31. Effect of release.—Robinson *v.* Bealle, 20 Ga. 275.

32. Failure to make and publish statements.—Larsen *v.* James, 1 Colo. App. 313, 29 Pac. 183.

33. False reports and statements.—Mason *v.* Moore, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597; Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

34. Duty to know truth of statements put forth.—Finn *v.* Brown, 142 U. S. 56, 35 L. Ed. 936, 12 S. Ct. 136; Hubbard *v.* Weare, 79 Iowa 678, 44 N. W. 915; United Society *v.* Underwood (Ky.), 9 Bush 609, 15 Am. Rep. 731; Huntington *v.* Attrill, 118 N. Y. 365, 23 N. E. 544; S. C., 42 Hun. 459, 4 N. Y. St. Rep. 869; Hauser *v.* Tate, 85 N. C. 81, 39 Am. Rep. 689; Townsend *v.* Williams, 117 N. C. 330, 23 S. E. 461; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Caldwell *v.* Bates, 118 N. C. 323, 24 S. E. 481; Shea *v.* Mabry, 69 Tenn. (1 Lea) 319; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592; Bolles Banks, § 4; Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

directors of a bank would be privileged to be negligent, and, the more ignorant they could manage to be about its condition, the more secure they would be from any liability.[35]

Misrepresentation.—It is not necessary that the false and fraudulent statements here spoken of as rendering the directors personally liable should be contained in the formal published reports of the bank's condition. If the officers of a banking corporation misrepresent its condition when they know or ought to know the truth and a person is thereby led to deposit his money therein and lose it, by reason of the unsafe condition of such bank, they are liable to such depositor directly to make good such loss, upon the ground of deceit.[36]

False Statements Knowingly Made.—There is no question, of course, as to the personal liability of the directors or other officers who, for the purpose of obtaining or retaining deposits, or for the purpose of collecting individual loans and securing unjust preferences for themselves, make statements as to the bank's condition which they know to be actually false.[37]

35. Same.—Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719.

36. Misrepresentation in other than formal reports and statements.—Stephens *v.* Overstolz, 43 Fed. 465; Gerner *v.* Mosher, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244; Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592; Baker *v.* Ashe, 80 Tex. 356, 16 S. W. 36; Giddings *v.* Baker, 80 Tex. 308, 16 S. W. 33; Kinkler *v.* Junica, 84 Tex. 116, 19 S. W. 359; Zinn *v.* Mendel, 9 W. Va. 580; Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

37. False statements knowingly made.—Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719; Townsend *v.* Williams, 117 N. C. 330, 23 S. E. 461; Miller *v.* Howard, 95 Tenn. 407, 32 S. W. 305; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592; Kinkler *v.* Junica, 84 Tex. 116, 19 S. W. 359; Giddings *v.* Baker, 80 Tex. 308, 16 S. W. 33; Baker *v.* Ashe, 80 Tex. 356, 16 S. W. 36.

Bank directors who, by false and fraudulent statements to the state treasurer as to the condition of the bank, in order to conceal its insolvency, induce him not only to make new deposits of the state's money, but also to permit a portion of the money deposited by his predecessor in office to remain, are liable to such treasurer for any loss, either of the old or new deposits. Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719.

A bank depositor, on rumors of its insolvency, went to withdraw his deposits, but was informed by the vice president and director that the bank was perfectly solvent, and that "we have got all the money you want. You need never have any fears of this bank as long as I am in it." Such depositor, relying on such representations, permitted his deposits to remain. The bank was in fact insolvent when the representations were made. Held, that such vice president and director was personally liable to such depositor for the money lost by the failure of the bank. Townsend *v.* Williams, 117 N. C. 330, 23 S. E. 461.

Having heard a rumor that a bank was not sound, one of its correspondents told its president that he had deposits in the bank, and wanted to know its financial condition. The president replied that there was no question of the ability of the bank to meet all liabilities, and the correspondent was thereby induced to continue his deposits, which were lost by reason of the insolvency of the bank. Held that, though the representation was not made with intent to deceive, the president was personally liable, if, by the exercise of ordinary diligence, he could have known that his statement was not true. Giddings *v.* Baker, 80 Tex. 308, 16 S. W. 33.

Directors who, on the bank's suspension, issue a circular declaring the solvency of the bank, and that they hope to reopen within sixty days, and authorize the bank officers to receive money on special deposit, and keep it

False Representation by President.—A bank president does not occupy the position of an indifferent third person. He is the principal officer and manager of his bank. It is his duty to use reasonable diligence to acquaint himself with the affairs of the bank. If by due diligence he could ascertain the condition of the bank and fails to do so, he is responsible for any false representation in regard to that condition acted upon, although made in good faith. If, however, by the use of such diligence he had not been able to ascertain the true condition of the bank, and so made a statement as to its condition which he believed to be true but which in fact was false, he would not be personally liable for that statement.[38]

Permitting Bank to Be Held Out as Solvent.—In jurisdictions where the doctrine that directors are trustees for depositors obtains, it is held that they are liable for losses resulting from their nonobservance of ordinary care and diligence in permitting the bank to be held out to the public as solvent when in fact it is insolvent.[39] When the directors ascertain that the bank is hopelessly insolvent, so that individually they are unwilling longer to aid it, their manifest duty is to close the doors at once, for a continuance of business under such circumstances, especially the receiving of deposits, is a fraud upon the public, and they should not receive any more deposits nor pay any more checks, but should proceed to execute their trust, either by making a general assignment for the benefit of creditors or by making a pro rata payment of the debts.[40] It is a gross fraud upon the public for directors to keep a hopelessly insolvent bank open and receive deposits until they have succeeded in drawing out their own funds or deposits. Such action is an unlawful preference of themselves, and the funds so withdrawn may be recovered for all the creditors by an assignee or receiver.[41] It is equally a fraud and a breach of his duty for a director, having knowledge that the bank is probably insolvent and that it will not be able to continue business or pay its depositors, to obtain from the cashier, without authority from the board of directors, discounted bills and notes of the bank equal to the amount of his deposits, and thus avoid the loss of his deposits.[42] In other states directors permitting an insolvent bank to continue business and to be held out to the public as

in the vaults of the bank, subject only to the check of the depositor, and subsequently, on the appointment of a receiver for the bank, turn over to him deposits made pursuant to the circular, are personally liable to the depositors for the amount of such deposits. Miller *v.* Howard, 95 Tenn. 407, 32 S. W. 305.

38. False representation by president.—Giddings *v.* Baker, 80 Tex. 308, 16 S. W. 33.

39. Permitting bank to be held out as solvent.—Delano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81; Lamb *v.* Laughlin, 25 W. Va. 300; Lamb *v.* Cecil, 28 W. Va. 653; Lamb *v.* Pannell, 28 W. Va. 663.

40. Same—Duty to close insolvent bank.—Lamb *v.* Laughlin, 25 W. Va. 300.

41. Same—Withdrawal of deposits by directors from insolvent bank.—Lamb *v.* Laughlin, 25 W. Va. 300. See, also, Lamb *v.* Cecil, 28 W. Va. 653; Lamb *v.* Pannell, 28 W. Va. 663.

42. Same—Directors obtaining funds and securities in lieu of deposits.—Lamb *v.* Cecil, 28 W. Va. 653. See, also, Lamb *v.* Pannell, 28 W. Va. 663.

worthy of confidence are liable for the resulting losses only where they have been guilty of gross negligence in that respect;[43] while in jurisdictions where the trust fund doctrine does not obtain it is held that the mere fact that a director, who knows the bank is insolvent, takes no action to close its doors, or announce its insolvency, does not make him liable for deceit to persons who have extended credit after the bank became insolvent on the assumption that it was solvent.[44]

Erroneous Information as to Individual Accounts.—No action will lie against an officer of a bank to recover for expenses incurred in consequence of erroneous information given by him in good faith to the plaintiff in regard to the amount of money which had been deposited to plaintiff's credit by a third person.[45]

As to Credit and Standing of Third Persons.—Where the cashier of a bank is applied to for information as to the solvency of a party and gives that information truly, he does not thereby undertake to watch over the interests of such party in the future; nor to be responsible if he fails to give notice of change of circumstances or reverses in trade that may befall the party about whom he has given information. The cashier may assume that if any future information is wanted he will again be applied to under such circumstances, and if no application is made he may well assume that the party whose interest is at stake, like other business men, is able to take care of himself and is guarding his investment with the watchfulness of one most concerned in the result. A party can not be held in such a case to have given a continuing guaranty against future contingencies, nor to have bound himself to notify the other of what he may well be assumed to be able to find out for himself.[46] A charge that if the cashier "knew plaintiff was buying T. & Co.'s paper on the faith of the representations made by him, and their circumstances had changed so that, as he says, 'these representations had become false,' it was the cashier's duty to have notified plaintiff and put him on his guard, otherwise he would be liable, is sound morally, and under some circumstances might be sound law where the party trusting to the representations lived at a different point, and might be assumed to rely entirely on the statements of his correspondent, yet it is very questionable whether the principal could be fairly applied to the case of parties all residing in the same town or city where the party buying paper might be expected, as a man engaged in such business, to look after his own interest, and had equal means of information or opportunities to acquire knowledge with any one else as to the

43. **Same—Cases holding liable only for gross negligence.**—Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725.

44. **Same—Directors held not liable for inaction.**—Hart *v.* Evanson, 14 N. Dak. 570, 105 N. W. 942, 3 L. R. A., N. S., 438.

45. **Erroneous informations as to individual accounts.**—Herrin *v.* Franklin County Bank, 32 Vt. 274.

46. **As to credit and standing of third persons.**—Horrigan *v.* First Nat. Bank, 68 Tenn. (9 Baxt.) 137.

changes in the situation of his debtor."[47]

Same—Effect of Release, Extension of Time, etc.—When the holder of paper has given credit to a third party upon the recommendation of a cashier of a bank, and the debtor is ready and offers to pay the note at maturity, and the holder instructs the cashier to give the debtor an extension of time, which the debtor accepts, and then fails, the cashier, though he had rendered himself liable by the recommendation, is discharged by the release of the holder.[48]

Judgment of Forfeiture against Bank No Defense to Directors.—It is no defense to an action against directors under a statute making them personally liable for the debts of the bank where they have made false reports of its condition, that judgment of forfeiture has been pronounced against the bank. Such judgment does not discharge the liability of the directors.[49]

§ 57 (6) Receiving Deposits after Insolvency.—See, also, ante, "Liability with Respect to Reports, Statements, and Representations," § 57 (5); post, "Receiving Deposits after Knowledge of Insolvency," § 61 (3b).

Mere Fact of Deposit and Loss No Ground for Action.—The mere fact that a man deposits money in an insolvent bank, believing it to be solvent, and thereby loses his money, gives him no cause of action, at common law, against the directors. Aside from statutory provisions, directors are not liable in an action at law for losses so sustained, unless the deposit was induced by the fraudulent conduct of the directors, officers or agents of the bank.[50] If it was so induced, then an action will lie against them personally upon the ground of fraud and deceit independently of any statute.[51]

What Constitutes Fraud and Deceit.—As to what constitutes fraud and deceit in such a case, there can be no question that it is not only a gross breach of their duty as trustees for creditors, but a fraud upon the public rendering them personally liable for the loss sustained, for directors to permit a bank which they know to be hopelessly insolvent to continue

47. **Same—Duty to keep customer informed.**—Horrigan *v.* First Nat. Bank, 68 Tenn. (9 Baxt.) 137.

48. **Same—Effect of release, extension of time, etc.**—Horrigan *v.* First Nat. Bank, 68 Tenn. (9 Baxt.) 137.

49. **Judgment of forfeiture against bank no defense to directors.**—Hargroves *v.* Chambers, 30 Ga. 580.

50. **Mere fact of deposit and loss no ground for action.**—Duffy *v.* Byrne, 7 Mo. App. 417; Fusz *v.* Spaunhorst, 67 Mo. 256; Minton *v.* Stahlman, 96 Tenn 98, 34 S. W. 222.

The cashier of a bank in which are deposited the funds of a corporation can not be held therefor in his individual capacity, although he is also the treasurer of the corporation, and deposited the funds in bank as such treasurer. Sprague *v.* Steam Nav. Co., 52 Me. 592.

51. **Same—Liability for fraud and deceit.**—Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Caldwell *v.* Bates, 118 N. C. 323, 24 S. E. 481; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592; Giddings *v.* Baker, 80 Tex. 308, 16 S. W. 33; Baker *v.* Ashe, 80 Tex. 356, 16 S. W. 36; Kinkler *v.* Junica, 84 Tex. 116, 19 S. W. 359; Zinn *v.* Mendel, 9 W. Va. 580; Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

to do business and receive money on deposit until they have succeeded in withdrawing their own deposits and thus obtained a fraudulent and unlawful preference for themselves.[52]

Same—Duty of Director upon Discovering Insolvency of Bank.—The obtaining of some fraudulent or unfair advantage for himself, however, is not an essential element of liability. When a director discovers that the bank is insolvent and fails to take such steps as lie in his power to close the bank for business, and takes part in any arrangement which permits the bank to be kept open, and deposits to be received, he is personally liable for damages to a depositor who is ignorant of the insolvency, and whose deposits were thereafter received. His plain duty, upon discovering the insolvency of the bank, is to call a meeting of the board of directors, or communicate with the superintendent of the banking department, or direct the cashier to discontinue the taking of deposits, or warn individual depositors of such insolvency, and for a failure to perform such duty, an action will lie against him personally.[53] And it is no defense that the director has expressed an opinion that deposits should not be received and has entered into an arrangement with other directors for their receipt under proper restrictions, where such arrangement is subsequently abandoned and never carried into effect.[54]

Constitutional and Statutory Provisions.—Provisions forbidding the receipt of deposits in banks after knowledge of their insolvency on the part of directors and officers are common in the banking laws of most states, and it is generally provided that the guilty officers or directors shall be personally liable for such deposits; but even where the statute contains no such provision, the applicable principle is, that where a statute prohibits the doing of an act, or imposes a duty on one for the benefit and protection of individuals, and the one upon whom the duty is so imposed neglects to perform the same, or disobeys the prohibition, he is liable to those for whose protection the statute was enacted for any damages proximately resulting from such neglect or disobedience.[55]

52. **What constitutes fraud in such case.**—Lamb *v.* Laughlin, 25 W. Va. 300; Lamb *v.* Cecil, 28 W. Va. 653; Lamb *v.* Pannell, 28 W. Va. 663.

53. **Same—Duty of director upon discovering insolvency.**—Cassidy *v.* Uhlmann, 170 N. Y. 505, 63 N. E. 554, affirmed in 54 App. Div. 205, 66 N. Y. S. 670, affirmed in Nathan *v.* Uhlman, 101 App. Div. 388, 92 N. Y. S. 13; affirmed in 184 N. Y. 606, 77 N. E. 1192.

At a critical period in the affairs of a bank, two of its directors, of whom defendant was one, who were in practical control during the absence of the president, actively participated, with full knowledge that the bank was hopelessly insolvent, in keeping it open for business, without notifying subsequent depositors of the facts. Held, that defendant was guilty of fraud, and was liable for the damage thus inflicted upon subsequent depositors. Cassidy *v.* Uhlmann, 27 App. Div. 80, 50 N. Y. S. 318, judgment reversed, 163 N. Y. 380, 79 Am. St. Rep. 596, 57 N. E. 620.

54. **Same—Same.**—Cassidy *v.* Uhlmann, 170 N. Y. 505, 63 N. E. 554, judgment affirmed, 54 App. Div. 205, 66 N. Y. S. 670.

55. **Constitutional and statutory provisions.**—Bott *v.* Pratt, 33 Minn. 323, 23 N. W. 237; Osborne *v.* McMasters, 40 Minn. 103, 41 N. W. 543, 12

Same—Bank Operating under Special Charter—Effect of Criminal Provision, etc.—The individual liability of a director under a general constitutional or statutory provision of this character is not affected by the fact that the bank is operating under a special charter,[56] nor by the fact that a preceding clause refers to such conduct as a crime, and authorizes the legislature to prescribe the punishment.[57]

Same—Whether Constitutional Provision Self-Executing.—A constitutional provision making officers of banks individually liable for receiving deposits after knowledge of the bank's insolvency has been held to be self-executing in the federal circuit court sitting in the state of Washington;[58] while the contrary has been held with reference to a somewhat similar provision by the supreme court of Missouri.[59]

When Bank Deemed to Be Insolvent.—Under a statute, making the managing officers of a banking corporation individually liable to depositors for money received on deposit, when they knew, or had good reason to believe, the bank insolvent, a bank is treated as insolvent when it becomes unable to meet its liabilities as they become due in the ordinary course of its business. It is not insolvent, within the meaning of such a statute, so long as it is meeting its liabilities as they become due, and there is a reason-

Am. St. Rep. 698; Baxter *v.* Coughlan, 70 Minn. 1, 72 N. W. 797.

Complaint held to state a cause of action, within the rule stated, under laws Minn. 1895, ch. 219. Baxter *v.* Coughlan, 70 Minn. 1, 72 N. W. 797.

The Missouri Act April 23, 1877, which provided that all bank officers who had assented to the receiving of deposits after knowledge of its insolvency might be proceeded against severally or jointly, was held to give no right of action to the depositor. Fischer *v.* Tamm, 13 Mo. App. 108.

But under the Act of 1879, Rev. Stat. Mo. 1879, § 918, providing that no director should assent to the reception of deposits after he should have knowledge that the bank was insolvent, and that every person violating the provisions of that section should be individually responsible for deposits so received, it was held that a depositor might maintain an action against a director who assented to receiving a deposit with knowledge of the bank's insolvency. Cummings *v.* Winn, 89 Mo. 51, 14 S. W. 512.

56. Same—Bank operating under special charter.—Cummings *v.* Spaunhorst, 5 Mo. App. 21.

57. Effect of criminal provision in statute.—Cummings *v.* Spaunhorst, 5 Mo. App. 21.

The provision of Const., art. 12, § 27, declaring, in effect, that any bank officer shall be individually responsible for deposits received or debts created with his assent when knowing the bank to be insolvent, held not to be self-enforcing. The expression "such deposits" does not refer to the clause, "it shall be a crime, the nature and punishment of which shall be prescribed by law." Fusz *v.* Spaunhorst, 67 Mo. 256.

58. Provision self-executing.—Mallon *v.* Hyde, 76 Fed. 388.

59. Contra.—Prunty *v.* Spaunhorst, 6 Mo. App. 579; Fusz *v.* Spaunhorst, 67 Mo. 256.

Const. 1875, art. 12, § 27, provides that it shall be a crime, the nature and punishment of which shall be prescribed by law, for any president, director, manager, cashier, or other officer of any banking institution to assent to the reception of deposits or the creation of debts by such banking institution after he shall have had knowledge of the fact that it is insolvent or in failing circumstances; and any such officer, agent or manager shall be individually responsible for such deposits so received. Held, that the provision is not self-executing, notwithstanding 2 Wag. St., p. 1013, § 3, prescribing what a petition shall contain, and page 999, § 1, denominating every action for the enforcement or protection of private rights or prevention of private wrongs a "civil action." Prunty *v.* Spaunhorst, 6 Mo. App. 579.

able expectation on the part of its officers familiar with its business affairs of continuing to do so. Whether the officers acted in good faith and upon a reasonable expectation of continuing the business must be determined from the consideration of all the attendant circumstances.[60]

Phrase "in Failing Circumstances" Construed.—The phrase "in failing circumstances," when used in a constitution or statute relating to receipt of deposits when insolvent, must be taken to mean a state of uncertainty whether the bank will be able to sustain itself, depending on favorable or unfavorable contingencies, which in the course of business may occur, and over which its officers have no control.[61]

Knowledge of Insolvency—Actual Knowledge Unnecessary.—Actual knowledge of insolvency is not essential to personal liability, unless made so by statute. It is the duty of officers of a banking institution receiving or assenting to the reception of deposits to know the financial condition of the bank, and the law presumes they do know it,[62] and directors are liable if they receive deposits when they know, or with proper attention may learn, that the bank is insolvent.[63] On the other hand, although the officers of a bank know it to be in embarrassed circumstances, yet, if they believe honestly, and upon reasonable grounds, that it will eventually maintain its credit, they are not bound to disclose its condition to would-be depositors before accepting deposits, nor are they liable to such depositors should the bank ultimately fail.[64]

Same—Statutory Provisions.—Knowledge of insolvency, under the Missouri statute,[65] was held to mean actual knowledge, and not innocent, bona fide ignorance arising from neglect to inform themselves;[66] hence, directors sued upon their personal liability under that act were not estopped to plead ignorance of insolvency because of their duty to manage the bank's affairs.[67] On the other hand, under a somewhat similar statute in Kansas,[68]

60. **When bank deemed to be insolvent.**—Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222; Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471; Eads *v.* Orcutt, 79 Mo. App. 511.

The insolvency of a bank can not be assumed from the simple fact of its having closed its doors for a few days, when there have been no steps taken to determine whether it is solvent or insolvent. Moseby *v.* Williamson, 52 Tenn. (5 Heisk.) 278.

61. **Phrase "in failing circumstances" construed.**—Dodge *v.* Mastin, 17 Fed. 660, 5 McCrary 404.

62. **Knowledge of insolvency—Officers presumed to know financial condition of bank.**—Eads *v.* Orcutt, 79 Mo. App. 511.

63. **Actual knowledge unnecessary.**—Delano *v.* Case, 17 Ill. App. 531.

64. **Knowledge of embarrassed circumstances—Belief in solvency.**—St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390.

65. **Knowledge under statutes—Missouri statute.**—Rev. Stats. Mo. 1889, § 2760.

66. **Same—Same.**—Utley *v.* Hill, 155 Mo. 232, 49 L. R. A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091; Union Nat. Bank *v.* Hill, 155 Mo. 279, 55 S. W. 1133; Haas *v.* Garnett, 155 Mo. 568, 55 S. W. 1132; Boatmen's Bank *v.* Garnett, 155 Mo. 569, 55 S. W. 1132.

67. **Same—Same—Directors not estopped to plead ignorance.**—Utley *v.* Hill, 155 Mo. 232, 49 L. R. A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091; Union Nat. Bank *v.* Hill, 155 Mo. 279, 55 S. W. 1133; Haas *v.* Garnett, 155 Mo. 568, 55 S. W. 1132; Boatmen's Bank *v.* Garnett, 155 Mo. 569, 55 S. W. 1132.

68. **Same—Knowledge under the Kansas statute.**—Gen. Stat. Kans. 1901, §§ 471, 472, Banking Law, §§ 65, 66.

making it unlawful for an officer of the bank to assent to the reception of deposits or to the creation of debts after knowledge of the bank's insolvency, and making it the duty of directors and officers to examine into the affairs of the bank, and, if possible, to know its conditions, it was held that directors were required to examine into its affairs with reasonable frequency and thoroughness, and that, failing to do so, they would be liable for the loss of deposits received after insolvency even though it should appear that such an examination as the law required would not have revealed the bank's insolvent condition.[69] In other words, not having exercised the diligence required by law, he would not be heard to say that it would have been unavailing to discover fraudulent and corrupt practices of the cashier or other officer resulting in the insolvency of the bank.[70]

Determining Knowledge of Insolvency—Duty of Jury.—In determining the question of the knowledge of the insolvency on the part of the president or cashier, the jury should consider their conduct and demeanor in reference to the affairs of the bank, whether or not they were operating in good faith, and whether or not they had a reasonable expectation of redeeming all of the deposits. In short, the jury should take all the circumstances in the case, weigh them fairly and impartially, and determine, in case they find that the bank was insolvent, whether the president and cashier knew of such insolvency, or had good reason to believe it was insolvent at that time.[71]

§ 57 (7) Sale of Drafts of Insolvent Bank.—The fact that the defendant was the assistant cashier of a bank which was insolvent when the plaintiffs purchased certain drafts from it, would not render such assistant cashier liable to the plaintiffs for a fraud, on the ground that he was bound to know that the bank was insolvent and to communicate that fact to the plaintiffs.[72]

§ 57 (8) Liability with Respect to Special Deposits.—When money has been deposited with a bank, and there has been no contract that a different rule shall prevail, the bank in which the deposit is made, ordinarily, becomes the owner of the money and consequently a debtor for the amount, and under obligation to pay on demand, not the identical money received, but a sum equal in legal value.[73] This rule does not apply, how-

69. **Same—Same.**—Forbes *v.* Mohr, 69 Kan. 342, 76 Pac. 827.

70. **Same—Same.**—Forbes *v.* Mohr, 69 Kan. 342, 76 Pac. 827.

71. **Determining knowledge of insolvency—Duty of jury.**—Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222.

A different rule prevails in suits by or for the corporation brought in a court of equity. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Shea *v.* Mabry, 69 Tenn. (1 Lea) 319; Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222.

72. **Sale of drafts of insolvent bank.**—Dickey & Co. *v.* Leonard, 77 Ga. 151, 152.

73. **General deposit becomes a debt.**—Marine Bank *v.* Fulton Bank, 2 Wall. 252, 17 L. Ed. 785; Keene *v.* Collier (Ky.), 1 Metc. 415; Downes *v.* Phœnix Bank (N. Y.), 6 Hill 297; Matter of Patterson (N. Y.), 18 Hun 221, affirmed in 78 N. Y. 608; Franklin Fire Ins.

ever, in the case of special deposits either of money or commodities, where the property in the thing deposited remains in the depositor and the bank becomes the simple bailee.[74] Directors of the bank are personally responsible to the depositors for the loss or conversion of special deposits in the bank whenever they knew of such conversion or might have known of it by the exercise of such care and diligence as the law requires of such officers in supervising the affairs of the bank.[75] They are not mere figureheads, with no duties to perform, and with the liberty of leaving matters of this character to their president and cashier, and relieving themselves of liability and duty by placing special funds, which they are under obligations to deliver to special depositors, in the hands of third persons, and then leaving it to their depositors to litigate their claims and rights with such third persons.[76]

§ 57 (9) Personal Liability with Respect to Loans, Discounts and Investments—§ 57 (9a) At Common Law.—Mere Errors of Judgment.—The officers of an insolvent bank can not be held personally responsible to creditors for losses on loans and discounts made by them in good faith, and, as they thought at the time, for the best interests of the bank, merely because such loans and discounts appear to have been unwise and hazardous when looked back upon.[77] The customs and methods of the community in which a banking business is done are, for such community, a standard of prudence and diligence by which the responsibility of the bank officers and directors at common law is to be tested; and if there has been a reasonable conformity to these, and absolute good faith and honesty of purpose, it would be unjust to hold them to a personal ac-

Co. *v.* Jenkins (N. Y.), 3 Wend. 130; Commercial Nat. Bank *v.* Henninger, 105 Pa. 496.

74. Bailee as to special deposit.—Marine Bank *v.* Fulton, 2 Wall. 252, 17 L. Ed. 785; Thompson *v.* Riggs, 5 Wall. 663, 18 L. Ed. 704; Bank *v.* Millard, 10 Wall. 152, 19 L. Ed. 897; Franklin Fire Ins. Co. *v.* Jenkins (N. Y.), 3 Wend. 130; Zinn *v.* Mendel, 9 W. Va. 580.

75. Same—Personal liability for loss or conversion.—Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; United Society *v.* Underwood (Ky.), 9 Bush. 609, 15 Am. Rep. 731; Miller *v.* Howard, 95 Tenn. 407, 32 S. W. 305.

76. Same—Where deposit delivered to third persons.—Miller *v.* Howard, 95 Tenn. 407, 32 S. W. 305.

The directors of a bank are personally liable for a deposit made during a suspension of payment upon faith of a circular issued by them that such deposits would be kept, subject to the depositor's orders, in the vaults of the bank, where they allow the receiver for the bank, subsequently appointed, to take possession of the same. Miller *v.* Howard, 95 Tenn. 407, 32 S. W. 305.

In the case of United Society *v.* Underwood (Ky.), 9 Bush. 609, 15 Am. Rep. 731, the deposit in question was a special deposit of bonds, and not an ordinary deposit of money. The petition substantially alleged that the defendants converted the bonds to their own use. It was held that the directors were personally responsible to the depositors for loss or conversion by the bank of special deposits in such bank whenever they knew of such conversion, or might have known of it by the exercise of such care and diligence as the law requires of such officers in supervising the affairs of the bank and that the directors must be considered as affected with the knowledge of such facts as appeared upon the books of the bank.

77. Liability for errors of judgment.—Witters *v.* Sowles, 31 Fed. 1.

countability to stockholders for loans which subsequent events prove to have been unwise.[78]

Excessive Loans to One Individual.—Whether the making of an excessive loan to an individual is, in the absence of statute fixing a limit to the sum that may be loaned to any one person, negligence, and what constitutes an excessive loan, depends upon the circumstances. While the lending of an amount equal to about one-third of the capital stock of a bank to a single person would seem to be unwise and hazardous, yet, where such a loan was made to one of the directors, who was the chief merchant of the town, largely while his business and financial standing were good, and afterwards to preserve his credit, and with an entirely honest purpose on the part of the bank officials to enable him to continue business, in the hope that he would finally be able to pay, it was held, that this was not sufficient, at common law, in the absence of any trace of fraud, to render the directors of the bank personally liable to the stockholders (depositors and creditors having been fully paid) for the resulting loss.[79]

Loans to Officers and Stockholders.—In the absence of statute prohibiting it, loans to officers and stockholders of the bank are not unlawful nor fraudulent per se.[80] But if a bank allows its stockholders to withdraw its funds to the amount of their subscriptions, and to use them, without security, in their private business, such conduct is a fraud on its creditors, which renders the directors liable in equity for the amount so withdrawn, and each agent who participated in the fraud individually responsible for the amount traced to his hands and all profits made from its use.[81]

Investments in Realty to Save Debt.—The fact that large amounts of assets of a bank were invested in realty, causing great losses from depreciation, will not render the directors liable for mismanagement and negligence where it appears that the realty was bought under foreclosure of mortgages held by the bank, to prevent a sacrifice.[82]

§ 57 (9b) Loans and Investments in Violation of Statute.—Directors render themselves personally liable for waste of the corporate property and assets by doing acts forbidden by the charter or general law, such as lending the money of the bank without exacting security as required by law, or investing the money of the bank in speculative enterprises forbidden by law.[83] It is not essential in such cases to allege and prove that

78. **Standard of diligence and care.**—Wheeler *v.* Aiken County, etc., Sav. Bank, 75 Fed. 781.

79. **Excessive loans to individuals.**—Wheeler *v.* Aiken County, etc., Sav. Bank, 75 Fed. 781.

80. **Loans to officers and stockholders.**—Wheeler *v.* Aiken County, etc., Sav. Bank, 75 Fed. 781.

81. **Allowing stockholders to withdraw funds to amount of subscriptions.**—Bank *v.* St. John, etc., Co., 25 Ala. 566.

82. **Investments to save debt and prevent sacrifice.**—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

83. **Loans and investments forbidden by law.**—Citizens' Loan Ass'n *v.* Lyon, 29 N. J. Eq. 110; Williams *v.* McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Hun *v.* Carey, 82 N. Y. 65, 59 How. Prac. 439, 37 Am. Rep. 546; Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Robinson *v.* Smith (N. Y.), 3 Paige 222, 24 Am. Dec. 212; Hodges *v.* New

the director acted fraudulently, or that he derived any benefit from the loan; it is sufficient to show that there was a culpable violation of duty as quasi trustee of the funds of the bank, by which loss was sustained.[84] However, on the ground that directors are not liable for errors of judgments and mistakes of law committed in good faith, it has been decided that where a director acts in entire good faith he is not liable for making a loan for a greater amount than the law allowed to be advanced on the security taken.[85] He is not chargeable for any mere error of judgment, or mistake in estimating the value of property, using reasonable and ordinary care.[86]

Loans to Directors and Officers.—Directors who knowingly participate in or assent to the making of loans to one of the members, in violation of the state banking laws, render themselves individually liable for all damages which the corporation, its shareholders or any other persons may sustain in consequence thereof; and to recover such losses the persons sustaining the same may maintain an action at law against the directors individually.[87]

Responsibility of Borrowing Director.—Under Rev. Stat., U. S., § 5200, directors of a national bank, who make or assent to the making of a loan to any one person of a sum exceeding one-tenth of the capital stock of the bank, become personally and individually liable for all losses sustained thereby; but where the borrower, in such a case, is also one of the directors, he is not so liable, but simply as a debtor to the bank.[88] A state statute merely forbidding the directors and other officers of a state bank from borrowing any money from the bank, on pain of criminal prosecution, affects only the officer so borrowing, and does not make other directors personally liable to the stockholders for losses resulting therefrom.[89] In Ohio, however, under the "act to incorporate the State Bank

England Screw Co., 1 R. I. 312, 53 Am. Dec. 624; Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

The defendant, who was a director and member of the finance committee of a savings bank, which afterwards became insolvent, and a receiver was appointed, having acted with the president in investing its funds on mortgage on real estate not worth at least double the amount of the sum invested above all incumbrances, against the prohibition in its charter (Laws N. J. 1869; P. L. N. J. 80, § 10), is chargeable with the loss on the investment. Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866.

84. Same—Necessity to show fraud or profit.—Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866.

85. Same—Mistakes and errors—Good faith.—Williams *v.* McDonald, 37 N. J. Eq. 409.

86. Same.—Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866.

87. Loans to directors and officers.—Witters *v.* Sowles, 31 Fed. 1; Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 129; Conant, etc., Co. *v.* Reed, 1 O. St. 298; Attorney-General *v.* Seneca County Bank, 5 O. St. 171; Arnold *v.* Reid, 1 O. Dec. 347.

The directors of an insolvent bank are liable for losses occasioned by loans made to its cashier on insufficient security to make good his overdrawn accounts, where the overdrafts were continued after the bank examiner had directed their attention to such objectionable practice. Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 126.

88. Responsibility of borrowing director.—Witters *v.* Sowles, 31 Fed. 1.

89. Same—Liability of other directors.—Wheeler *v.* Aiken County, etc., Sav. Bank, 75 Fed. 781.

of Ohio and other banking companies," and providing that the directors of any bank incorporated thereunder shall not be liable to the bank except to such amount and in such manner as shall be prescribed by the by-laws of such bank, adopted by its stockholders to regulate its liabilities, a director who borrows money from the bank without the authority of a by-law, and his associate directors who consent to such loan, are liable personally for all damages which any other person may sustain in consequence of such loan.[90]

§ 57 (9c) Liability for Acts of Associates and Subordinates.—Directors guilty of gross negligence in permitting the cashier to make loans in violation of statute and without security are personally liable for the loss sustained and it is no excuse that they had no benefit from their neglect and that their services were gratuitous.[91] But, before the directors of a bank can be held liable, in case of almost total inattention to its management, for losses from loans made by the cashier without their knowledge or consent, it must be shown that the cashier did not exercise reasonable skill, diligence, and prudence in making the loans.[92] It is not negligence per se in a cashier of a bank to pay the overdraft of a responsible customer of character and business integrity; and therefore the directors can not be made liable in an action against them for negligence and mismanagement on mere proof that an account was overdrawn, and a loss thereby sustained.[93] Directors of a national bank can not be held to the common-law liability for inattention to duty as directors in not preventing a hazardous, imprudent and disastrous loan, if such loan was made by their associates, without their knowledge, connivance, or participation.[94]

§ 57 (10) Individual Liability with Respect to Collections and Payments.—The mere failure to sue on notes held by a bank, thus permitting them to become barred, will not render the directors liable for negligence and mismanagement, unless it is shown that the makers were solvent, and that payment might have been enforced.[95] Where a bank cashier who has received a note for collection, fails to present it on the proper day, and to have it protested, if not paid, so that the indorsee is discharged, he will be liable to the owner of the note.[96]

90. **Same—Same.**—Attorney-General *v.* Senaca County Bank, 5 O. St. 171; Conant, etc., Co. *v.* Reed, 1 O. St. 298; Arnold *v.* Reid, 1 O. D. 347.

91. **Liability for acts of associates and subordinates.**—Union Nat. Bank *v.* Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; S. C., 155 Mo. 279, 55 S. W. 1133.

92. **Same—Necessity for negligence or fraud on part of subordinate.**—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

93. **Same—Same—What constitutes.**—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

94. **Common-law liability for failure to prevent hazardous loan.**—Witters *v.* Sowles, 31 Fed. 1.

95. **Liability with respect to collections and payments.**—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

96. **Same—Failure to bind indorsers, etc.**—Hough *v.* Young, 1 O. 504.

Payments.—The cashier of a bank, who, on purchasing for himself property from a debtor of the bank, agrees that the price shall be applied in a certain manner on the indebtedness to a bank, acts, in making such agreement, in his official capacity, and is not individually liable for a breach thereof;[97] and if he volunteers to arrange for the application of the price to the indebtedness of the bank in a particular manner, he is to that extent the agent of the debtor, and is not individually liable if the bank refuses to make the arrangement.[98]

§ 57 (11) Individual Liability with Respect to Sale, Transfer or Purchase of Stock.—Where the directors of a bank take notes, judgments, and the like in the payment of subscriptions to stock, it is incumbent on them to show that such notes, etc., were of the value for which they were transferred, or that they exercised ordinary care in ascertaining their value, and had reason to believe them to be worth the amounts for which they were taken, in order to escape liability therefor, as such transactions are a deviation from the usual course of business.[99] For accepting such unauthorized securities in payment for stock the directors may, in case of loss, be held personally liable for the full amount of the stock so paid.[1] Directors are not responsible, however, to one from whom, in the name of the bank, they have made an unauthorized purchase of its stock, and which the bank had repudiated.[2] And the unauthorized action of the directors of a bank in withholding assent to the transfer of stock to a purchaser thereof, preventing the purchaser from reselling the stock before the insolvency of the bank, is not in itself evidence of fraud on the purchaser.[3]

Liability for Signing Invalid Certificates of Stock.—Where the officers of the bank sign certificates of stock which are invalid because the steps necessary to validate their issue were not taken, they will be liable in an action of deceit to another bank which takes such stock as collateral, the measure of damages being the difference between the face value of the stock and its actual value.[4]

§ 57 (12) Wrongfully Declaring Dividends.—Both as to third persons and stockholders alike it is a good cause of action against directors that they declare dividends out of the capital stock or deposits of the bank, and not out of its earnings.[5] A general statute making the directors

97. **Payments breach of agreement as to application.**—Pease *v.* Francis, 25 R. I. 226, 55 Atl. 686.

98. **Same—Same.**—Pease *v.* Francis, 25 R. I. 226, 55 Atl. 686.

99. **Accepting unauthorized securities in payment of stock subscription.**—Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567.

1. **Same.**—Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

2. **Responsibility for unauthorized purchase of stock.**—Abeles *v.* Cochran, 22 Kan. 405, 31 Am. Rep. 194.

3. **Liability for refusing to transfer stock.**—Penfold *v.* Charlevoix Sav. Bank, 140 Mich. 126, 103 N. W. 572.

4. **Liability for signing invalid certificate of stock.**—Lloyd *v.* Western Nat. Bank, 30 Wkly. L. Bull. 165, 11 O. Dec. 851, affirmed in 54 O. St. 681, 47 N. E. 1113.

5. **Liability for wrongfully declaring dividends.**—Solomon *v.* Bates, 118 N.

of any corporation jointly and severally liable for paying dividends before the capital stock is fully paid in or when the corporation is insolvent or unable to pay dividends without impairing or diminishing the capital, is applicable to banking corporations.[6] Bank directors can not be held personally liable, however, for money paid out for dividends "to a greater amount than net profits after deducting losses and bad debts" (Rev. Stat. U. S., § 5204), because there were debts bad in fact, but supposed to be good, when the dividends were declared and paid. Bad judgment on the part of the directors, as to the condition of the assets, without bad faith, does not make them individually liable.[7] Nor can there be any recovery by or on behalf of shareholders for dividends improperly declared and paid out to the shareholders themselves.[8] Where the stockholders of a bank, upon the expiration of their charter, make dividends of their capital stock among themselves, so that there are not corporate funds left sufficient to redeem their outstanding notes or bills, a holder of such bills can not maintain an action at law as for a tort against an individual stockholder who has received his portion of such dividends, even though the declaration allege fraud against the defendant. Whatever remedy there may be in such a case must be in equity and for the benefit of all the creditors.[9]

§ 57 (13) Officers of Fraudulent and Illegal Banks.—The liability of the ostensible president of a spurious bank for debts contracted by his assistance is not collateral, but direct and original; and he must respond in damages to the same extent as the bank, if legally constituted, would have been liable.[10] The directors and stockholders of a bank organized under an act which is subsequently declared unconstitutional are not liable for the payment of the bills or other indebtedness of the bank, neither as

C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Dykman *v.* Keeney, 10 App. Div. 610, 42 N. Y. S. 488; Gaffney *v.* Colvill (N. Y.), 6 Hill 567; In re Gunkle's Appeal, 48 Pa. 13.

6. **Same—Applicability of statute.**—Williams *v.* Brewster, 117 Wis. 370, 93 N. W. 479.

7. **Same—Errors of judgment—Ignorance of bank's condition.**—Witters *v.* Sowles, 31 Fed. 1.

Ky. St. 1903, § 548, declares that if the directors of any corporation shall declare and pay any dividend when the corporation is insolvent, they shall be individually liable for all debts of the corporation existing or thereafter incurred. Section 596 declares that the directors of a bank may declare a dividend after deducting expenses, losses, bad and suspended debts, interest and taxes, etc., and § 598 provides that if the directors of a bank shall "knowingly" violate any of the provisions of the law relating to banks, the directors so offending shall be jointly and severally individually liable to the creditors and stockholders for any loss or damage not made good within a reasonable time. Held, that where the directors of a bank innocently declared a dividend while the bank was insolvent, such directors were not liable under § 548 for all existing and subsequent debts of the bank but were only liable under § 598 for the amount of the dividend so declared. Franklin *v.* Caldwell, 123 Ky. 528, 29 Ky. L. Rep. 935, 96 S. W. 605.

8. **Liability to shareholders.**—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

9. **Stockholders dividing assets of suspended bank among themselves.**—Vose *v.* Grant, 15 Mass. 505.

10. **Liability of officers of fraudulent and illegal banks.**—Hauser *v.* Tate, 85 N. C. 81, 39 Am. Rep. 689.

stockholders and directors, nor as partners.[11] Where the statute provides that the holders of notes and bills issued by an unauthorized bank may recover from those personally interested in the company without proof of demand and notice, the payee and first indorser of a bill drawn by such company is liable without demand upon the drawee.[12] Where the officers and directors are personally liable for the notes and bills issued by an unauthorized banking association the enactment, in an act to regulate judicial proceedings, of a provision declaring that such notes and bills shall be taken to be absolutely void in all courts in proceedings where banks and bankers are parties, does not render such notes absolutely void, but merely suspends the remedy upon them so long as it continues in force, and upon its repeal the officers of such illegal association again become liable for notes issued before its repeal.[13]

§ 57 (14) Nominal Directors and Persons Held Out as Directors.—Where the owners of the charter and stock of a state bank, men of good character and having the confidence of the community, published in the newspapers of the city in which the bank was located, a business card of the bank, with their own names as officers, and with the name of one of themselves as a director, and the names of four other persons as directors, who were not stockholders, who had never been notified that they were elected directors, nor accepted the office, nor acted as such, and continued the publication for over four years with the knowledge of such persons, but without their active participation, the creditors, upon the failure of the bank, had no right of action, either through or independent of the corporation, against such persons for failing to discharge the duties of directors, it not appearing that they, or either of them, had done or said anything tending to lead any of the creditors to believe that they were directors.[14] Neither were creditors entitled to sue such directors under a statute giving a right of action where the directors were shown to be guilty of intentional fraud and willful mismanagement, the testimony in the case

11. **Where bank organized under act subsequently declared unconstitutional.**—State *v.* How, 1 Mich. 512.

Act March 5, 1837, provides that all such persons as shall become stockholders of a banking association shall constitute a body corporate in fact and in name. Section 21 provides that, if such banking association shall become insolvent, the directors shall be liable in their individual capacity for its debts. Subsequently so much of the act as purports to confer corporate rights on such association was held by the supreme court to be unconstitutional. By a prior law, associations for banking were prohibited unless specially authorized by law. Held, in an action against directors of such bank by a creditor, that the word "associations," used in § 21, has the same effect as if the word "corporations" were used, and, such associations being illegal, there can be no directors, and therefore no right of action exists by virtue of said section. Brooks *v.* Hill, 1 Mich. 118.

12. **Rights of bill holders—Fixing liability of indorsers, etc.**—Watson *v.* Brown, 14 O. 473.

13. **Operation of statute declaring notes void.**—Johnson *v.* Bentley, 16 O. 97.

14. **Liability of persons held out as directors.**—Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728.

entirely exonerating the defendants from all participation and knowledge or even suspicion of the acts of which plaintiffs complained.[15] A secret agreement among defendants that they would take over a bank from another whose sureties they were, upon his giving a note signed by certain persons, does not affect defendants' liability to plaintiff, if, notwithstanding such agreement, they took charge of and operated the bank and incurred the liability upon which suit was brought.[16]

§ 58. —— Actions and Proceedings to Enforce—§ 58 (1) Time to Sue and Limitations.—A suit of this character, whether brought at law by the corporation itself, or in equity by a creditor or shareholder for its benefit is alike subject to the bar of the statute of limitations.[17] Though brought in equity, such suit is to enforce a legal right, not for injury to or conversion of property, but upon the director's implied contract that they will exercise ordinary diligence in the discharge of the duties of their office; hence, the suit is barred only by the lapse of time prescribed for actions of the latter character, or for suits in equity, and not by the lapse of the period prescribed for the enforcement of rights arising ex delicto.[18] Where the action is at law and to enforce a statutory liability, it is ex contractu, ex delicto, penal or remedial, according as the statute may provide or the courts, in construing it, may hold, and will be held subject to the statute barring actions ex contractu or the statute barring actions ex delicto accordingly.[19] Where the cause of action is fraudulently and effectively

15. **Same—Statutory liability.**—Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728.

16. **Where defendants had agreed to take over bank and operate same.**—Curtis *v.* First Nat. Bank (Tex. Civ. App.), 138 S. W. 795.

17. **Applicability of statutes of limitation.**—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

18. **Same—Nature of suit as being ex contractu or ex delicto.**—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Williams *v.* Reilly, 41 N. J. Eq. 137, 3 Atl. 692; Williams *v.* Halliard, 38 N. J. Eq. 373.

Defendant was treasurer and manager of a bank which required all its officers to be members of the board of managers. Moneys were drawn out of the bank, for illegal loans, on checks signed in blank by the treasurer, but which he says were never authorized to be used for that purpose. The receiver asks for a decree holding him responsible therefor. Defendant demurs, claiming that the suit is barred by the statute of limitations. Held, that the liability being one cognizable by a court of equity alone, the demurrer should be overruled. Williams *v.* Reilly, 41 N. J. Eq. 137, 3 Atl. 692.

In an action by a receiver of an insolvent bank against its managers to recover for losses by their alleged mismanagement, defendants could set up the statute of limitations as to illegal investments or overdrafts by the president, made more than six years previously. Williams *v.* Halliard, 38 N. J. Eq. 373.

19. **Same—Action at law to enforce statutory liability.**—An action under Rev. St., § 301, to enforce against the directors of a bank liability for having furnished false statements of the affairs of the bank to the state treasurer, is ex delicto, and prescribed by one year. Knoop *v.* Blaffer, 39 La. Ann. 23, 6 So. 9.

Gen. St., § 278, providing that if any banking association neglects to make a semiannual statement, within a certain time, of the condition of the bank to the state treasurer, "the directors shall be personally liable for all debts of said association contracted previous to and during the period of such neglect," is a penal statute; and a cause of action against a director accruing

concealed from the party entitled to sue thereon, the statute of limitations does not run during such concealment.[20] Hence, in an action against a delinquent official to recover for his peculations or mismanagement, the statute, as a rule, begins to run only from the discovery of his wrongdoing, and the bank is not chargeable with notice by reason of the knowledge of the president, director, or other officer who is guilty of collusion with the principal offender, either in the commission or concealment of his crime.[21]

under it is barred in one year, under § 2170, limiting to one year "all actions for any penalty or forfeiture of any penal statute." Gregory *v.* German Bank, 3 Colo. 332, 25 Am. Rep. 760; Larsen *v.* James, 1 Colo. App 313, 29 Pac. 183.

The charter of a bank, providing that, when the debts of such bank shall exceed three times the amount of its capital stock the "directors * * * shall be liable for the same, * * * and may be sued" therefor, creates an obligation quasi ex contractu; and therefore the statute of limitations applying to penal liability affords no defense in an action against the directors. Banks *v.* Darden, 18 Ga. 318; Hargroves *v.* Chambers, 30 Ga. 580. See, also, Neal *v.* Moultrie, 12 Ga. 104.

Under the statute in the preceding paragraph, it was held that the right of action was barred only after a period of twenty years Hargroves *v.* Chambers, 30 Ga. 580.

An action under La. Rev. St., §§ 300, 301, to enforce the liability of the directors of a banking corporation for the debts of the bank, on the ground that they had participated in or assented to the bank's making loans and discounts while in an insolvent condition, is one ex quasi delicto, and prescribed by one year. Knoop *v.* Blaffer, 39 La. Ann. 23, 6 So. 9.

An action by a depositor against the officers of an insolvent banking corporation, who, it is alleged, received a deposit, knowing the bank to be insolvent, brought under Gen. St. 1889, par. 406, providing that it shall be unlawful for any officer of a banking institution to consent to the acceptance of deposits after the bank is known to be insolvent, and that every person violating the act shall be individually responsible for deposits received in violation of it, is one upon a statute for a penalty, within paragraph 4095, subd. 4, and hence barred in one year. Ashley *v.* Frame, 4 Kan. App. 265, 45 Pac. 927; Frame *v.* Ashley, 57 Kan. 477, 53 Pac. 474.

The liability of directors of a bank, under Hill's Ann. Laws Or., § 3231, which makes such directors who vote for the declaration of a dividend when the bank is insolvent "jointly and severally liable for the debts of the corporation then existing or incurred while they remain in office," is penal in its nature, and the directors are not, as to such liability, "joint contractors or united in interest," within the meaning of § 14 of such Laws, providing that an action shall be deemed commenced as to each defendant when the complaint is filed and the summons served on him or on a co-defendant, who is a joint contractor or united in interest with him; hence an action to enforce such liability is not commenced as to a particular defendant until the service of summons on him. Patterson *v.* Thompson, 90 Fed. 647.

20. Effect of concealment of cause of action.—Vance *v.* Mottley, 92 Tenn. 310, 21 S. W. 593.

21. Same—Notice or knowledge.—Vance *v.* Mottley, 92 Tenn. 310, 21 S. W. 593; Lawrence *v.* Stearns, 79 Fed. 878; Lamb *v.* Cecil, 25 W. Va. 288; Lamb *v.* Pannell, 25 W. Va. 298; Lamb *v.* Laughlin, 25 W. Va. 300.

And, in such case, the bank is not chargeable with the knowledge of the embezzlement by one of its directors who colludes with the delinquent cashier in fraudulently concealing the facts from the officers and the other directors of the corporation. Vance *v.* Mottley, 92 Tenn. 310, 21 S. W. 593.

In a suit by the receiver of a bank to charge its president with losses arising from his negligent management, where it is fairly inferable from the evidence that the acts constituting such negligence were not disclosed by the president to the directors until long after their occurrence, and until disclosed by the bringing of a suit by a third party, and the judgment therein, the lapse of more than the statutory period of limitation since the actual occurrence of the negligence can not be imputed to the receiver as

§ 58 (1½) Nature and Form of Proceeding.—In General.—In quite a number of jurisdictions it is held that, independently of statute, no action at law will lie against the directors or other officers of a bank, in favor of depositors or creditors, for any mere negligence or nonfeasance, however gross such negligence or nonfeasance may be, but that such an action may be maintained for acts of positive fraud and misfeasance provided the facts are sufficient to support an action for fraud and deceit; that for whatever remedy there may be aside from this, resort must be had to a court of equity.[22] In other states it is held that for any breach of duty toward them, the depositors and creditors may sue the directors directly either at law or in equity, according to the nature of the injury, and that it will be no defense that their principal is also liable.[23] As to national banks, this may be otherwise when a receiver has been appointed, since the manner of enforcing the personal liability of the directors is prescribed by Rev. Stats. U. S., §§ 5234, 5239.[24] Where the misfeasance consists in the conversion or misappropriation of special deposits, directors may be proceeded against personally by the owner of the deposit.[25]

Under Statutes.—Where the individual liability of directors has been made a matter of statutory regulation, the nature of the proceeding, if not prescribed by the statute in terms, depends upon a just construction of the statute with reference to the nature of the liability charged upon the directors and the corresponding rights conferred upon the creditors and depositors. In Georgia, under a statute declaring the directors liable in their private and individual capacities for the excess of debts over and above the statutory limit, it was held that their liability was not penal, but remedial;

laches. Lawrence *v.* Stearns, 79 Fed. 878.

Where a director of an insolvent banking corporation, by collusion with the cashier, receives discounted bills and notes for his deposits, without the authority of the directors, and suit is not brought therefor until nearly five years after such transaction, the doctrine of laches does not apply. Lamb *v.* Cecil, 25 W. Va. 288; Lamb *v.* Pannell, 25 W. Va. 298; Lamb *v.* Laughlin, 25 W. Va. 300.

22. Nature and form of remedy.—Allen *v.* Curtis, 26 Conn. 456; Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; United Society *v.* Underwood (Ky.), 9 Bush 609, 15 Am. Rep. 731; Vose *v.* Grant, 15 Mass. 505; Smith *v.* Poor, 40 Me. 415, 63 Am. Dec. 672; Fusz *v.* Spaunhorst, 67 Mo. 256; Hart *v.* Evanson, 14 N. D. 570, 105 N. W. 942, 3 L. R. A., N. S., 438; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222; Deaderick *v.* Bank, 100 Tenn. 457, 45 S. W. 786; Zinn *v.* Mendel, 9 W. Va. 580; Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

In Massachusetts it is held, independently of statute, that no action at law will lie against directors for appropriating the capital of the bank to themselves in the form of dividends, and that the remedy, if any, must be in a court of equity in which the rights and liabilities of all parties can be adjusted. Vose *v.* Grant, 15 Mass. 505.

23. Same.—DeLano *v.* Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. Rep. 81; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Conant, etc., Co. *v.* Reed, 1 O. St. 298.

24. Same—As to national banks.—Bailey *v.* Mosher, 11 C. C. A. 304, 63 Fed. 488; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725.

25. Remedy for conversion or misappropriation of special deposits.—Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; United Society *v.* Underwood (Ky.), 9 Bush 609, 15 Am. Rep. 731; Miller *v.* Howard, 95 Tenn. 407, 32 S. W. 305.

joint and not several, a statutory liability enforceable at law.[26] In Ohio, directors who knowingly participate in or assent to the making of loans to one of their members, in violation of the state's banking laws, render themselves individually liable for all damages which the corporation, its shareholders or any other persons may sustain in consequence thereof, and to recover such losses, the persons sustaining the same may maintain an action at law against the directors individually.[27] In that state, under a charter provision making the directors personally liable for the excess of debts over and above the statutory limit, it was held that the statute contemplated an action of debt to recover such amount as a penalty and to vindicate a violation of the law; in other words, that the remedy provided by the charter was a penal action, given to any creditor, but for the benefit of all.[28] Under the Massachusetts statute no action at law will lie for a creditor of a bank against a stockholder for the official mismanagement of the directors, but only a bill in equity.[29] In Pennsylvania, the remedy afforded by statute was held to be exclusive, and that no bill in equity could be maintained.[30] It was also held in that state, under an act providing for an investigation and report by auditors, and an investigation by the court of the matters contained in the report in case they should report the insolvency to have been fraudulent, that where the report stated that the insolvency was not fraudulent there could be no further investigation, and the whole proceeding was at an end.[31] In Tennessee, upon the refusal of the corporation or the directors to sue, creditors and stockholders may have

26. Proceedings under statutes—Georgia statute.—Banks *v.* Darden, 18 Ga. 318; Robinson *v.* Bealle, 20 Ga. 275.

27. Same—In Ohio.—Conant, etc., Co. *v.* Reed, 1 O. St. 298.

28. Same—Same—A penal action.—Sturges *v.* Burton, 8 O. St. 215, 72 Am. Dec. 582.

29. Bill in equity in Massachusetts.—Harris *v.* Dorchester, 40 Mass. (23 Pick.) 112.

30. In Pennsylvania.—In re Texter's Appeal (Pa.), 4 Walk. 316 (arising under Act May 11, 1855, P. L. 632).

31. Same—Investigation upon report of auditors.—Wright *v.* Davenport, 66 Pa. 148.

The act of April 16, 1850, provides (§ 40) that, if the insolvency of a bank be occasioned by the fraudulent conduct of its directors, they shall be liable to the stockholders and creditors, etc.; (§ 41) that the insolvency of every bank hereafter incorporated shall be deemed fraudulent unless its affairs shall appear, upon investigation, to have been fairly and legally administered; (§ 42) that the term "insolvency," used in the act, shall be construed to apply to a bank when it is compelled to make an assignment according to the provisions of the act, and that upon making such assignment the directors shall file a full statement of its affairs, etc.; (§ 43) that upon the filing of such statement the court shall appoint three auditors to make an investigation of the affairs of the bank, etc.; (§ 44) that the auditors shall report to the court the result of their investigation, and, in case they report that the insolvency was fraudulent, it shall be their duty to report the amount due from the several directors, according to the liabilities imposed by the act; and (§ 45) that the court shall thereupon proceed to an investigation of the matters contained in such report, and shall determine whether the insolvency of such bank was fraudulent or otherwise, or it may direct an issue to try the fact of fraudulent insolvency. Held, that § 45 has no application except where the auditors report a fraudulent insolvency, and, where the report is that the insolvency is not fraudulent, the whole proceeding is at an end. Wright *v.* Davenport, 66 Pa. 148.

relief in equity for losses resulting both from misfeasance and nonfeasance,[32] and under a charter providing that the directors should be individually liable for any loss or damage sustained by creditors because of certain violations of the charter, it was held that, under the statutes of the state, a court of chancery was invested with jurisdiction to inquire into and determine whether there had in fact been a violation of the charter rendering the directors liable, and that they might be proceeded against by original bill, or, to save circuity, they might be brought in by a supplemental bill filed in a pending suit against the corporation;[33] but even under the statute no proceeding at law will lie in favor of third persons for mere negligence or nonfeasance, but only for intentional fraud or willful mismanagement.[34]

As Ex Contractu or Ex Delicto—Penal, etc.—A breach of a duty imposed by statute or by express contract is ex contractu, but the breach of a duty imposed by law arising upon a given state of facts is a tort.[35] An action for damages for breach of duty in the latter case is an action for a tort.[36] A cause of action against directors for the loss of a deposit, caused by their neglect and mismanagement, for example, is in tort, not in contract, the contract of deposit being with the corporation and not with the directors;[37] and even if there had been a special contract or a statutory provision, the plaintiff might sue for the negligence in tort.[38] Where the directors transfer stock of the bank to the cashier, to the end that he may borrow money thereon, ostensibly for himself but in reality for the bank, and agree to protect him and save him harmless in the transaction, and the money so borrowed is turned over to the bank, the remedy, if any, of the persons lending money on the stock without knowing that the loan was for the benefit of the bank, is against the directors by individual suit for tort, and their claim can not be joined with a suit by stockholders to

32. Tennessee—Refusal of corporation or directors to sue.—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Deaderick *v.* Bank, 100 Tenn. 457, 45 S. W. 786; Shea *v.* Knoxville, etc., R. Co., 65 Tenn. (6 Baxt.) 277; Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398; Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728.

33. Same—Same—Practice.—Johnson *v.* Churchwell, 38 Tenn. (1 Head) 146.

34. Same—Remedy at law.—Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222; Deaderick *v.* Bank, 100 Tenn. 457, 45 S. W. 786.

35. Nature of action as ex contractu or ex delicto.—Hodges *v.* Wilmington, etc., R. Co., 105 N. C. 170, 10 S. E. 917; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am St. Rep. 725.

36. Same.—Williamson *v.* Dickens, 27 N. C. 259; Bond *v.* Hilton, 44 N. C. 308, 59 Am. Dec. 552; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725.

37. Same—Action for loss of a deposit.—Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Caldwell *v.* Bates, 118 N. C. 323, 24 S. E. 481; followed Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719.

38. Same—Effect of contract or statutory provision.—Robinson *v.* Threadgill, 35 N. C. 39; Purcell *v.* Richmond, etc., R. Co., 108 N. C. 414, 12 S. E. 954; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725.

settle the assets of the bank, or by creditors to enforce their contracts.[39] In Georgia, the action given by statute against directors for incurring an indebtedness beyond the statutory limit has been held to be not penal, but remedial;[40] while under a somewhat similar provision in Ohio it was held that the statute was penal in character and that the creditors and depositors, or any of them, suing to recover such penalty, must bring an action of debt for the recovery of the penalty.[41] It has also been held in the federal courts that debt lies in favor of a holder of a dishonored bank note, against a stockholder in the bank, to recover the amount of the note, under the provisions of a bank charter making the stockholders personally liable in such cases.[42]

Same—Whether Action for Individual or Collective Benefit.—A depositor or creditor who has sustained individual loss through the misrepresentations and fraud of a director or directors may, independently of statute, maintain in his own behalf alone an action of fraud and deceit just as any person may sue another for actionable fraud and deceit whenever the facts are sufficient to support an action of that character. That the defendants happened to be directors of a bank and committed the fraud in their official or representative capacity does not alter the case, since an agent can not plead his representative capacity or the liability of his principal as a defense to his individual liability for his torts.[43] Thus a single depositor may maintain in his own behalf alone an action against the directors of a bank for the loss of a special deposit caused by their fraud, neglect and mismanagement.[44] Where the suit is under the authority of some statute the construction of the statute must control. Thus, it has been seen that under a statute making directors personally liable for the excess of debts over and above the statutory limit and giving a right of action to any creditor, that it was held that it was given for the benefit of all and to create a fund for the indemnity of all.[45]

Equitable Proceedings—Right to Proceed in Equity.—A proceeding to recover damages against the directors of a bank may be brought in equity only when some equitable relief is sought, as an accounting or a discovery, or when there exists some ground of equitable jurisdiction, as fraud or

39. **Action for transferring stock to cashier to enable him to obtain loan, ostensibly for himself, but in reality for the bank.**—Jones *v.* Johnson, 86 Ky. 530, 6 S. W. 582, 9 Ky. L. Rep. 789.

40. **Penal or remedial—Georgia statute.**—Banks *v.* Darden, 18 Ga. 313; Robinson *v.* Bealle, 20 Ga. 275.

41. **Same—Ohio statute.**—Sturges *v.* Burton, 8 O. St. 215, 72 Am. Dec. 582.

42. **Remedy of holder of dishonored bank notes.**—Bullard *v.* Bell, Fed. Cas. No. 2,121, 1 Mason 243.

43. **Action for individual or collective benefit.**—United Society *v.* Underwood (Ky.), 9 Bush. 609, 15 Am. Rep. 731; Hart *v.* Hanson, 14 N. Dak. 570, 105 N. W. 942; Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536; Zinn *v.* Mendel, 9 W. Va. 580.

44. **Same.**—United Society *v.* Underwood (Ky.), 9 Bush 609, 15 Am. Rep. 731; Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719.

45. **Same—Proceeding under statute.**—Sturges *v.* Burton, 8 O. St. 215, 72 Am. Dec. 582.

breach of trust.[46]

Same—Individual or Collective Benefit—Demand of Suit as a Condition Precedent.—In those jurisdictions where it is held that the

46. **Right to proceed in equity.**—Higgins *v.* Tefft, 4 App. Div. 62, 38 N. Y. 716, 74 N. Y. St. Rep. 100; Dykman *v.* Keeney, 154 N. Y. 483, 48 N. E. 894, reversing 21 App. Div. 114, 47 N. Y. S. 352; Bridgens *v.* Dollar Sav. Bank, 66 Fed. 9; Merchants', etc., Nat. Bank *v.* Masonic Hall, 65 Ga. 603.

In an action by a receiver against the directors and personal representatives of deceased directors of a bank for misfeasance, where none of the allegations of the complaint shows reason for interposition of a court of equity, a prayer demanding judgment that the damages which the bank, its depositors, stockholders, and other creditors, had sustained by reason of the matters and things before stated and set forth, may be ascertained and determined; that defendants, as the representatives of those who were directors of such bank, may be adjudged to pay such damages; and that plaintiff may recover the amount so ascertained, for the benefit of the creditors and stockholders of the bank—can not be said to claim any relief which would require a resort to such court. Higgins *v.* Tefft, 4 App. Div. 62, 38 N. Y. S. 716, 74 N. Y. St. Rep. 100.

Where a receiver is appointed in a proceeding for dissolution of the bank, in which a final judgment has been entered, dissolving the bank and appointing him permanent receiver of its property and effects, in an action by him against certain persons to recover damages for the misfeasance or nonfeasance of defendants as directors of such bank, a petition which is otherwise insufficient does not entitle plaintiff to equitable relief, and constitute the action one in equity, because it alleges that plaintiff has, since his appointment, disposed of and realized on the assets of the bank, paid sixty per cent of the claims of creditors, and realized all that can be realized from its assets; that the deficiency of assets to pay such creditors arises from the negligence and improper conduct of defendants and others named, directors and trustees of the bank; that plaintiff has been authorized by the court to bring such action; and that some of the creditors have requested plaintiff to commence an action against the directors and trustees of the bank to hold them liable for their negligence and improper conduct as directors. Higgins *v.* Tefft, 4 App. Div. 62, 38 N. Y. S. 716, 74 N. Y. St. Rep. 100.

The receiver of an insolvent bank brought an action against several persons who had been directors of the bank for various lengths of time, within a period of years, alleging that the defendants, as directors, had been negligent and wasteful, and that various irregular and unlawful practices had been pursued by the bank under their management, in consequence of which the bank had been ruined; that the plaintiff could not prove the acts complained of without a discovery and account by the defendants; that without relief in the action a multiplicity of suits would be necessary; and there was no adequate remedy at law—and demanded judgment that an account be taken and discovery required from the defendants, and that, upon the accounting, the amounts due be ascertained, and judgment given for the plaintiff therefor. Held, that this complaint did not state a cause of action in equity, but only several causes of action at law for damages against the directors. Judgment (1897), 47 N. Y. S. 352, 21 App. Div. 114, reversed. Dykman *v.* Keeney, 154 N. Y. 483, 48 N. E. 894.

Where a creditor has obtained execution against a bank which has been returned unsatisfied, an amendment to a pending bill against the bank to reach equitable assets, which sought to require the president to account for assets in his hands so far as to pay the debt, was not without equity, and was properly supplemental to the original bill against the bank. Merchants', etc., Nat. Bank *v.* Masonic Hall, 65 Ga. 603.

The C. Bank, which was in failing circumstances, had money on deposit in the D. Bank, which owned a large amount of the C. Bank's stock. K., the managing director of both banks, with knowledge of the C. Bank's insolvency, caused that bank to purchase its stock from the D. Bank, and to pay for it with the cash on deposit in the D. Bank. Held, that this made a case of breach of trust by the agent of the two corporations, within the jurisdiction of a court of equity. Bridgens *v.* Dollar Sav. Bank, 66 Fed. 9.

duty of the director is to the corporation and not to the depositor or creditor, it is held that such a bill can not be maintained by complainant for his peculiar and personal benefit; that the wrongs complained of do not especially affect his stock or his demands as a creditor; that the negligence of the defendants is in the discharge of duties to the corporation as such, and that the corporation, for such negligence, has a right of action. Primarily, therefore, such suit should be brought by the corporation in its corporate name, and only under peculiar circumstances will a creditor or stockholder be permitted, by courts of equity, to bring the suit which the corporation has failed to bring. But where the corporation is disabled from suing, as where the managing agents of the corporation (its officers and directors) are themselves to be the defendants, or where the corporation wrongfully and willfully refuses to sue, then, in either case, a court of equity will entertain a suit by a creditor or shareholder, substituting him to the collective or corporate right of action. In either case, the recovery must be for the benefit of the corporation, and all its creditors and shareholders.[47] This right of action in the corporation passes to an assignee or receiver, and after the appointment of such assignee or receiver, the suit should be brought in his name, and only in the name of a depositor or creditor where the assignee or receiver refuses to bring suit after demand that he do so.[48] In other jurisdictions the principle embodied in the old ninety-fourth equity rule (now the twenty-seventh), that a demand upon the corporation and a refusal must first be had, is held to apply only to stockholders and not to depositors and creditors, and that the latter may maintain a suit directly against the bank and the guilty directors without such precedent demand and refusal;[49] and under the practice prevailing in some jurisdictions, the requirement of a precedent demand and refusal is held to be unnecessary even in the case of stockholders.[50]

47. Same—Individual or collective benefit—Demand of suit as condition precedent.—Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Cunningham *v.* Pell (N. Y.), 5 Paige 607; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Deaderick *v.* Bank, 100 Tenn. 457, 45 S. W. 786; Shea *v.* Knoxville, etc., R. Co., 65 Tenn. (6 Baxt.) 277; Shea *v.* Mabry, 69 Tenn. (1 Lea) 319; Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398; Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728; Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

48. Right passes to assignee or receiver—Refusal of assignee to sue.—Jones *v.* Johnson, 86 Ky. 530, 6 S. W. 582, 9 Ky. L. Rep. 789; Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Ackerman *v.* Halsey, 37 N. J. Eq. 356; Williams *v.* Halliard, 38 N. J. Eq. 373; Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Robinson *v.* Smith (N. Y.), 3 Paige 222, 24 Am. Dec. 212; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728.

49. Ninety-fourth equity rule held not to apply to creditors and depositors.—Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Foster *v.* Bank, 88 Fed. 604.

50. Nor to stockholders in some cases.—Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Caldwell *v.* Bates, 118 N. C. 323, 24 S. E. 481.

While it is quite well settled that an action can be brought against the directors by the depositors and other creditors for damages caused by their

Same—Duty to Exhaust Remedies against Corporation.—In order to charge the directors personally in accordance with a charter provision in case of certain violations of said charter, "voted for," or "sanctioned" by them, it is indispensable—First, that such violations should be established in a direct proceeding in a court of record against the corporation, though it is not necessary that a forfeiture should have been first actually declared; and, secondly, that the assets legal and equitable of the bank should have been exhausted.[51] But where it is admitted by demurrer or otherwise that the corporation is insolvent, it is not necessary to exhaust remedies against it before suing the directors for wrongs caused by their negligence, fraud, or deceit.[52]

Previous Recovery at Law.—An action by a bank receiver against directors, for losses alleged to have been caused by their negligence, is not premature because the total losses have not been ascertained and the exact limit of the directors' liability fixed.[53]

Rescission of Fraudulent Contract or Transaction.—In an action by assignees of an insolvent bank against a director for fraudulently selling to the bank a portion of its own stock, where recovery is sought merely for the loss suffered, no rescission of the sale is necessary.[54]

Effect of Pending Proceeding to Close Bank.—A proceeding by state bank commissioners to close the affairs of an insolvent bank is no bar to an

gross mismanagement, neglect, and false representations, and this without first applying to the corporation itself, or to the receiver to bring such action, there have been authorities that a stockholder could not maintain such action without such prior demand and refusal; but it is made clear that this was only at law, and that in equity, upon proper allegations, a stockholder, as well as a creditor, may now maintain the action directly, and, in the first instance, against the directors. Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725.

51. Exhausting remedies against corporation.—Johnson *v.* Churchwell, 38 Tenn. (1 Head) 146.

52. Same—Where corporation insolvent.—Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Caldwell *v.* Bates, 118 N. C. 323, 24 S. E. 481.

If a bank, on the eve of insolvency, having notes out which it can not redeem, and a large claim on a solvent stockholder for money lent, extends his debt by taking his notes, payable at two and three years, with its president as sole surety, this is a fraud on its creditors, and they may proceed in equity directly against such debtor, without a judgment at law or process of garnishment. Bank *v.* St. John, etc., Co., 25 Ala. 566.

While the liability of the officers and directors of a bank, under paragraph 406, Gen. St. 1889, for receiving deposits or contracting debts while the bank is insolvent, is in the nature of a penalty, and may be immediately enforced against such bank officers without first proceeding against the bank itself, it does not authorize an attachment action against a director on a contingent liability of the bank growing out of its having indorsed and guarantied the payment of notes of a third party which have not yet matured, notwithstanding an allegation in the petition that the maker of the note "is insolvent," and that the bank was insolvent, and known to the director who is sued to have been insolvent, when the notes were so indorsed and guarantied, and the money for them paid by plaintiff to the indorser. Wichita Nat. Bank *v.* Weeks, 5 Kan. App. 694, 49 Pac. 105.

53. Previous recovery at law.—Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120.

54. Rescission of fraudulent contract or transaction.—Shultz *v.* Christman, 6 Mo. App. 338.

action by a creditor against its directors to enforce their personal liability for its debts, as provided by a statute forbidding that they shall exceed three times its paid-up capital, since, in the proceeding by the commissioners, all that the creditors could claim would be their pro rata share of the bank's assets.[55]

Concurrent Remedies.—The fact that the depositor has proved up his claim before the assignee of an insolvent bank will not preclude his pursuing the offending officer with an action under the statute making the officers of the bank personally liable for deposits received when the bank was insolvent (Rev. St. 1889, § 2760). The two remedies, not being inconsistent, may be pursued at the same time; but plaintiff can have but one satisfaction.[56]

§ 58 (2) Set-Off.—A director of a bank can not so buy up claims against it at a discount as to entitle himself to credit therefor at full face value, in settlement with creditors on his personal liability as stockholder, and thus defeat the suit of a creditor who commenced his action before the bought-up claims were actually so applied.[57] But where, before the improper declarations of a dividend by the defendants, and after consultation with the superintendent of the banking department, they deliver to the bank their individual notes, together with a memorandum reciting that the notes are given for the purpose of removing a doubt as to the character of some of the receivables of the bank, and to make said bank unquestionably solvent, and these notes are paid to the receiver after the failure of the bank, the defendants are entitled to have the money so paid, in excess of the amount necessary to make good the impairment of the capital, existing when the notes were given, applied on their liability arising out of the improper declaration of the dividend.[58]

§ 58 (3) Parties—§ 58 (3a) In General.—As has been seen, it is held in some states, following the strict equity practice, that the right of action is in the corporation, its assignee or receiver, and that creditors and depositors can maintain a bill in their own name only upon showing that the corporation or its assignee has refused to sue, or that owing to the directors being the guilty parties, the corporation is in no position to sue.[59] If a receiver has been appointed, the cause of action is in him, and he may sue

55. **Effect of pending proceeding to close bank.**—White *v.* How, Fed. Cas. No. 17,549, 3 McLean 291.

56. **Concurrent remedies.**—Eads *v.* Orcutt, 79 Mo. App. 511.

57. **Set-Off—Buying up claims.**—Holland *v.* Heyman & Bro., 60 Ga. 174.

58. **Same—Setting off excess of payments.**—Dykman *v.* Keeney, 160 N. Y. 677, 54 N. E. 1090, affirming 10 App. Div. 610, 42 N. Y. S. 488.

59. **Parties plaintiff—Generally.**—Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Cunningham *v.* Pell (N. Y.), 5 Paige 607; Shea *v.* Knoxville, etc., R. Co., 65 Tenn. (6 Baxt.) 227; Shea *v.* Mabry, 69 Tenn. (1 Lea) 319; Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398; Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Deaderick *v.* Bank, 100 Tenn. 457, 45 S. W. 786; Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

either in his own or the corporate name,[60] and stockholders and creditors can not demand that they be made parties plaintiff, as of right;[61] though if the receiver refuses to bring suit, a creditor and stockholder thereof may, for the benefit of himself and such other creditors and stockholders as elect to join him, maintain a suit against the president and directors for gross official neglect and mismanagement, whereby the bank was financially ruined.[62] As the officers sustain a fiduciary relation toward the corporation, such liability survives as a part of the assets of the corporation and is assignable, and the result of that doctrine is that all such liabilities pass to an assignee for the benefit of creditors by a general assignment of its property for that purpose, and such assignee may sue thereon.[63] In these jurisdictions it is held that

60. Where receiver has been appointed.—Van Dyck *v.* McQuade, 57 How. Prac. 52, 45 N. Y. Super. Ct. 620; Bank *v.* Johnson (N. Y.), 8 Wend. 645.

1 Rev. St., p. 601, tit. 4, § 2, makes it unlawful for the directors of an incorporated company to make dividends except from surplus profits, and provides that in case of violation of such provisions the directors, except those who may cause their dissent to be entered on the minutes of the directors at the time, or who were not present, shall, in their individual and private capacities, be liable "to the said corporation, and to the creditors thereof, in the event of its dissolution," to the amount of capital stock of such company, so divided, etc. Act May 17, 1875 (Laws 1875, c. 371), § 34, makes the directors liable in such case "to the corporation," etc. Held, that both under the Revised Statutes and the Act of 1875, the receiver of such corporation is vested with the right of action on the liability of a director under such statute. Van Dyck *v.* McQuade, 57 How. Prac. 62, 45 N. Y. Super. Ct. 620.

An action by a receiver against the director of a bank to recover the penalty provided by Act April 21, 1825, for paying a portion of the capital stock to a stockholder, may be brought in the name of the corporation, although the statute declares that any company violating its provisions shall be deemed and adjudged to have surrendered its rights, and to be dissolved; as such dissolution is but quasi, and not absolute. Bank *v.* Johnson (N. Y.), 8 Wend. 645.

61. Same—Right of stockholders and creditors to be made parties.—Kimball *v.* Ives (N. Y.), 30 Hun 568.

62. Same—Where receiver refuses to sue.—Ackerman *v.* Halsey, 37 N. J. Eq. 356.

63. Same—Survival of action—Rights of assignee.—Movius *v.* Lee, 30 Fed. 298; Howe *v.* Barney, 45 Fed. 668; Jones *v.* Johnson, 86 Ky. 530, 6 S. W. 582, 9 Ky. L. Rep. 789; Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Ackerman *v.* Halsey, 37 N. J. Eq. 356; Williams *v.* Halliard, 38 N. J. Eq. 373; Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120; Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Robinson *v.* Smith (N. Y.), 3 Paige 222, 24 Am. Dec. 212; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728; Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536; Shultz *v.* Christman, 6 Mo. App. 338.

A bank's creditors, on its insolvency, have a direct interest in its affairs, and are the cestuis que trustent of the receiver, entitled to enforce all the corporation's rights, and to collect its assets, including the right to claim damages for the directors' negligence. Campbell *v.* Watson, 62 N. J. Eq. 396, 50 Atl. 120.

Where a bank has become insolvent, and, under the general laws, it is sought to make the directors liable for its debts, proceedings must be in the name of the assignee, and in the court of common pleas of the county in which the bank is located. In re Means' Appeal, 85 Pa. 75.

Right of assignee to sue in foreign jurisdiction.—One who was made assignee of an insolvent bank in pursuance of a decree of an Illinois court of equity of competent jurisdiction may intervene in an action in Massachusetts to claim funds of the insolvent attached by a creditor resident in Vermont. Witters *v.* Globe Sav. Bank, 171 Mass. 425, 50 N. E. 932.

the complainant should file his bill not only in behalf of himself, but in behalf of all others in like situation as himself, making the corporation itself a party defendant, together with all the creditors who refuse to join in the bill, to the end that they may all come under the decree and the rights of all parties be determined in the one proceeding.[64] And where an action is allowed to be brought by depositors to enforce the rights of a bank against its officers because the proper officers thereof actually or virtually refuse to bring it, the recovery becomes part of the assets of the bank, and goes to its assignee, and both he in his official capacity and the bank are indispensable parties defendant, unless the latter is, for all practical purposes, defunct, in which case it need not be a party.[65] Under this view, if the corporation is for any reason estopped from suing the suit of the stockholder or creditor is likewise affected.[66]

Demand of Suit Not Required in Some Jurisdictions.—In other jurisdictions the practice permits the creditor or depositor to bring action or suit directly in his name and without previous request to the corporation, its assignee or receiver to sue;[67] and under the practice prevailing in some of these jurisdictions, neither the bank nor the receiver is a necessary party.[68]

Right of Pledgee of Stock to Sue.—A pledgee of shares of stock in a banking corporation has, merely by virtue of the pledge, no right of action against the directors of the bank to recover damages for the negligence and mismanagement of the directors, whereby the assets of the corporation are lost and the shares in the same rendered valueless.[69]

§ 58 (3b) Joinder of Parties and Causes.—Under the charter of a

64. **Same—Joinder of others in like situation—Corporation and others as defendants.**—Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Chester *v.* Halliard, 36 N. J. Eq. 313; Cunningham *v.* Pell (N. Y.), 5 Paige 607.

65. **Assignee and bank indispensable parties.**—Gores *v.* Field, 109 Wis. 408, 84 N. W. 867, 85 N. W. 411; Gores *v.* Murphy, 109 Wis. 408, 84 N. W. 867, 85 N. W. 411; In re Texter's Appeal (Pa.), 4 Walk. 316.

66. **Estoppel to sue.**—Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625. See, also, Brannin *v.* Loving, 82 Ky. 370, 6 Ky. L. Rep. 328; Dunn *v.* Kyle, 77 Ky. (14 Bush) 134; Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488.

67. **Suit without demand upon corporation in other jurisdictions.**—Foster *v.* Bank, 88 Fed. 604; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Caldwell *v.* Bates, 118 N. C. 323, 24 S. E. 481; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84.

An action may be maintained by a creditor against the directors in their own name or under the corporate name on a claim disallowed by them. Arques *v.* Union Sav. Bank, 133 Cal. 139, 65 Pac. 307.

A right of action accruing, under Const. Wash., art. 12, § 12, against a bank officer who received deposits with knowledge of the bank's insolvency, does not inure to the bank, nor become an asset of the bank which a receiver is entitled to control, but is vested in the depositors whose money was taken. Mallon *v.* Hyde, 76 Fed. 388.

68. **Same—Bank and receiver as parties.**—Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725.

69. **Suit by pledgee of stock.**—Barnes *v.* Swift, 26 Wkly. L. Bull. 110, 11 O. Dec. 321; Barnes *v.* Pogue, 29 Wkly. L. Bull. 382, 11 O. Dec. 798.

bank providing that, when the debts of such bank shall exceed three times the amount of its capital stock, the "directors under whose administration it shall happen shall be liable for the same in their private and individual capacities, and may be sued for the same," an action can not be brought against a single director, but must be against all jointly.[70] But in a suit under such statute by a creditor of the bank against the two surviving directors, upon the ground that all the directors became individually liable by violating the charter, it is not necessary to join the representatives of the deceased directors,[71] though it may be done where, under the law of the state, the cause of action survives against the personal representative.[72] Where the directors are jointly liable under a statute for the debts of the bank, a creditor need not join in his suit a director who, being a citizen of another state, is not within the jurisdiction of the court.[73] Where the object of the suit is to charge the directors with liability for a breach of trust, the rule is well settled that relief may be had against any or all those who concurred in the wrong, the tort being treated as several as well as joint,[74] and the corporation itself may be joined or not at the election of the plaintiff.[75]

Joinder of Causes.—A cause of action against bank directors for the loss of a deposit, caused by their neglect and mismanagement, even if ex contractu, may be joined with a cause of action for fraud and deceit, arising out of the same subject matter.[76] And in an action against the directors of

70. Joinder of parties and causes.—Banks *v.* Darden, 18 Ga. 318.

71. Same—Joinder of personal representatives.—Hargroves *v.* Chambers, 30 Ga. 580.

72. Same—Same.—Wilkinson *v.* Dodd, 41 N. J. Eq. 566, 7 Atl. 337.

Where one of the managers of a bank died after an alleged misconduct of himself and his colleagues, held, that the receiver might make his executors parties to a suit to enforce the managers' liability, under Revision, p. 396, § 5, relating to the survival of actions against personal representatives. Wilkinson *v.* Dodd, 41 N. J. Eq. 566, 7 Atl. 337.

73. Joinder of defendant residing in another state.—White *v.* How, Fed. Cas. No. 17,548, 3 McLean 111.

74. Torts joint and several.—Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Caldwell *v.* Bates, 118 N. C. 323, 24 S. E. 481.

Where directors of a bank have been negligent in its management, in a suit by a receiver appointed for such bank to recover damages resulting from such negligence it is not necessary to join all the directors, as the action arises ex delicto. Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567.

Recipients of moneys fraudulently transferred by bank officers need not be made defendants in a suit therefor. Wilkinson *v.* Dodd, 40 N. J. Eq. 123, 3 Atl. 360.

75. Election as to joinder of corporation.—Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Caldwell *v.* Bates, 118 N. C. 323, 24 S. E. 481.

76. Joinder of actions.—Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719.

A cause of action for a tort arising out of the defendant's failure to discharge the duties required of them by the by-laws is properly united in the same action with a tort arising out of fraud and deceit charged in the same complaint. Salmon *v.* Richardson, 30 Conn. 360, 79 Am. Dec. 255; Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725.

It is not a misjoinder of causes of action to join in the same action, brought against the bank directors individually, a cause of action for gross negligence in the discharge of their duties, whereby the plaintiff was injured, with causes of action for the fraud and deceit of the directors in making false statements and misrepresentations of the condition of the bank, whereby the plaintiff was in-

a bank for damages arising from the grossly negligent management of the bank's affairs, the various specifications of misconduct may properly be combined in a single paragraph, as constituting a single cause of action.[77] But a cause of action against the directors ex delicto can not be joined with a suit in equity by the stockholders.[78]

Parties by Representation.—Where the assets of an insolvent bank are insufficient to meet all the claims of creditors and depositors, though no preference is allowed, the allowance of preference to some creditors is prejudicial to other creditors and depositors who have a common interest in defeating the preference, and, where they are numerous, a few may appear and defend for the whole, under a statute providing that, when the question is one of common interest to many persons, one or more may defend for the benefit of the whole; and those appearing in the trial court, contesting the right to a preference, are proper parties to the proceedings, and may appeal from a judgment awarding a preference.[79]

§ 58 (4) Pleading—§ 58 (4a) General Rules and Observations. —Justice of Claim; Disallowance.—Where a creditor seeks to recover a personal judgment against the directors, either in their individual names or under the corporate name, on a claim alleged to have been wrongfully disallowed by them, it is essential to the sufficiency of the complaint that they should allege specifically that the claim is just and the fact of its presentation and disallowance.[80]

Matters Required to Be Established by Judgment.—Where it is required that the violation of the charter shall be first established at law, it is necessary that such fact should be alleged and shown.[81]

duced to deposit his money in the care of the bank. Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Caldwell *v.* Bates, 118 N. C. 323, 24 S. E. 481.

A bill by depositors against the directors of a bank for negligence in the discharge of their duties resulting in injury to plaintiffs and other depositors is not rendered bad for misjoinder of causes of action by a further allegation that the president of the bank, by fraudulent representations, induced plaintiff to deposit money therein. Foster *v.* Bank, 88 Fed. 604.

77. **Same.**—Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567.

78. **Action ex delicto not to be joined with suit in equity.**—Jones *v.* Johnson, 86 Ky. 530, 6 S. W. 582, 9 Ky. L. Rep. 789.

Certain persons loaned money to a cashier on his notes, with stock of the bank as security, not knowing that the loan was for the benefit of the bank. The bank records showed that the stock was sold to the cashier to raise money for the bank, which agreed to protect him. He deposited the money when obtained with the bank. Held, that the remedy of the lenders, if any, was against the directors by individual suits for tort, and their claim could not be joined in a suit by stockholders to settle the assets of the insolvent bank, or by creditors to enforce their contract. Jones *v.* Johnson, 86 Ky. 530, 6 S. W. 582, 91 Ky. L. Rep. 789.

79. **Parties by representation.**—Stilson *v.* First State Bank (Iowa), 129 N. W. 70.

80. **Justice and disallowance of claim.**—Arques *v.* Union Sav. Bank, 133 Cal. 139, 65 Pac. 307.

81. **Matters required to be established by judgment.**—Johnson *v.* Churchwell, 38 Tenn. (1 Head) 146.

An allegation in the complaint, in an action to recover of bank officers moneys of the bank negligently dissipated, "that the legal liability of stockholders to contribute to the loss of said corporation, as plaintiffs are ad-

Negativing Matters of Defense.—Matters of defense should generally be left to the defendants to set up in their plea or answer, and need not be negatived in the declaration or compaint.[82]

Certainty of Allegations.—Where the action is to recover against the directors personally for losses resulting from their negligence in the management of the affairs of the bank, and it appears that they permitted the books and records to be so loosely and imperfectly kept that the transactions complained of can not be specifically described, a motion to make the complainant more certain is properly overruled.[83]

Complaint Bad on Its Face.—A complaint apparently bad on its face as showing matter going to defeat the cause of action set forth therein will not be held subject to demurrer where it appears that the objectionable matter is the result of a mistake or clerical error, and that upon a just construction of the whole pleading it is not open to valid objection upon the ground stated in the demurrer.[84]

Duplicity and Misjoinder.—A complaint to recover of bank officers moneys of the bank negligently dissipated does not also join a cause of action for damages suffered by a depositor who was induced to deposit by deceitful representations as to solvency, because it alleges that false statements as to solvency were given out and published by defendants, and that plaintiffs relied thereon in making deposits, if, viewing the complaint as a whole, the allegations appear to be historical in their nature, and intended merely to fully state the acts of defendants in their mismanagement of the bank's affairs.[85]

vised and believed, has been enforced and paid," does not imply that any action to enforce the liability of stockholders was ever brought. Gores *v.* Field, 109 Wis. 408, 84 N. W. 867, 85 N. W. 411.

82. **Negativing matters of defense.**—Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567.

A complaint in an action by a receiver of a bank against the directors thereof for damages resulting from their gross negligence in management is not bad for want of an averment that the receiver and parties represented by him were without fault, as in such case facts showing fault on their part should be set up in the answer. Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567.

83. **Certainty of allegations.**—Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567.

84. **Complaint bad on its face.**—Gores *v.* Field, 109 Wis. 408, 84 N. W. 867, 85 N. W. 411.

The complaint in an action by a depositor against a bank director for mismanagement alleged that defendant ceased to be a director February 23, 1893, and that plaintiff did not know the facts till the inventory of the bank was filed on June 21, 1899. The verification of the complaint was made on May 24, 1899, and the complaint besides showed that the assignment was made June 1, 1893, within twenty days after which date the assignor was required, by Rev. St. 1898, § 1697, to file its inventory, certified by the assignee. Held, that the officer's certificate to the verification must be accepted as conclusive on demurrer as to its date, and that besides the complaint on its face showed that the date, June 21, 1899, therein, was a clerical error, as it would not be presumed that the statutory duty was unperformed, there being no allegation to that effect; and hence a contention that the complaint showed that action was barred by the six-years limitation was unwarranted. Gores *v.* Field, 85 N. W. 411, 109 Wis. 408, 84 N. W. 867.

85. **Duplicity and misjoinder.**—Gores *v.* Field, 109 Wis. 408, 84 N. W. 867, 85 N. W. 411. See, generally, ante, "Joinder of Parties and Causes," § 58 (3b).

§ 58 (4b) Where Cause of Action Based upon Negligence, Fraud or Deceit.—Official Relation of Defendants and Participation in, or Connection with, Wrongful Acts.—Where the cause of action set forth in the complaint is based upon the ground of loss sustained through the defendant's negligent and fraudulent mismanagement of the bank's affairs, it must be alleged as to each defendant that he was an officer of the bank when the acts complained of occurred,[86] and, in addition thereto, his participation in or guilty connection with the wrongful acts should be shown.[87]

False Representations and Intent to Defraud—Knowledge of Falsity.—Where a creditor of the bank brings an action against the individual directors for fraud and deceit, the false representations made or caused to be made, done or caused to be done, by the defendants, and relied on by the plaintiff, and the intent thereby to deceive and defraud the plaintiff, must be averred or alleged in positive terms.[88] Thus a complaint in an action to recover from a director damages for falsely and fraudulently representing that the stock of a bank is worth par, by which the plaintiff's intestate was induced to purchase stock from the bank, when, in truth, the stock was worthless, and of no value, and was wholly lost, is bad when it does not aver that the defendant knew that the stock was not worth what he represented it to be, nor that the defendant made the representations with the intent to induce the plaintiff's intestate to become a purchaser.[89]

86. **Averment of official relation or agency of defendants.**—Gores *v.* Elliott, 108 Wis. 465, 84 N. W. 865.

87. **Defendants' participation in or connection with wrongful acts.**—Gores *v.* Field, 109 Wis. 408, 84 N. W. 867, 85 N. W. 411.

In an action against the cashier and other officers of an insolvent bank to recover moneys of the bank negligently dissipated, the complaint alleged that "by the negligence and want of ordinary care and diligence on the part of the defendants, and each of them, on discharge of their duties as directors and managers of the said bank, and inattention to its affairs, permitted and allowed the funds and deposits therein and belonging thereto to be squandered and lost." Held to include the cashier as one of the delinquent officers. Gores *v.* Field, 109 Wis. 408, 84 N. W. 867, 85 N. W. 411.

88. **False representations and intent to defraud.**—Zinn *v.* Mendel, 9 W. Va. 580.

An allegation that defendants, as directors, "caused and permitted" false statements of the condition of the bank to be published, is not sufficient to charge defendants for any loss sustained thereby, there being no allegation that the statements were signed by the directors, or purported to be made by their authority. Pieratt *v.* Young, 20 Ky. L. Rep. 1815, 49 S. W. 964.

Stating case under statute.—In a suit by a depositor to recover against the officers, directors and stockholders of an insolvent banking corporation as individuals, the averment that they wrongfully, negligently, and knowingly failed to comply substantially with its articles of incorporation, and deceived the public and plaintiff in relation to its liabilities, in several particulars enumerated, does not state a case under a statute which subjects them to liability for damages resulting from their "intentional fraud in failing to comply substantially with the articles of incorporation or in deceiving the public or individuals in relation to their liability." Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222.

89. **Same—Knowledge and intent to defraud.**—Mabey *v.* Adams, 16 N. Y. Super. Ct. 346.

That Plaintiff Relied Thereon and Was Actually Deceived.—In addition to the foregoing, plaintiff should allege that he relied and acted upon the false statement or representation and that he was deceived thereby.[90]

Averment of Loss or Injury.—The complaint must further show that the plaintiff has actually suffered loss or injury by reason of the alleged acts of misfeasance,[91] or by reason of the fraudulent statements and representations.[92]

Insufficiency of Assets to Pay Claims.—Where an action is brought by a receiver of a bank against the directors thereof for damages resulting from their gross negligence in management, it is unnecessary to allege that there are unpaid claims against the bank, and that the assets in the receiver's hands are insufficient to meet them, as the injury results regardless of the debts and assets.[93] However, if an averment of this kind could be deemed necessary, it has been held that a general allegation of insolvency by the receiver is a sufficient averment that there are unpaid claims against the bank, and that the assets in the hands of the receiver are insufficient to pay them.[94]

Receiving Deposits after Knowledge of Insolvency, Averment of Insolvency.—The bill in a suit against a bank and its receiver to recover a deposit accepted by the bank after its insolvency is known to its officers, must sufficiently aver the insolvency of the bank.[95]

Same—Knowledge of Insolvency.—But a complaint charging bank directors with fraud and deceit in making false statements of the bank's solvency need not allege that defendants knew or believed the bank to be insolvent, such knowledge being conclusively presumed.[96] And where no false statements or representations, beyond the mere keeping the bank

90. That plaintiff relied thereon and was deceived thereby.—Brady *v.* Evans, 24 C. C. A. 236, 78 Fed. 558.

In an action of deceit against the directors for making false statements as to the bank's condition, whereby the plaintiff lost the amount of his deposit, previously made, it is not sufficient to allege that the plaintiff was induced to remain a depositor by the statements so made, but it must be directly averred that, but for such statements, he would have withdrawn his deposits before the failure of the bank. Brady *v.* Evans, 24 C. C. A. 236, 78 Fed. 558; Pieratt *v.* Young, 20 Ky. L. Rep. 1815, 49 S. W. 964.

91. Averment of injury and loss.—Butt *v.* Cameron (N. Y.), 53 Barb. 642.

92. Same.—Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719.

In an action by a depositor against the directors of an insolvent bank, an allegation that the vice president permitted the president and cashier to borrow large sums "upon inadequate security," and fraudulently suppressed such loans in making up the official reports, and that the directors knew of such conduct, states no cause of action; there being no averment that the loans were lost, or could not be collected, or that their loss in any way injured plaintiff. Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719.

93. Insufficiency of assets to pay claims.—Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567.

94. Same.—Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567.

95. Receiving deposits after knowledge of insolvency—Averment of insolvency.—Western German Bank *v.* Novell, 69 C. C. A. 330, 134 Fed. 724.

96. Averment of knowledge of insolvency.—Tate *v.* Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719.

open and receiving deposits, are alleged, an allegation that the bank was insolvent and made so by the president and directors, is a sufficient averment of their knowledge of insolvency, since such knowledge will be implied from the allegation that the insolvency was caused by the president and directors.[97] So an averment that, at the time the deposit was received, the bank was insolvent and known to be such, is sufficient under a statute making it a penal offense for an officer of a bank to receive deposits when he knows, or has reason to know, that the bank is unsafe or insolvent.[98] But an averment that defendants had "due notice and knowledge of such facts and circumstances as, by ordinary diligence and business skill, would have shown them" that the bank was insolvent, is insufficient to fix a liability under a statute making bank directors who are guilty of "any fraud or willful mismanagement" of the affairs of the bank individually liable to its creditors for loss occasioned thereby.[99]

Same—Intent to Injure Plaintiff or Cause Loss of His Money.—It is not necessary in such an action to allege that, "when the plaintiff deposited his money, the directors knew or believed he would not get it back, or intended by deceit to get it from him, or cause him to lose it;" but it is sufficient to allege that, the bank being insolvent, the defendants caused false and fraudulent statements of the condition of the bank to be published, representing it to be solvent and with capital stock unimpaired, and declaring dividends, with a view to conceal its insolvent condition and procure deposits, and that the plaintiff was deceived thereby into making the deposit which he is seeking to recover.[1]

Same—Offer to Return Certificate of Deposit.—The complaint in an action of this kind should offer to surrender the certificate of deposit.[2]

97. **Same.**—Sommerville *v.* Beal, 49 Fed. 790.

98. **Same.**—Hyland *v.* Roe, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873.

Rev. St. 1898, § 4541, makes it a penal offense for an officer of a bank to receive money on deposit when he knows, or has reason to know, that the bank is unsafe or insolvent. Held, that where the depositor in a bank that had passed into the hands of a receiver presented a petition asking for an order requiring the receiver to pay over to him the deposit, which alleged that when the deposit was made the bank was insolvent, and known to be such by its president, the petition sufficiently showed fraud on the part of the bank. Hyland *v.* Roe, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873.

99. **Same.**—Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222.

1. **Same—Intent to injure plaintiff or cause loss of his money.**—Solomon *v.* Bates, 118 N. C. 311, 24 S. E. 478, 54 Am. St. Rep. 725; Caldwell *v.* Bates, 118 N. C. 323, 24 S. E. 481.

Under Laws 1895, c. 219, relating to receiving deposits in insolvent banks, a complaint which alleges that the defendants, as directors of an insolvent bank, received from the plaintiff a deposit of money therein, knowing the bank to be then insolvent, of which fact he was ignorant, whereby he lost the deposit, states a cause of action. Baxter *v.* Coughlan, 70 Minn. 1, 72 N. W. 797.

2. **Same—Offer to return certificate of deposit.**—Hyland *v.* Roe, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873.

Where the payee of a check deposited it in a bank, receiving in return a certificate of deposit, and the next day the bank suspended, owing to insolvency, a petition by the depositor that the receiver pay the proceeds of the check to him, but which did not offer to surrender the certificate of deposit, was insufficient to warrant the relief asked. Hyland *v.* Roe, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873.

§ 58 (4c) Matters of Defense.—Ratification and Estoppel.—The fact that the stockholders of a bank authorized the directors thereof to accept certain judgments, notes, etc., in payment of subscriptions to stock, will not estop the receiver thereof on its insolvency from asserting a claim against such directors on that account on behalf of creditors.[3] Neither is the trustee in a deed of assignment estopped to sue to recover the amount of discounted bills, fraudulently received from the cashier without authority by a director, by reason of the fact that he has paid the director dividends on the indebtedness of the bank to him as represented by such bills.[4] And where the directors have made fraudulent transfers of the funds of the bank to third persons, the fact that the receiver has made a compromise with the persons receiving the funds does not release the guilty directors from their liability nor estop the receiver from suing them for their part in the transaction.[5]

Estoppel of Directors to Deny Liability on Obligations Executed to Maintain Credit of Bank.—Where the directors of a bank execute and deliver their notes to the bank to make up an impairment of its assets, in order to satisfy the superintendent of banking, and secure his sanction to continue the business of the bank, and to give it credit with the public for the receiving of deposits and doing its general business, the makers of the notes are estopped, as against the receiver, who represents the creditors of the bank, from alleging want of consideration. They are also estopped from contesting their liability, on the ground of an alleged agreement between them and the cashier of the bank that the notes were not to be enforceable until the deficiency upon the rejected securities should be ascertained.[6]

§ 58 (5) Evidence—§ 58 (5a) Presumption and Burden of Proof.—In an action against the directors of a bank to make them personally liable for the misappropriation of funds by the cashier, the burden of proof is on the plaintiff to prove not only the loss, but a want of diligence on the part of the directors in discovering or preventing the defalcation.[7] But where the action is against the bank it will not be heard to say that its directors were ignorant of such frauds, for in such case the law presumes that the directors know every entry made by its subordinate offi-

3. Ratification and estoppel—Receiver not estopped by acts of stockholders.—Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567.

4. Estoppel of trustee by payment of dividends on fraudulent indebtedness of bank to defendant.—Lamb *v.* Cecil, 25 W. Va. 288.

5. Effect of compromise with third persons to whom directors have fraudulently transferred funds.—Wilkinson *v.* Dodd, 40 N. J. Eq. 123, 3 Atl. 360.

6. Estoppel of directors to deny liability on obligations executed to maintain credit of bank.—Sickels *v.* Herold, 15 Misc. Rep. 116, 36 N. Y. S. 488, affirming 11 Misc. Rep. 583, 32 N. Y. S. 1083.

7. Presumption and proof of negligence.—Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428; Clews *v.* Bardon, 36 Fed. 617; In re Dunham, 25 Ch. Div. 725; Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

cers in the bank books, and therefore the misappropriation of funds by a cashier, unknown to the directors, constitutes no defense to the bank.[8] Where the action is against the president, directors, cashier, or agent of the bank for fraud in receiving deposits, knowing the bank to be insolvent or in failing circumstances, the plaintiff, by making out a prima facie case of fraud, shifts the burden of explanation to the defendant,[9] and so far as the defendant's knowledge of the insolvency is concerned the plaintiff has only to prove to the satisfaction of the jury that the bank was insolvent in order to place upon the defendant the burden of proving want of knowledge.[10]

§ 58 (5b) Competency and Admissibility of Evidence.—Appointment of Receiver and Authority to Sue.—Where want of jurisdiction of the subject or of the parties in proceedings for the appointment of a receiver for an insolvent bank is not apparent, entries of the record therein are competent evidence of the appointment of the receiver, and of the order of the court authorizing him to sue in his own name for the debts of the bank, in an action against the bank directors for damages arising from their negligence, though defendants were not directors or stockholders when the application for a receiver was made.[11]

Official Relation of Defendants to Bank.—Parol evidence is admissible to show who were the officers of the bank without requiring proof of their legal appointment.[12]

Negligence, Fraud or Misfeasance.—The official relation of the de-

8. **Same—Where action is against bank.**—Savings Bank *v.* Caperton, 87 Ky. 306, 10 Ky. L. Rep. 201, 8 S. W. 885, 12 Am. St. Rep. 488; Lane & Co. *v.* Bank, 56 Tenn. (9 Heisk.) 419.

9. **As to fraudulent insolvency.**—Cassidy *v.* Uhlmann, 170 N. Y. 505, 63 N. E. 554, affirming 54 App. Div. 205, 66 N. Y. S. 670.

Pennsylvania statutes.—The Act of April 16, 1850, provides (§ 40) that if the insolvency of a bank be occasioned by the fraudulent conduct of its directors, they shall be liable to the stockholders and creditors, etc.; (§ 41) that the insolvency of every bank hereafter incorporated shall be deemed fraudulent unless its affairs shall appear, upon investigation, to have been fairly and legally administered; (§ 42) that the term "insolvency," used in the act, shall be construed to apply to a bank when it is compelled to make an assignment according to the provisions of the act, and that upon making such assignment, the directors shall file a full statement of its affairs, etc.; (§ 43) that upon the filing of such statement the court shall appoint three auditors to make an investigation of the affairs of the bank, etc.; (§ 44) that the auditors shall report to the court the result of their investigation, and, in case they report that the insolvency was fraudulent, it shall be their duty to report the amount due from the several directors, according to the liabilities imposed by the act; and (§ 45) that the court shall thereupon proceed to an investigation of the matters contained in such report, and shall determine whether the insolvency of such bank was fraudulent or otherwise, or it may direct an issue to try the fact of fraudulent insolvency. Held, that upon the trial of such issue the question of fraudulent insolvency is to be tried without any prima facie imputation of fraud. Wright *v.* Davenport, 66 Pa. 148.

10. **Same—Knowledge of insolvency.**—Dodge *v.* Mastin, 17 Fed. 660, 5 McCrary 404.

11. **Appointment of receiver and authority to sue—Docket entries.**—Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567.

12. **Admissibility of parol evidence as to who were officers, etc.**—State *v.* Bourne, 86 Minn. 432, 90 N. W. 1108.

fendants to the bank having been established, evidence of their negligence and fraud in the management of its affairs is admissible in an action by a depositor or creditor claiming to have been damaged thereby.[13] As bearing on the issue of the liability of directors for acts of their associates done in their absence, it is competent to consider the illegal course of conduct in which such directors had engaged, when present, with their associates.[14] And where the issue is whether purported loans in extending a depositor's paper and taking up its overdrafts were loans in the regular course of business and in good faith, evidence of the custom of extending discounts in other banks is inadmissible.[15]

Receiving Deposits While Insolvent.—In an action against the director of a bank for fraudulently receiving deposits, knowing the bank to be insolvent, the director may testify to his belief as to the solvency of the bank after information obtained from different sources, since his knowledge thereof is the material issue.[16] But the record in a suit by the receiver of the bank against its president to set aside a deed of trust made by the bank to secure the defendant, is not competent evidence against the defendants in a suit to hold the officers and directors personally responsible for misrepresentations as to the solvency of the bank whereby plaintiffs were induced to deposit their money therein.[17] Neither is it admissible in such action to prove the declarations of the president of the bank, touching its financial condition, made to a third person but never made known to the plaintiff.[18] And notice by a bank that it will receive on deposit the depreciated bills of another bank, is no evidence of the insolvency of the bank making such offer.[19]

Variance.—Where, in an action by the receiver of a bank against the directors for negligence in managing the bank, certain specific charges of negligence are made in the petition, plaintiff is confined to them.[20] But where, in a suit by the receiver against the directors, the pleadings allege that certain overdrafts were "negligently" permitted, the allegation is sustained by proof of illegal overdrafts.[21]

§ 58 (5c) Weight and Sufficiency of Evidence.—Evasion of

13. **Evidence of negligence and fraud.**—Wolf *v.* Simmons, 75 Miss. 539, 23 So. 586.

14. **Liability for acts of associates—Previous course of conduct.**—Wilkinson *v.* Dodd, 42 N. J. Eq. 234, 7 Atl. 327; Williams *v.* McDonald, 42 N. J. Eq. 392, 7 Atl. 866; Dodd *v.* Wilkinson, 42 N. J. Eq. 647, 9 Atl. 685.

15. **Evidence of custom in other banks.**—Dykman *v.* Keeney, 34 App. Div. 45, 54 N. Y. S. 1.

16. **Receiving deposits while insolvent.**—Cassiday *v.* Uhlmann, 163 N. Y. 380, 57 N. E. 620, 79 Am. St. Rep. 596, reversing 27 App. Div. 80, 50 N. Y. S. 318.

17. **Record in former suit against president not admissible against directors.**—Giddings *v.* Baker, 80 Tex. 308, 16 S. W. 33.

18. **Same—Declarations of president.**—Baker *v.* Ashe, 80 Tex. 356, 16 S. W. 36.

19. **Same—Accepting depreciated bills of another bank.**—Daniels *v.* Kyle, 5 Ga. 245.

20. **Variance.**—Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76.

21. **Same.**—Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76.

Statute Requiring Overdue Debts to Be Computed as Losses.—Where the law requires that all debts owing a bank which have remained overdue a year without prosecution or payment of interest shall be computed as losses, and it is shown that the bank, being creditor of a depositor for overdrafts, took his notes for the principal and interest, and marked the overdraft "Paid," and before a year marked two of the notes "Paid," and charged the amount to the depositors account as an overdraft, and that this overdraft was marked "Paid," and taken up by new notes, and that there were other transmutations of the form of such indebtedness, but that no money was ever paid on the principal or interest, such evidence was sufficient to require the court to submit to the jury whether such transactions were merely the taking up of defaulted notes, in evasion of the statutes, or were loans in the regular course of business.[22]

Receipt of Deposits with Knowledge of Insolvency.—Generally speaking, evidence that the defendant director was in the bank from day to day, that he attended board meetings regularly, examined statements showing the condition of the bank, and discussed with other directors the advisability of continuing business and receiving deposits, is sufficient to show knowledge of insolvency at the time the deposit was received;[23] but since in the nature of things there is no end to the variety of circumstances under which such cases may arise, each one must, in the end, be determined upon its own facts. A few illustrations are given in the notes.[24]

22. **Evasion of statute requiring overdue debts to be computed as losses.**—Dykman *v.* Keeney, 34 App. Div. 45, 54 N. Y. S. 1.

23. **Receipt of deposits with knowledge of insolvency.**—Cassidy *v.* Uhlmann, 54 App. Div. 205, 66 N. Y. S. 670, affirmed in 170 N. Y. 505, 63 N. E. 554; Jernberg *v.* Mix, 100 Ill. App. 264; Hollingsworth *v.* Howard, 113 Ga. 1099, 39 S. E. 465.

24. **Same—Illustrations.**—Proof in a civil case of the reception of deposits by a banker when insolvent, and one day before suspension, makes a prima facie case of fraud. Jernberg *v.* Mix, 100 Ill. App. 264.

Where, at a meeting of the directors of a bank, the books are examined, and it is apparent that the surplus is gone and that the capital is impaired, and, in the language of a director at the time, that "the bank is busted," it is sufficient to establish knowledge on the part of such director of the insolvency of the bank, so as to render him liable for deposits thereafter received. Judgment 66 N. Y. S. 670, 54 App. Div. 205, affirmed. Cassidy *v.* Uhlmann, 170 N. Y. 505, 63 N. E. 554.

Where a bank director, for a week preceding its failure, was at the bank during business hours and in the evening with other directors, and caused a statement of its affairs to be made, and, on examination of such statement, became aware of the bank's insolvency, and, after a discussion of the propriety of receiving deposits in view of the insolvency, agreed on such course, proof of these facts was sufficient to warrant a finding that when certain deposits were received just prior to the bank's failure such director knew of the insolvency, and actually took part in directing their receipt. Cassidy *v.* Uhlmann, 54 App. Div. 205, 66 N. Y. S. 670, affirmed in 170 N. Y. 505, 63 N. E. 554.

In an action for damages alleged to have been sustained on account of false representations made by the officers of a banking corporation as to its solvency, which induced plaintiff to deposit his money in a branch bank belonging to such company, evidence that the bank collapsed very soon after the deposit was made, with facts warranting the inference that one of such officers knew the parent bank was in an insolvent condition when he represented to plaintiff that it was financially sound, is sufficient to sustain a finding that such official knew the bank was insolvent. Hollingsworth *v.* Howard, 113 Ga. 1099, 39 S. E. 465.

§ 58 (6) Trial.—Instructions—Defining Insolvency.—Under a statute which makes it a felony to receive deposits, knowing, or having reason to believe, that the bank is insolvent, an instruction that a bank is not insolvent as long as it is meeting its liabilities as they become due in the ordinary course of business, and there is reasonable expectation on the part of the officers familiar with its affairs of continuing to do so, is correct.[25]

Same—Liability for Receiving Deposits after Insolvency.—In an action against bank directors to recover deposits alleged to have been received with knowledge of the bank's insolvency, an instruction that plaintiff can not recover unless the jury finds that defendant was guilty of bad faith "amounting to fraud," is erroneous where the court refuses to further charge that it was a fraud for the officers of the bank to permit a deposit when they knew that the bank was insolvent.[26] And in an action against the directors of an insolvent bank for false representations whereby plaintiff was induced to deposit his money in said bank, which money he lost by reason of the insolvency of the bank, an instruction that defendants were liable "if they knowingly made, with intent to defraud the public generally, false representations of the solvency of the bank, without regard to whether plaintiff ever relied or acted upon such representations;" and that, if defendants made representations of the solvency of the bank while in a position to know the facts on which plaintiff relied, they were liable, whether such representations were false or not, was not a correct statement of the principles of the law governing the defendants' liability, and the error in such instruction was not cured by a statement in other instructions that plaintiff could not recover unless the representations were false, and were relied on by plaintiff; such instructions, taken as a whole, being contradictory.[27]

Defining Individual Bankers as a Partnership.—In an action against individuals who conducted a bank, on an indebtedness arising from transactions with the bank, an instruction that if defendants operated a bank themselves or through officers or agents, and they or their officers or agents, in the usual course of banking business, drew drafts against plaintiff bank, and plaintiff paid the amounts thereof, etc., defendants would be liable, was not objectionable as authorizing recovery upon the theory of a partnership among defendants.[28]

Judgment—Personal Service of Process.—Under an act providing that the president and directors shall be liable to every creditor of the bank,

25. **Instruction defining insolvency.**—Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222.

26. **Same—Liability for receiving deposits after insolvency.**—Nathan *v.* Uhlmann, 101 App. Div. 388, 92 N. Y. S. 13, affirmed in 184 N. Y. 606, 77 N. E. 1192.

27. **Same—Erroneous instruction defining liability not cured by contradictory instruction.**—Baker *v.* Ashe, 80 Tex. 356, 16 S. W. 36.

28. **Defining individual bankers as a partnership.**—Curtis *v.* First Nat. Bank (Civ. App.), 138 S. W. 795.

a judgment against such officers individually is not authorized, unless process be issued against and served upon them personally; process sued out against the corporation only is not sufficient.[29]

Damages and Amount of Recovery.—Where the fact of violation of the charter has been previously established, the measure of the liability of the directors will be the amount which the effects of the corporation may fall short of discharging its liabilities, in consequence of such violation of the charter.[30] A depositor induced by the misrepresentations of officers of an insolvent bank to deposit money with it, upon the failure of the bank is entitled to recover of the officers so guilty the amount of his deposit with interest less the value of his claim against the bank after it had failed.[31] For example, where a recovery has been had by a depositor and he has also proved up his claim against the bank and has been paid a dividend by the receiver, and other assets remain from which further payments may be expected, the measure of damages is the amount of the deposit less the dividend paid and less the value of the claim against the bank at the time of the action against the directors. Interest upon the deposits should also be allowed.[32]

§ 60. Criminal Responsibility—§ 60 (1) Constitutional and Statutory Provisions.—Officers of national banks, see post, "Criminal Responsibility of Officers or of Persons Aiding or Abetting Them," § 255; "Prosecution and Punishment," § 257. On insolvency, see, also, post, "Criminal Responsibility on Insolvency," § 83.

Constitutionality of Statutes.—The "law of the land," as that term is used in a constitutional provision declaring, that "no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land," implies a rule embracing alike and affecting equally all persons in general, or all persons who exist or who may come into the like state and circumstances. Therefore, an act creating a new felony in relation to the officers, agents and servants of a particular bank is not a law of the land within the meaning of such constitutional provision, and is unconstitutional. Such a law, says the court, inserted as one of the provisions in the charter of a bank and applicable solely to the officers, agents, and servants of that bank, is of no more validity than a statute enacted with regard to the clerks, servants and agents of some private individual and applicable solely to the clerks, servants and agents of that individual.[33]

29. **Judgment—Personal service of process.**—Cunningham *v.* Pell (N. Y.), 5 Paige 607.

30. **Damages—Amount of recovery.**—Johnson *v.* Churchwell, 38 Tenn. (1 Head) 146.

31. **Same.**—Baker *v.* Ashe, 80 Tex. 356, 16 S. W. 36.

32. **Same.**—Baker *v.* Ashe, 80 Tex. 356, 16 S. W. 36.

33. **Constitutionality of statutes.**—Budd *v.* State, 22 Tenn. (3 Humph.) 483, 39 Am. Dec. 189. See also, in this connection Hazen *v.* Union Bank, 33 Tenn. (1 Sneed) 115.

Construction of Statutes.—While it is true that care must be taken not to weaken the wholesome provisions of the statutes designed to protect depositors and stockholders against the wrongdoing of bank officials, it is of equal importance that they should not be so construed as to make transactions of such officials, carried on with the utmost honesty and in a sincere belief that no wrong was being done, criminal offenses, and subject them to the severe punishments which may be imposed under those statutes.[34] A court can not create a penalty by construction, but must avoid it by construction, unless it is brought within the letter and the necessary meaning of the act creating it. And where a statute may be so construed as to give a penalty, and also, and as well so, as to withhold the penalty, it will be given the latter construction.[35] If there be any reasonable doubt, therefore, as to whether the offense charged be an offense punishable by law, that doubt should be resolved in favor of the accused. No man should be guessed or construed into prison.[36]

Officers and Agents Comprehended within Statute.—A statute which enacts that if any cashier, agent, or servant or any other officer of the corporation shall do particular things which are by the statute forbidden, then they shall be punished in the manner prescribed by the statute, must, under a reasonable construction, be held to include clerks employed by the bank, notwithstanding clerks are not mentioned by name; and there is no merit in a contention that a clerk employed in the bank can not be punished under the statute because not comprehended and described by the terms "officers, servants or agents."[37]

"Incorporated Banks."—The words "incorporated bank," used in a general statute, include banks chartered since the passage of the act as well as those then existing, and include banking corporations organized under the laws of the United States and situated in the state as well as like corporations created by the laws of the state.[38] The same words in a

34. **Construction of statutes.**—Potter *v.* United States, 155 U. S. 438, 39 L. Ed. 214, 15 S. Ct. 144; Spurr *v.* United States, 174 U. S. 728, 43 L. Ed. 1150, 19 S. Ct. 812.

35. **Same—As to penalty.**—State *v.* Gibbs (O.), 7 N. P., N. S., 345, 360.

36. **Same—Reasonable doubt.**—State *v.* Gibbs (O.), 7 N. P., N. S., 345, 360.

Scope of the penal section of the Ohio Free Banking Act.—Section 30 of the act entitled "An act to authorize free banking," passed March 21, 1851, and amended in 76 O. L., 72, enumerating and defining certain acts of officers and others "of any banking company," as penal, although worded in general language is limited in its operation to banks organized under that act. State *v.* Gibbs (O.), 7 N. P., N. S., 345 (see 82 O. St. 456, 457, 462, 7 N. P., N. S., 371, 9 N. P., N. S., 129, 18 O. D. N. P. 694); State *v.* Laning, 18 O. D. N. P. 681.

Violation of oath not construed as a crime.—Violation by a director of a trust company of his oath of office prescribed by Banking Law, § 195, held not a violation of Penal Law, § 297, punishing directors of moneyed corporations willfully doing any act forbidden by law. People *v.* Knapp (N. Y.), 99 N. E. 841.

37. **Officers and agents comprehended by statutes.**—Budd *v.* State, 22 Tenn. (3 Humph.) 483, 39 Am. Dec. 189.

A director of a trust company is not a "public officer" within Penal Law, § 1857, punishing omission of public duty by a public officer. People *v.* Knapp (N. Y.), 99 N. E. 841.

38. **"Incorporated banks."**—Com-

statute treating as guilty of larceny any officer of an "incorporated bank" who does certain specified acts, applies to savings banks, and, therefore, under such a statute an officer of a savings bank may be indicted.[39]

Repeal of Statutes.—A special statute prescribing punishment for officers guilty of fraudulently wrecking a bank, and filling a place peculiarly its own, is not repealed by implication by subsequent general legislation.[40] But where the later of two acts covers the whole subject matter of the earlier one, not purporting to amend it, and plainly shows that it was intended to be a substitute for the earlier act, such later act will operate as a repeal of the earlier one, though the two are not repugnant.[41]

§ 60 (2) Accessories, Aiders and Abettors.—A section of a general banking law, providing for the punishment of all who knowingly aid or assist in a violation of any of its provisions, is designed to provide a punishment for all offenders, principals as well as aiders and abettors, except such as are within other sections of the act which sections themselves prescribe the punishment for specific offenses.[42]

§ 60 (3) Officers of De Facto Banking Corporations.—Where several persons associate themselves together with a view of organizing a bank, and duly file a charter as a state banking corporation, the existence of the corporation dates from the filing of the charter; and if such bank is thereafter conducted under the supervision and control of the bank commissioner, and is recognized and treated by him as one having authority, the mere omission or neglect of the commissioner to formally issue a written certificate of authority will not exempt the officers of the bank from an observance of the requirements of the banking law, or excuse them for violations of the same.[43] Where a state bank is duly chartered, and holds itself out to the public as a banking institution, receiving money on deposit, and otherwise transacting a banking business, and where the officers, having knowledge of the manner in which the bank is doing business, make reports to the bank commissioner on demand, showing the character of the business done, they

monwealth *v.* Tenney, 97 Mass. 50. See, also, Commonwealth *v.* Hall, 97 Mass. 570.

39. Commonwealth *v.* Warner, 173 Mass. 541, 54 N. E. 353, disapproving dictum in Commonwealth *v.* Pratt, 137 Mass. 98. See, also, Commonwealth *v.* Shepard (Mass.), 1 Allen 575.

40. **Repeal of statutes.**—Youmans *v.* State, 7 Ga. App. 101, 66 S. E. 383.

Pen. Code 1895, § 206, deeming every insolvency of a bank, or refusal or failure to redeem its bills, fraudulent, but providing that such presumption of fraud may be repelled by showing that the bank has been fairly administered, was not repealed even by implication, by Act Dec. 20, 1893 (Acts 1893, p. 66), or by Act Dec. 15, 1898 (Acts 1898, p. 73), since it fills a place peculiarly its own. Youmans *v.* State, 7 Ga. App. 101, 66 S. E. 383.

41. **Same.**—Thornton *v.* State, 5 Ga. App. 397, 63 S. E. 301.

Laws 1883, p. 133, c. 107, providing for the incorporation of trust companies, was expressly repealed by Rev. Laws 1905, and the provisions of § 11 were re-enacted in Rev. Laws 1905, § 3045. State *v.* Barnes, 108 Minn. 230, 122 N. W. 11; S. C., 108 Minn. 527, 122 N. W. 12.

42. **Accessories, aiders and abettors.**—People *v.* Comstock, 115 Mich. 305, 73 N. W. 245.

43. **Officers of de facto banks.**—State *v.* Mason, 61 Kan. 102, 58 Pac. 978.

can not deny that the bank is duly organized and doing business under the laws of the state; and such officers become liable to punishment for a violation of any of the penal provisions of the banking law, the same as though a formal certificate of authority had been issued to it by the bank commissioner.[44]

§ 61. —— Offenses—§ 61 (1) Illegal and Unauthorized Banking.—Where an unauthorized bank issues notes payable to order, in similitude and appearance like bank notes, struck upon an engraved plate, signed by the president and secretary of the company, and intended, designed and calculated, by the company and those concerned in paying them out and putting them in circulation, to circulate as money, under an agreement with those to whom the notes are paid by the company that, as soon as they should receive them, they should indorse them and circulate them as money, the creditors of the company, to whom the notes are paid, are as much concerned in the transaction as the company itself, and by indorsing the notes they, as well as the officers proper of the company, make themselves liable for the penalty of the law, under a provision of the statute that every person whose handwriting shall appear on the notes, shall be taken to be an officer of the bank; and the fact that the notes are not indorsed until after they are paid out by the company will not relieve the parties concerned from the penalty provided by the act.[45]

§ 61 (2) Criminal Liability for Fraud, Negligence, Fraudulent Insolvency, etc.—Statutes making directors and officers criminally responsible for fraud, negligence, mismanagement and failure to comply with the articles of incorporation are usually construed to refer only to active intentional fraud and willful mismanagement, and not to mere negligence and acts of omission.[46] The same construction has been applied to a statute making the officers criminally liable for the fraudulent insolvency of the bank. Under such a statute the president and directors are not punishable merely for the insolvency of the bank, but are criminally liable if the insolvency of the bank has been caused by their intentional fraudulent acts. Under such a statute it has been held that it is not mere mismanagement, resulting in the insolvency of the bank, which is punishable, but insolvency which indicates intentional fraud and dishonesty on the

44. **Same.**—State *v.* Mason, 61 Kan. 102, 58 Pac. 978.

45. **Offenses, illegal and unauthorized banking.**—Bonsal *v.* State, 11 O. 72. See, also, Myers *v.* Manhatten Bank, 20 O. 283; Lawler *v.* Walker, 18 O. 151; Steedman *v.* State, 11 O. 82.

46. **Criminal responsibility for fraud, negligence, etc.**—Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222.

Thus under the Tennessee statute there is no liability for negligence or mere acts of omission, as where certain persons who owned no stock, never accepted positions as directors, and who took no part in the management of the bank, suffered themselves to be advertised and held out as directors of the bank. Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728.

part of those officers charged with the management of the bank, and which can not otherwise be explained after full opportunity for explanation has been given;[47] and that the mere failure of the bank to redeem its bills is not sufficient to show guilt.[48] On the other hand, where the insolvency is due to the intentional fraud of an officer of the bank the penalties prescribed by the statute may be imposed upon him without regard to whether the bank has issued bills or not.[49] Such an act is not unconstitutional as violating the constitutional prohibition against imprisonment for debt. The punishment imposed for wrecking the bank is not imprisonment for debt, but fraudulent conduct. The fact that, in perpetrating a fraudulent practice upon another, the perpetrator may become a debtor, does not bring him within the protection of the constitutional inhibition and prevent the legislature from prescribing punishment for his fraudulent practice; and it is immaterial that he is at the time a debtor to him who was defrauded.[50]

Presumption and Burden of Proof.—It is entirely competent for the legislature, from a constitutional standpoint, to make the fact of insolvency and failure to redeem its bills, either or both, presumptive evidence of fraud sufficient to place upon the defendant the burden of rebutting the presumption that the insolvency was due to his fraudulent conduct.[51]

§ 61 (3) Doing Business While Insolvent—Receiving Deposits, etc.—§ 61 (3a) In General.—While the criminal responsibility of bank officials for keeping the bank open and continuing to do business after knowledge of its insolvency generally arises under provisions relating to the receipt of deposits after knowledge of insolvency, such is not always the case. For example, the statute may make it a penal offense for any bank officer to create or assent to the creation of any indebtedness by the bank, after knowledge of its insolvency,[52] and the receipt of a deposit after knowledge of insolvency will be a violation of such a statute.[53] So the obtaining of a deposit or loan by means of false representations as to the bank's solvency may amount to the crime of obtaining money or property under false pretenses under the general criminal statute of the state defining that offense;[54]

47. **Same—Fraudulent insolvency.**—Youmans *v.* State, 7 Ga. App. 101, 66 S. E. 383.

48. **Mere failure to redeem bills not sufficient to show guilt.**—Youmans *v.* State, 7 Ga. App. 101, 66 S. E. 383.

49. **Same—Issuance of bills not a prerequisite to guilt.**—Youmans *v.* State, 7 Ga. App. 101, 66 S. E. 383.

50. **Same — Same—Constitutionality of statute.**—Youmans *v.* State, 7 Ga. App. 101, 66 S. E. 383.

51. **Same—Same—Presumption and burden of proof.**—Youmans *v.* State 7 Ga. App. 101, 66 S. E. 383.

52. **Creation of indebtedness after knowledge of insolvency.**—Rev. Stat. Mo., 1889, § 3581.

53. **Same.**—State *v.* Sattley, 131 Mo. 464, 33 S. W. 41.

54. **False pretenses—Obtaining loan or deposit by means of false representations.**—Commonwealth *v.* Schwartz, 92 Ky. 510, 18 S. W. 775; People *v.* Moore, 37 Hun 84, 3 N. Y. Cr. R. 458.

A banker who, after collecting money for a customer, induces the customer, while it is still in his possession, to loan it to the bank, by falsely pretending that the bank is solvent, when he knows or has reason to believe that it is not, is guilty of "obtaining" money under false pretenses, within the meaning of Gen. St. art. 13, c. 29, § 2, since it is only in cases where the delivery of property is necessary

and selling a draft and accepting the money therefor after knowledge that the bank is hopelessly insolvent, and that the amount standing to its credit in the bank upon which the draft is drawn has been, or will be, exhausted by prior drafts before the draft so sold can be presented, may render the banker subject to arrest for fraudulent practices under the general laws of the state.[55]

§ 61 (3b) Receiving Deposits after Knowledge of Insolvency.—General Purpose of Statutes.—The purpose of statutes making it a crime to receive deposits when a bank is known to be insolvent is not only to protect innocent depositors, but to deter bank officers from so conducting a bank as to endanger its solvency.[56]

Constitutionality of Statutes.—Statutes making it a criminal offense to receive deposits after knowledge of the bank's insolvency are not unconstitutional, either as depriving persons engaged in the business of banking of any property or vested right, liberty or privilege without due process of law,[57] or as denying the equal protection of the laws.[58] Neither are they

in order to deprive the owner of it that the false pretense must relate to such delivery. Commonwealth *v.* Schwartz, 92 Ky. 510, 18 S. W. 775.

A banker who, for the purpose of securing a deposit, falsely pretends that his bank is solvent when he knows or has reason to believe that it was not, and who represents to the depositor that he has a safe place to invest the money so as to enable him to pay the depositor six per cent interest thereon, is guilty of obtaining money under false pretenses, though he intended to repay the money, within Gen. St., art. 13, c. 29, § 2, which defines that offense to be the obtaining of money or property from another by means of any false pretense, statement, or token, with intent to commit a fraud. Commonwealth *v.* Schwartz, 13 Ky. L. Rep. 929, 18 S. W. 358; S. C., 19 S. W. 189.

A banker, by obtaining possession of a draft in the usual course of business, without disclosing the fact of his insolvency, does not necessarily render himself criminally liable for obtaining property on false pretenses. People *v.* Moore, 37 Hun 84, 3 N. Y. Cr. R. 458.

55. Sale of draft after knowledge of insolvency.—Anonymous, 67 N. Y. 598.

56. General purpose of statutes.—Ex parte Pittman, 31 Nev. 43, 99 Pac. 700.

57. Constitutionality of statutes—Vested rights and privileges.—In re Koetting, 90 Wis. 166, 62 N. W. 622; Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447.

Act of Illinois of June 4, 1879, making it criminal for any person doing a banking business, or officer of any bank, to receive deposits, knowing that the bank is insolvent, whereby the deposit is lost to the depositor, is not unconstitutional, as a deprivation of property without due process of law, in that it curtails inherent right to contract. Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447.

Rev. St. 1878, § 4541, providing that any officer or agent of any bank or institution, or of any person, company, or corporation engaged in whole or in part in banking, or any person engaged in such business in whole or in part, who shall accept on deposit, or for safe-keeping, or to loan, any money, or any paper for collection, when he knows, or has good reason to know, that such bank, company, corporation, or person is unsafe or insolvent, shall be punished, etc., does not impair any banking right, and is therefore within the enacting power of the legislature, and does not require the vote of the people provided by Const., art. 11, § 5. In re Koetting, 90 Wis. 166, 62 N. W. 622.

58. Same—Equal protection of the laws.—Baker *v.* State, 54 Wis. 368, 12 N. W. 12; Ex parte Pittman, 31 Nev. 43, 99 Pac. 700.

Rev. St., § 4541, inflicting a punishment on any banker or employee of a bank who shall receive money, etc., on

obnoxious to a constitutional prohibition against imprisonment for debt,[59] or to the constitutional guaranty of a jury trial because of a provision making the failure of the bank within thirty days from the receipt of the deposit prima facie evidence or intent to defraud.[60] The existence of a constitutional provision imposing individual civil responsibility upon bank officers for receiving deposits under such circumstances is not an implied prohibition to the legislature against making the same act a crime.[61] And under a constitutional requirement that criminal acts shall prescribe the nature and punishment of the crime which they undertake to define, an act providing that any bank officer who shall receive or assent to the reception of a deposit, or who shall create or assent to the creation of any indebtedness by the bank, knowing that it is in a failing condition, shall be guilty of larceny and punished, etc., is sufficient.[62]

Essentials of the Offense.—Under a statute of this character, the essentials of the offense defined thereby are, generally speaking: a person, bank, or other institution engaged in a business answering to the description of the business defined in the statute; second, actual insolvency at the time the money was received; third; knowledge of insolvency; and, fourth, the receipt of money as a deposit or the obtaining of a loan or incurring of an indebtedness in violation of the prohibition contained in the statute.[63]

Individual, Bank, or Institution Coming within Condemnation of Statute.—A trust company, though it has and exercises some of the functions of a bank, is not a bank in such sense as will render its officers amenable to a statute of this character where, under its charter, it has no right to receive deposits subject to check; and the fact that it has engaged in the

deposit when he knows that he or the bank is "unsafe or insolvent," is not in conflict with Const. U. S. Amend. 14, which declares that "no state shall deny to any person within its jurisdiction the equal protection of the law." Baker *v.* State, 54 Wis. 368, 12 N. W. 12.

Act March 29, 1907 (St. 1907, p. 414, c. 189), making it a crime to receive bank deposits knowing the bank to be insolvent, is not unconstitutional, as being a special law for the punishment of offenses. Ex parte Pittman, 31 Nev. 43, 99 Pac. 700.

59. **Same—Imprisonment for debt.**—Commonwealth *v.* Sponsler, 1 Lack Leg. N. 61.

Act May 9, 1889, providing for the punishment of bankers receiving money from a depositor, knowing that the bank is insolvent, does not violate Const., art. 1, § 16, which provides that a debtor, where there is a strong presumption of fraud, shall not be confined in prison after giving up his estate to his creditors. Commonwealth *v.* Sponsler, 1 Lack. Leg. N. 61.

60. **Statute creating prima facie presumption not a denial of right to trial by jury.**—Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447.

61. **Not forbidden by constitutional provision imposing civil liability.**—State *v.* Oleson, 35 Wash. 149, 76 Pac. 686.

2 Ballinger's Ann. Codes & St., § 7121, making banking officers criminally liable for receiving deposits after knowledge of insolvency of the bank, is not in violation of Const., art. 12, § 12, providing that any officer of a banking institution who shall receive or assent to the reception of deposits after he shall have knowledge of the fact that such banking institution is insolvent or in failing circumstances shall be individually responsible for deposits so received. State *v.* Oleson, 35 Wash. 149, 76 Pac. 686.

62. **Sufficiently defining crime.**—State *v.* Sattley, 131 Mo. 464, 33 S. W. 41.

63. **Essentials of the offense.**—Commonwealth *v.* Smith, 4 Pa. Super. Ct. 1.

business of receiving such deposits in violation of its charter does not bring it or the offending officials within the purview of the act.[64] Whether such a statute includes within its purview private and unchartered banks and their officers is a question of legislative intent and statutory construction in each case.[65] A statute which does include private banks and bankers applies to attorneys at law, partners in business, held forth to the public by their letter heads, notes, checks, etc., as the bank of a certain county.[66] Where the statute makes it a felony for any one connected with a banking concern, either public or private, to receive deposits while such institution is insolvent, it is not material in what capacity the interested or guilty party is connected with the bank, whether as an ostensible partner, or as a secret conspirator with the actual operator of the same, if any substantial aid is given by him tending to violate the statute; and hence a formal dissolution of a banking firm can not exonerate the retiring partner from full accountability for subsequent acts in an unlawful plan to receive deposits during the insolvency of the bank.[67]

64. Persons and institutions coming within purview of statute—Trust company.—State *v.* Reid, 125 Mo. 43, 28 S. W. 172.

65. Private and unchartered banks.—Section 1350, Rev. St., of Mo. declaring that "if any president, director, manager, cashier, or other officer of any banking institution, shall receive a deposit after he has knowledge that the bank is insolvent, he shall be guilty of larceny," was enacted to enforce § 27, art. 12, Const. 1875, on banking corporations, and does not apply to private banks and bankers. State *v.* Kelsey, 89 Mo. 623, 1 S. W. 838; S. C., 1 S. W. 841.

The proviso in Rev. St. of Mo. 1899, § 1945 (Ann. St. 1906, p. 1320), relating to the offense of receiving deposits when insolvent, stating that "the failure of any such bank, or banking institution, or trust company, or institution, shall be prima facie evidence of knowledge on the part of any such officer or person that the same was insolvent, or in failing circumstances when the money or property was received on deposit," applies to private as well as incorporated banks. State *v.* Salmon, 216 Mo. 466, 115 S. W. 1106.

Laws of Wash. 1893, c. 111, is entitled "An act punishing bank officers for receiving deposits knowing the bank to be insolvent," and section 1 makes any president, director, manager, cashier, or other officer of any banking institution who shall receive deposits knowing the bank to be insolvent guilty of a felony. Section 2 provides that "any person" violating section 1 shall be punished, etc. Const., art. 12, is entitled, "Corporations other than municipal," and § 12 is almost identical in language with the statute, which was passed with reference thereto. Acts 1907, c. 225, § 22, incorporated the word "owner" into the law, while Acts 1909, c. 249, § 388, included stockholders and employees as well as owners, etc. Held, in view of the title of the act, its language, and the other statutes and constitutional provisions, that section 1 did not apply to private individual bankers. State *v.* Youngbluth, 60 Wash. 383, 111 Pac. 240.

Acts of Va. 1893-94, c. 210, making it an offense for any private banker or any employee of any private banker to accept a deposit with knowledge that he or such institution is insolvent, was not impliedly repealed by Acts 1902-3-4, c. 578 (Va. Code 1904, § 1171), creating the same offense with reference to banks, and defining the word "bank" to include banks of deposit and discount, savings banks, savings societies, savings institutions, and trust companies, or other corporation chartered to receive deposits, or do a banking business, since repeals by implication are not favored, and will not be presumed unless the repugnancy is such that both can not be sustained and construed together. Boyenton *v.* Commonwealth (Va.), 76 S. E. 945.

66. Attorneys at law operating under banking name.—Commonwealth *v.* Sponsler, 1 Lack. Leg. N. 61.

67. Capacity in which guilty party connected with bank.—State *v.* Clements, 82 Minn. 434, 85 N. W. 229.

Same—Persons Engaged in Unauthorized or Illegal Banking.—Under an act, making it unlawful for the officers of any bank, "or the owner, agent, or manager of any private bank or banking institution," to receive deposits knowing such bank to be insolvent, the owner of a private bank is liable, though he had not complied with the provisions of the statute in the organization of his bank, and consequently was doing an unauthorized business.[68] But the contrary has been held with respect to a trust company which had and exercised some of the functions of a bank, but which had no authority under its charter to receive deposits subject to check.[69]

Insolvency—When Bank Deemed Insolvent or in Failing Circumstances.—There are two doctrines upon this subject. According to one line of decisions, a bank is insolvent within the purview of a statute forbidding the receipt of deposits after knowledge of insolvency when there is a present inability to pay depositors as banks usually do, and meet all liabilities as they become due, in the ordinary course of business.[70] According to the other line of decisions, the terms "unsafe," "insolvent," "in failing circumstances," etc., do not mean insolvent in the limited sense of inability to pay depositors and creditors in the ordinary course of business, but insolvent in the broad sense of a deficiency of cash and assets convertible into cash within a reasonable time to pay liabilities.[71] Under this view, the words

68. **Same—Persons engaged in unauthorized or illegal banking.**—State *v.* Buck, 108 Mo. 622, 18 S. W. 1113; S. C., 120 Mo. 479, 25 S. W. 373. See, also, ante, "Officers of De Facto Banking Corporations," § 60 (3); "Illegal and Unauthorized Banking," § 61 (1).

69. **Same—Trust company receiving deposits in violation of charter.**—State *v.* Reid, 125 Mo. 43, 28 S. W. 172.

70. **Insolvency—When bank deemed insolvent or in failing circumstances.**—State *v.* Stevens, 16 S. Dak. 309, 92 N. W. 420; State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700; Eads *v.* Orcutt, 79 Mo. App. 511.

71. **Same—Same—Contrary view.**—Ellis *v.* State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A., N. S., 444; Fleming *v.* State, 62 Tex. Cr. App. 653, 139 S. W. 598.

The term "insolvency" as used in Ky. St., § 597 (Russell's St., § 2186), providing that, if any president of a bank shall receive or assent to the receiving of deposits with knowledge that the bank is insolvent, he shall be guilty of a felony, means that all of the bank's property and assets are not sufficient to satisfy its debts, and not that it may not have sufficient funds in its vaults to satisfy all its depositors, or any considerable number of them, on the same day, or in case of a run. Parrish *v.* Commonwealth, 136 Ky. 377, 123 S. W. 339.

A bank is "unsafe or insolvent" within St. 1898, § 4541, making a bank officer criminally responsible who shall receive a deposit, knowing the bank to be unsafe or insolvent, when the cash value of its assets realizable in a reasonable time in case of liquidation, as ordinarily prudent person would close up their business, is not equal to its liabilities, exclusive of stock liabilities. Ellis *v.* State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A., N. S., 444.

Where bank officers largely indebted to it and possessing property interests in a corporation to a very significant amount as compared with such indebtedness convey such property to the bank on account thereof, pursuant to an understanding, the fact that some of the officers equally interested in the bank and the outside property are not debtors of the bank, but have nevertheless agreed with their associates to join in conveying such property to strengthen the bank, which obligation the other officers have reason to suppose will be and which in fact is redeemed, does not militate against the outside interests of such nondebtor officers being considered by the others, before the transfer, on the question of whether the bank is solvent. Ellis *v.* State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A., N. S., 444.

"unsafe or insolvent" occurring in a statute are held to be legal equivalents.[72] And in balancing the assets against the liabilities, the capital stock and surplus fund are to be classed as resources,[73] together with all the property, real and personal, belonging to said bank, its bills receivable, notes, obligations due the bank of any and every character, considering the solvency of the makers, indorsers, and guarantors thereof, and the value of the securities thereon, if any, also including all stocks and bonds held by the bank as its property.[74] Considering the general purpose and policy of such statutes, together with the fact that no reasonable man would make a general deposit in a bank if he knew that it was not at that time able to pay depositors and creditors in the usual course of business, and that his only hope of ever recovering it again was dependent upon the assets of the bank panning out a sufficient amount to pay dollar for dollar upon a general liquidation and winding up of its affairs, there is no doubt but that the view first stated is correct, and that under a proper construction of such an act it is the duty of the officers to close the doors of the bank and refuse to receive further deposits as soon as they discover that the bank is not able to pay depositors checks and meet obligations as they arise in the ordinary course of business.[75]

Uncertainty as to Bank's Real Conditions—Reasonable Belief, Good Faith, etc.—What is here said, however, is not intended to militate against the doctrine that directors, knowing that the bank is getting into deep water, financially, may yet have reasonable grounds to believe that through judicious management, or the assistance of outside capital, it will be able to tide over its temporary embarrassment and establish itself upon a firm basis, and that so believing, they may in all good faith, and without subjecting themselves to criminal liability, keep it open and continue to receive deposits so long as there is a reasonable ground for such belief and ability to pay obligations as they arise in the ordinary course of business.[76]

Liability as Affected by Cause and Extent of Insolvency.—On an issue as to whether a banker received deposits while insolvent, it is immaterial whether the bank became insolvent by his fault or by accident, and whether the insolvency consisted in inability to pay depositors or other creditor, or both.[77]

72. **Same—"Unsafe or insolvent" used synonymously.**—Ellis *v.* State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A., N. S., 444.

73. **Same—What considered assets.**—State *v.* Myers, 54 Kan. 206, 38 Pac. 296.

74. **Same—Same.**—Fleming *v.* State, 62 Tex. Cr. App. 653, 139 S. W. 598.

75. **Same—Better doctrine.**—See State *v.* Stevens, 16 S. Dak. 309, 92 N. W. 420; State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700; Eads *v.* Orcutt, 79 Mo. App. 511; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222; Cassiday *v.* Uhlmann, 170 N. Y. 505, 63 N. E. 554; Nathan *v.* Uhlmann, 184 N. Y. 606, 77 N. E. 1192.

76. **Uncertainty as to bank's condition—Reasonable belief, good faith, etc.**—St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390, reversing 27 Fed. 243; Dodge *v.* Mastin, 17 Fed. 660, 5 McCrary 404; Fleming *v.* State, 62 Tex. Cr. App. 653, 139 S. W. 598.

77. **Liability as affected by cause and extent of insolvency.**—Carr *v.* State, 104 Ala. 4, 16 So. 150.

Knowledge of Insolvency.—While practically all statutes concerning criminal liability for receipt of deposits after knowledge of insolvency proceed upon the same general idea or principle, yet in their exact wording as to details they present such a variety of expression that it is well-nigh impossible to formulate any general statement as to the character or degree of knowledge of insolvency necessary to guilt. But considering the dual purpose of such statutes, namely, to protect depositors from fraud, after insolvency, and to spur directors and other officials of banking institutions up to such a degree of diligence, prudence, and careful attention in the management of the bank's affairs as will reduce the danger of insolvency to a minimum, the reasonable and common sense doctrine would seem to be that actual knowledge of insolvency should not be held essential to guilt, but that directors and other chief officers who are in a position to know, and whose duty it is to know, the condition of the bank should be held guilty, not only in cases of actual knowledge, but in every case in which their lack of knowledge is due to their own negligence and fault; since under the contrary doctrine the natural effect of the statute would be, not to encourage diligence, careful attention, and an intimate knowledge of the bank's affairs, but exactly the contrary course of conduct, for the simple reason that the more ignorant an official could show himself to be of the bank's condition, the less danger there would be of his conviction under the statute. And, accordingly, it has been so held.[78] It must be admitted, however, that the majority of the cases take the opposite view, and, giving the statutes a strict construction in favor of the accused, hold that actual knowledge of insolvency is essential to guilt.[79] On the other hand, it has been held in at

78. **Knowledge of insolvency—Necessity for actual knowledge.**—State *v.* Cadwallader, 154 Ind. 607, 57 N. E. 512.

An officer of a bank who receives a deposit when the bank is insolvent, in violation of Burns' Rev. St. 1894, § 2031, subjecting such officer to punishment as for embezzlement, is not excusable for lack of knowledge as to the insolvency of the bank, where his ignorance of the insolvency was due to his own negligence or fault. State *v.* Cadwallader, 154 Ind. 607, 57 N. E. 512.

79. **Same—Cases holding actual knowledge essential to guilt.**—State *v.* Tomblin, 57 Kan. 841, 48 Pac. 144; State *v.* Dunning, 130 Iowa 678, 107 N. W. 927; Parrish *v.* Commonwealth, 136 Ky. 377, 123 S. W. 339; Stewart *v.* State, 95 Miss. 627, 49 So. 615.

A person charged with having received deposits, as an officer of a bank, when it was insolvent, is not guilty of a crime, under Laws 1891, c. 43, § 16, because through his negligence he does not know its condition; but he must have received the deposits knowing the bank to be insolvent. State *v.* Tomblin, 57 Kan. 841, 48 Pac. 144.

One may not be convicted under Code, § 1885, making it a felony for any banker to knowingly receive deposits when insolvent, unless actual knowledge of the insolvency is shown, and the fact of insolvency at the time of receiving a deposit, together with ignorance of insolvency through negligence, is not sufficient. State *v.* Dunning, 130 Iowa 678, 107 N. W. 927.

The word "knowledge" as used in Ky. St., § 597 (Russell's St., § 2186), making it a felony for a bank president to receive deposits with knowledge of the bank's insolvency, has no technical meaning, but meant that the officer had knowledge of the existing condition by means of his relation to the bank, his association with it, and his control over it; his direction thereof being such as to give him actual, personal information concerning

least one jurisdiction that neither knowledge of insolvency nor intent to defraud was an essential element of guilt under the statute in force therein; or, in other words, that the liability imposed by the statute was absolute.[80]

Receipt of Deposits—What Constitutes a Deposit.—A statute making a bank criminally responsible for receiving a deposit knowing the bank to be insolvent, contemplates such a deposit as will create the relation of debtor and creditor, or bailor and bailee, or principal and agent;[81] but does not, unless the statute is expressly so worded, include a loan to the bank while the latter is insolvent.[82] Incidentally it may be stated that a certificate of deposit, signed by the cashier of defendants' bank, certifying that a certain person had deposited therein a named sum, payable to her own order, in current funds, on return of the certificate properly indorsed, is evidence of a deposit, within the meaning of such statute, and not of a loan.[83] The deposit of a check in a bank, it being treated by the depositor and the bank as money, the former obtaining credit upon which he may draw money, is a deposit of money within the purview of a statute of this kind,[84] and it is immaterial that upon the presentation of the check it was paid partly in cash and partly by a credit to the payee's account.[85]

Same—Money, Notes, Bills, etc., within Purview of Statute.—The word "draft," as used in an act, providing for the punishment of a banker who receives deposits of money, drafts, etc., when the bank is known to be insolvent, includes checks.[86] And under a statute making it a felony for

it. Parrish *v.* Commonwealth, 136 Ky. 377, 123 S. W. 339.

One may not be convicted, under Code 1906, § 1169, making it a crime for an employee of a bank to receive a deposit, knowing or having good reason to believe the bank to be insolvent, unless he actually knew or had good reason to believe the bank was insolvent; and the fact that the bank was insolvent, and accused was ignorant of it through negligence, is not sufficient. Stewart *v.* State, 95 Miss. 627, 49 So. 615.

Receipt of deposit by officers of an insolvent bank does not constitute an offense under Act March 13, 1909 (Laws Nev. 1909, c. 92), unless they knew of such insolvency. Eureka County Bank Habeas Corpus Cases (Nev.), 126 P. 655.

80. Same—Liability held to be absolute.—Murphy *v.* People, 19 Ill. App. 125; Lanterman *v.* Travous, 73 Ill. App. 670, affirmed in 174 Ill. 459, 51 N. E. 805.

The act for the protection of bank depositors (June 4, 1879) renders bankers liable to prosecution for receiving deposits when insolvent, whether they are aware of their insolvency or not. Lanterman *v.* Travous, 73 Ill. App. 670, affirmed in 174 Ill. 459, 51 N. E. 805.

81. Receipt of deposits—What constitutes a deposit.—Ellis *v.* State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A., N. S., 444.

82. Same—Loan not included.—State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700.

83. Same—Certificate of deposit evidence of deposit and not loan.—State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700; State *v.* Shove, 96 Wis. 1, 70 N. W. 312.

To receive money, giving a certificate of deposit therefor payable at a certain time, with interest, is receiving it "on deposit," within Rev. St., § 4541, declaring it an offense for an officer of a bank, when knowing it is insolvent, to receive money "on deposit" or "for safe-keeping" or "to loan" or "for collection." State *v.* Shove, 96 Wis. 1, 70 N. W. 312.

84. Same—Deposit of check a deposit of money.—Ellis *v.* State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A., N. S., 444.

85. Same—Check paid partly in cash and partly by giving credit.—State *v.* Salmon, 216 Mo. 466, 115 S. W. 1106.

86. Same—Money, notes, bills, etc., within purview of statute.—State *v.* Warner, 60 Kan. 94, 55 Pac. 342.

a bank cashier to receive on deposit bank bills or notes, United States Treasury notes, or "other notes, bills, or drafts, circulating as money or currency," the quoted phrase refers to notes, bills, or drafts, other than United States Treasury notes and national bank notes, which pass from hand to hand: that is, such as are payable to bearer or are properly indorsed by the payee so that the legal title may pass by delivery.[87]

Same—What Constitutes "Receiving."—It is not necessary, to constitute a violation of the statute, that the deposit must be received in the bank building or rooms, but the receipt of money on deposit for the bank outside of its rooms is sufficient.[88]

Same—When Offense Complete.—Under a statute, providing that, if any banker shall receive any deposit when insolvent, whereby the deposit so made "shall" be "lost" to the depositor, said banker "so receiving said deposit" shall be deemed guilty of embezzlement, and on conviction fined in a sum double the amount of the "sum so embezzled and fraudulently taken," the crime is consummated when the insolvent banker, having fraudulently received the deposit, by his failure, suspension, or involuntary liquidation deprives the depositor of the benefit of such part of the deposit as remains to his credit.[89] It is not necessary that a demand be made for the return of the deposit, where the day after the deposit a receiver was appointed for the banker, who was hopelessly insolvent.[90] And where the statute contains a provision making insolvency and failure of the bank within thirty days after the receipt of the deposit prima facie evidence of knowledge and intent to defraud, the offense is still complete whenever the deposits are received by an insolvent bank, whether such receipt be within thirty days of the closing of the bank or not, the thirty day limit being merely a rule of evidence declaring what is prima facie evidence of an intent to defraud.[91]

Same—When Deposit "Lost" to Depositor.—Where the statute defines the offense as consisting of the fraudulent receipt of deposits with knowledge of insolvency, "whereby the deposit so made shall be lost to the depositor," the deposit is "lost" to the depositor when, by reason of such insolvency, he is deprived of the use of the same or any part thereof.[92] And this does not mean such loss or deprivation as may appear upon the ultimate settlement of the bank's affairs, but simply inability by reason of insolvency to repay the same upon demand,[93] or in the usual course of

87. **Same—Same.**—State *v.* Smith, 91 Ark. 1, 120 S. W. 156.

88. **Same—What constitutes "receiving."**—State *v.* Yetzer, 97 Iowa 423, 66 N. W. 737.

89. **Same—When offense complete.**—Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447.

90. **Same—Same—Demand of return of deposit unnecessary.**—Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447.

91. **Same—Same—Effect of provision making failure within thirty days prima facie evidence.**—Lanterman *v.* Travous, 73 Ill. App. 670, affirmed in 174 Ill. 459, 51 N. E. 805.

92. **Same—When deposit lost to depositor.**—State *v.* Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L. R. A. 179.

93. **Same—Same.**—State *v.* Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L. R. A. 179.

business as required by the implied contract arising out of the offer and acceptance of the deposit;[94] for it is held that the word "lost" includes the loss of the use of the whole or a part thereof even for a time, and it is no defense that the resources of the bank are ultimately found sufficient to pay all the debts,[95] or that, pending the prosecution, the depositor is tendered the full amount of his claim.[96]

Same—Liability as Affected by Return, or Intent to Return Deposit.—The fact that a banker receiving money on deposit, knowing the bank to be insolvent, intended at the time to return the same is immaterial.[97] It is different, however, in the case of a special deposit specifically set apart with the owner's name and kept separate from the general funds of the bank, and which identical money or bonds or other security is afterwards returned to him unimpaired by reason of the bank's insolvency.[98]

Same—Ability to Follow Deposit as a Trust Fund.—It is no defense to a prosecution for knowingly receiving a deposit as a banker when insolvent that the depositor could follow the money so received as a trust fund.[99]

Same—Receiving Deposits from Persons Indebted to Bank.—Statutes creating criminal liability for the receipt of deposits after knowledge of insolvency do not contemplate, as coming within the condemnation of the act, those transactions which, though they may be deposits in form, are, in practical effect, only the payment of a present existing indebtedness, then due and owing, as upon an overdrawn account.[1] In order to claim the benefit of this exception, however, the indebtedness must have been such that the bank had the legal right at the time the deposit was received to apply it upon the debt, so that the depositor would have had no right to have the deposit repaid on demand; in other words, the debt must have

94. **Same—Same.**—State *v.* Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L. R. A. 179.

95. **Same—Same.**—State *v.* Krasher, 170 Ind. 43, 83 N. E. 498; State *v.* Harter, 170 Ind. 703, 83 N. E. 1135.

96. **Same—Same.**—Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447.

97. **Same—Liability as affected by return or intent to return deposit.**—Commonwealth *v.* Sponsler, 1 Lack. Leg. N. 61.

98. **Same—Special deposits—Return of identical money or other thing.**—Commonwealth *v.* Junkin, 170 Pa. 194, 32 Atl. 617.

Under Act May 9, 1889, § 1, providing that any officer of a bank who shall take money from a depositor with the knowledge that the bank is at the time insolvent shall be guilty of embezzlement, an officer of a bank, knowing the bank to be insolvent and about to close, who received $20, handed to him for deposit, placed it in an envelope marked with its owner's name, to be returned to him after the bank closed, and who returned the identical $20 to the depositor after the bank's failure, was not guilty of embezzlement. Commonwealth *v.* Junkin, 170 Pa. 194, 32 Atl. 617.

99. **Same—Ability to follow deposit as a trust fund.**—State *v.* Eifert, 102 Iowa 188, 65 N. W. 309, 71 N. W. 248, 38 L. R. A. 485, 63 Am. St. Rep. 433.

1. **Same—Receiving deposits from persons indebted to bank.**—Ellis *v.* State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A., N. S., 444.

A banker is not guilty of receiving deposits with knowledge of the bank's insolvency, within the meaning of Act May 9, 1889, making it a criminal offense so to do, when the depositor at the time owes the bank a sum greater than the amount of the deposit. Commonwealth *v.* Schall, 12 Pa. Co. Ct. R. 209.

been then due and owing.[2] Where a bank officer accepts a deposit and places it to the credit of a depositor, his status, as regards guilt under such a statute, is thereby fixed, and is not subject to change by maturity thereafter of an indebtedness by the depositor to the bank, before suspension of the bank, absorbing a part or the whole of the deposit.[3] And this is true even where the statute contains an express exception as to deposits received from persons indebted to the bank.[4]

Guilty Knowledge or Participation in Receipt of Deposits—Liability for Acts of Another.—Where once it is shown that the directors or other managing officers of the bank had knowledge of its insolvency, or were chargeable with such knowledge, in those jurisdictions where that is held to be sufficient, it is not necessary, in order to fix their guilt under the statute, to go further and show that they were the persons who actually manually received the deposit, or that they had actual knowledge of its receipt, or that they were even present in the bank or in the town at the time it was received.[5] In other words, the offense defined by the statute may be committed through agents and subordinates, as well as in person, and if the directors or other chief officers having in charge the management of the bank's affairs fail to take prompt steps to close the bank upon discovering its insolvency and to prevent the receipt of further deposits, they must be held responsible for the acts of their agents and subordinates who do the actual receiving; and this, as stated, without regard to their actual knowledge of the receipt of any particular deposit or deposits, or their personal presence in the bank, or even in the town, at the time the deposit was received,[6] and without regard to whether the teller or other

2. **Same—Same, debt must have been then due and owing.**—Ellis *v.* State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A., N. S., 444.

3. **Same—Same—Same.**—Ellis *v.* State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A., N. S., 444.

4. **Same—Same—Effect of express exception contained in statute.**—State *v.* Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L. R. A. 179; State *v.* Cadwallader, 154 Ind. 607, 57 N. E. 512.

5. **Guilty knowledge or participation in receipt of deposits—Liability for acts of another.**—State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700; Carr *v.* State, 104 Ala. 4, 16 So. 150; Baker *v.* State, 54 Wis. 368, 12 N. W. 12; McClure *v.* People, 27 Colo. 358, 61 Pac. 612; State *v.* Mitchell, 96 Miss. 259, 51 So. 4.

6. **Same—Managing affairs responsible for acts of subordinates.**—State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700; Carr *v.* State, 104 Ala. 4, 16 So. 150; Baker *v.* State, 54 Wis. 368, 12 N. W. 12; McClure *v.* People, 27 Colo. 358, 61 Pac. 612; State *v.* Mitchell, 96 Miss. 259, 51 So. 4; State *v.* Sattley, 131 Mo. 464, 33 S. W. 41.

Under the Act (Acts 1892-93, p. 95) making guilty of a misdemeanor a bank officer or agent who shall receive for deposit any money, knowing at the time that the bank is insolvent, a manager who keeps his bank open for business, knowing it to be insolvent, is guilty in respect to a deposit received by the teller in the course of business, though the manager himself be not present, or even in town, and the teller himself have no guilty knowledge. Carr *v.* State, 104 Ala. 4, 16 So. 150.

In a prosecution against a bank president for receiving or assenting to the reception of deposits with knowledge of the bank's insolvency, he need not be shown to have assented to that particular deposit, since his recognition of the general authority of the teller to receive deposits, without taking any steps to prevent such receipt, after he knew, or in law was charged with knowledge, of the bank's in-

official who actually received the money knew that the bank was then insolvent.[7] It is their duty, under such circumstances, to at once revoke the authority of subordinate employees in the matter of receiving deposits, and failing to do so, they are criminally liable for the acts of those employees with respect to deposits thereafter received.[8]

Same—Officer Who Assists or Advises Keeping Bank Open.—Where an officer of a bank, knowing the bank to be insolvent, assists, advises, etc., the keeping of the bank open for the receipt of deposits, and while it is so kept open a particular deposit is received, such officer is guilty of a violation of such statute, though the money is actually received by another.[9]

solvency, was an assent to the reception of a deposit by his employee. McClure *v.* People, 27 Colo. 358, 61 Pac. 612.

An officer of a bank can not relieve himself from criminal liability for receiving deposits when the bank was insolvent by intentionally absenting himself from the bank, and abstaining from participating in its management, and purposely neglecting to avail himself of means of information as to its financial condition, or by showing that if he had given his attention to its business, by reason of his lack of fitness and ignorance of banking methods, he could not have ascertained its true condition. McClure *v.* People, 27 Colo. 358, 61 Pac. 612.

Acts 18th Gen. Assem., c. 153, provides that no banking firm shall accept on deposit any money when insolvent, and any member of such firm, who receives a deposit, knowing of such insolvency, shall be guilty of a felony, etc. An indictment alleged that defendants, a firm engaged in banking, were, on a date specified, insolvent, and, being so, that they accepted and received on deposit a certain sum of money. Held, that evidence is admissible that the deposit was received by the cashier of defendants' bank during their absence; it being immaterial whether they did the act constituting the offense in person or by an agent. State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700.

Under Code 1906, § 1169, declaring a punishment if the president, manager, cashier, teller, assistant, clerk, or other employee, or agent of a bank receive a deposit knowing, or having good reason to believe, the establishment to be insolvent, without informing the depositor of such condition, there may be a conviction of a director, the bank having been kept open by the directors with knowledge of its status, though he did not manually receive the deposit. State *v.* Mitchell, 96 Miss. 259, 51 So. 4.

Rev. St., § 4541, provides that any employee of a bank, "or of any person engaged in banking, * * * or any person engaged in such business," who receives money or commercial paper on deposit, or for safe-keeping, etc., when he has good reason to know that he is "unsafe or insolvent," shall be punished as therein prescribed. Held, that the banker himself may be punished as provided in that section, and it is not confined to officers, clerks, or agents of corporations, or individuals engaged in such business. Baker *v.* State, 54 Wis. 368, 12 N. W. 12.

7. Same—Knowledge of insolvency by person actually receiving deposit.—Carr *v.* State, 104 Ala. 4, 16 So. 150.

8. Same—Duty to revoke authority of subordinates upon knowledge of insolvency.—State *v.* Sattley, 131 Mo. 464, 33 S. W. 41.

If a bank employee, by authority of his superior officer, given before the latter had knowledge that the bank was insolvent, receives a deposit after its insolvency, such officer, unless he revoked the authority after he became aware of the condition of the bank, will be liable to prosecution under Rev. St. 1889, § 3581, making it a crime for a bank officer to assent to the receipt of a deposit, knowing that the bank is in failing circumstances. State *v.* Sattley, 131 Mo. 464, 33 S. W. 41.

9. Same—Officer who assists or advises keeping bank open.—State *v.* Yetzer, 97 Iowa 423, 66 N. W. 737.

One who had complete and personal charge of the business of an unincorporated bank, and knew of its insolvent condition when money was received on deposit by its president, was an accomplice to the crime. Brown *v.* State (Tex. Cr. App.), 151 S. W. 561.

Same—Officer Who Permits or Connives at Receipt of Deposit.—An officer of an insolvent bank who, knowing of its insolvency, permits or connives at the receiving of deposits, is guilty of the offense defined by the statute, whether he is a managing party or not.[10]

Same—Liability for Acts of Subordinates in Violation of Orders.—An officer of an insolvent bank, who instructs the teller or other subordinate employee to receive no further deposits, whatever his civil liability may be, is not liable to a criminal prosecution for the act of such employee in receiving deposits in violation of his orders.[11] It is essential, therefore, and generally sufficient, in a prosecution of this kind, for the state to prove either the receipt of the deposit by the defendants, or one of them, a direction to their subordinates to receive it, a participation in its receipt, or a ratification thereof by the use of that particular money or otherwise.[12]

Same—Distinction between Receipt and Assent to Receipt.—In Nevada, under a statute penalizing every officer of any bank who "receives any deposits" knowing the bank to be insolvent, the court drew a distinction between the receipt and the "assent" to the receipt of a deposit, holding that the statute did not penalize the act of "assent" to the reception of a deposit, and that where the teller of an insolvent bank received a deposit, the president, though knowing of the insolvency, could not be punished on the theory that he assented to the reception of the deposit.[13] At its next session, the legislature amended the act, evidently for the purpose of meeting the distinction made by the court, and made it a crime either to receive or to assent to the receipt or deposits after knowledge of insolvency.[14] Under this amended act the court held that an officer of an incorporated bank could not be held criminally liable simply because he was such officer and had knowledge of the bank's insolvency, or because deposits were being received for the bank by some other officer, but that only such officers as were present at the receipt of the deposits, or who actually received the same, or who had authority to close the bank to prevent the receipt of deposits could be guilty of the offense of "assenting" to the receipt of deposits.[15]

10. Same—Officer who permits or connives at receipt of deposit.—State v. Yetzer, 97 Iowa 423, 66 N. W. 737.

11. Same—Liability for acts of subordinates in violation of orders.—Commonwealth v. Junkin, 170 Pa. 194, 32 Atl. 617.

12. Same—Essential elements required to be proven.—Commonwealth v. Schall, 12 Pa. Co. Ct. R. 209.

13. Same—Distinction between receipt and assent to receipt.—Ex parte Rickey, 31 Nev. 82, 100 Pac. 134.

14. Same—Same.—Acts Nev. March 13, 1909, St. 1909, c. 92.

15. Same—Same.—Ex parte Smith, 33 Nev. 466, 111 Pac. 930; Ex parte Griffin, 33 Nev. 490, 111 Pac. 939.

Act March 13, 1909 (Laws Nev. 1909, c. 92), which makes it an offense for a bank officer or employee to receive a deposit, knowing that the bank is insolvent, does not make directors, who were absent from the county when deposits were received, punishable on a bare assumption that they assented thereto; it being necessary to show affirmative assent. Eureka County Bank Habeas Corpus Cases (Nev.), 126 P. 655.

A director or officer, when he is not

Under a Louisiana statute making it a crime for a bank officer to assent to the reception of deposits after he knows that the bank is insolvent, it was held that the statute did not require that the officer should have charter authority for assenting to the deposit, but simply that he should be an officer and should assent; and hence, in a prosecution of the cashier of a bank, the question was not as to who under the charter had authority, but simply whether or not as matter of fact the defendant was cashier, and as such assented to the deposit.[16]

Same—Joint Offenses.—Two or more persons, partners as bankers, may jointly commit the crime of receiving deposits with knowledge that they and the bank are insolvent.[17]

§ 61 (4) Embezzlement, Misappropriation, False Entries, etc.—A statutory provision for the protection of incorporated banks, which makes it penal for a cashier to convert any "money, bank bill, or note" does not extend to promissory notes (other than bank notes) or commercial paper.[18] Where bonds are placed by the owner for safe-keeping in a locked drawer of the bank safe of which he carries the key, such bonds are still in the custody of the owner and subject to his immediate orders, and a cashier who obtains the bonds by breaking the drawer and pledges them to another bank as security for a debt of his bank, is not only guilty of trespass, but of a larceny of the bonds.[19] The liability of a private banker, for fraudulently converting a special deposit of money, under a statute which makes such conversion a crime,[20] is none the less that his bank, which used the money, is a partnership, and such case is covered by an allegation of conversion "to his own use."

False Entries.—Check books, on the stubs of which false entries of deposit are made, and which were issued by the bank and given away, are books of entry within the meaning of an act making it an offense for the officer of any corporation to make a false entry in any book of the corporation with intent to defraud.[21] And a cash book falsely stating the amount of cash in the bank at the close of business on the day preceding

specially authorized by the board of directors or stockholders, is not empowered to prevent the reception of deposits, or to close a bank which has long been doing business and its receiving deposits, merely because he is such officer. Eureka County Bank Habeas Corpus Cases (Nev.), 126 P. 655.

Receipt in a private bank of a deposit by the teller held a receipt by the banker; but receipt in an incorporated bank by the teller held a receipt by the corporation, as affecting criminal responsibility for receipt of the deposit while the bank was insolvent. Eureka County Bank Habeas Corpus Cases (Nev.), 126 P. 655.

16. **Same—Same—Louisiana statute.**—State *v.* Hoffman, 120 La. 949, 45 So. 951.

17. **Same—Joint offenses.**—State *v.* Smith, 62 Minn. 540, 64 N. W. 1022.

18. **Embezzlement, misappropriation, etc., securities included in statutory offense.**—State *v.* Stimson, 24 N. J. L. 9.

19. **Bonds deposited for safe-keeping.**—Truslow *v.* State, 95 Tenn. 189, 31 S. W. 987.

20. **Liability of individual member of private banking partnership.**—Carr *v.* State, 104 Ala. 4, 16 So. 150.

21. **False entries—On stub of check book.**—Commonwealth *v.* Dewhirst, 190 Mass. 293, 76 N. E. 1052.

an examination of the bank is a false book, notwithstanding the fact that on the day of the examination the president of the bank borrowed for a few hours and put into the bank sufficient cash to make up the amount shown by the cash book.[22] Where the prosecution is for the fraudulent alteration of entries under a statute declaring that persons committing such offense with intent to defraud shall be punished as for forgery, it is immaterial, so far as the defendant's guilt or innocence is concerned, whether or not the bank directors consented to the change.[23]

Constitutionality of Statute.—As heretofore noticed, a charter provision, applicable solely to the employees of that particular bank, and providing that any officer, servant or agent making false entries in any of the books of the bank shall be deemed guilty of a felony and punished as therein prescribed, has been held to be unconstitutional within the purview of the provision that no man shall be taken, or imprisoned, or disseized, etc., except by the judgment of his peers or the law of the land.[24]

§ 61 (5) False Reports, Statements, and Returns, Exhibiting False Books, etc.—What Reports, etc., Included in Statute.—A statutory provision making it a criminal offense for any officer of a corporation to knowingly concur in making any false report or statement of its pecuniary condition, includes false reports made to the state banking department although such reports are not specifically mentioned therein.[25] That the alleged false report is incomplete through the failure to observe some statutory requirement as to its form or the manner of its execution is no defense, where it is received by the public examiner without objection on that ground.[26] The exhibiting of a false minute of an alleged meeting of the board of directors of a trust company to an examiner appointed by the banking department, with the intent to deceive such examiner as to the financial condition of the company, is the exhibiting of a false paper.[27] Likewise a cash book falsely stating the amount of cash

22. **Obtaining temporary loan to conceal falsity of showing made by books.**—People *v.* Helmer, 13 App. Div. 426, 43 N. Y. S. 642, 12 N. Y. Cr. R. 134, judgment reversed on other points in 154 N. Y. 596, 49 N. E. 249.

23. **Fraudulent alterations—Consent of directors as a defense.**—Quertermous *v.* State, 95 Ark. 48, 127 S. W. 951.

24. **False entries—Constitutionality of charter provision.**—Budd *v.* State, 22 Tenn. (3 Humph.) 483, 39 Am. Dec. 189.

25. **False reports—What reports included by statute.**—People *v.* Britton, 134 App. Div. 275, 118 N. Y. S. 989.

26. **Incomplete or informal report.**—State *v.* Struble, 19 S. Dak. 646, 104 N. W. 465

For example, where a report of the condition of a bank, submitted to the public examiner and alleged to be false, was received by him without objection on the ground that it was not attested by the signature of at least two of the bank's directors, as required by Laws 1903, p. 81, c. 79, § 2, it was nevertheless sufficient to sustain an information against the officer, verifying the same for making a false report. State *v.* Struble, 19 S. Dak. 646, 104 N. W. 465.

27. **False minutes of board meeting.**—State *v.* Twining, 73 N. J. L. 3, 62 Atl. 402, affirmed in 73 N. J. L. (44 Vr.) 683, 64 Atl. 1073.

A paper exhibited to a person authorized to examine the condition of trust companies, as the unrecorded minutes of a meeting of directors, and

in the bank at the close of business on the day preceding an examination of the bank is a "false book," notwithstanding that on the day of the examination the bank president borrowed for a few hours and put into the bank enough cash to make up the amount shown in the cash book.[28]

Persons Included by Statute.—A statute which provides that every officer, agent or clerk of any corporation or of any persons proposing to organize a corporation or to increase its capital stock who knowingly exhibits any false, forged, or altered book, paper, voucher, security or other instrument of evidence, to any public officer or board authorized by law to examine the organization of such corporation, or to investigate its affairs, or to be allowed an increase of its capital stock, with intent to deceive such officer or board in respect thereto, is punishable by imprisonment, etc., is not limited to one proposing to organize a corporation, or to increase the capital stock of any corporation, but extends to and covers the case of an officer of a bank charged with exhibiting a false report of the bank's affairs to the bank commissioners with intent to deceive them with respect thereto.[29]

When False.—Where the report is substantially true, and gives a fair exhibit of the condition of the bank at the time, though not as indicated by the books, the cashier in swearing to such return is not guilty of perjury.[30] But the report to the state examiner must agree with the books of the bank as to the names by which accounts are called; hence, it is a false report to report overdrafts as loans.[31]

Exhibiting—What Constitutes.—It is a question of fact as to what constitutes the exhibiting of the books of the bank to an examiner, and it is reversible error for the court to instruct or intimate that the president "exhibits" the books so as to be liable for knowingly exhibiting false books, where he is in the bank when the examiner calls to examine the books, and knows the object of his visit, although he does not personally show the books.[32] But where one of two officers of a trust company produces a false minute to the examiner, in the presence of the other, who by his silence acquiesces in such exhibition although he knows of its falsity, both are

containing a resolution for the purchase of shares of stock which the examiner had found among the assets of the company, is a "paper" within the meaning of Trust Companies Act 1899 (P. L. 1899, p. 461), § 17, and if false and exhibited to the examiner with intent to deceive him, the officers exhibiting it were guilty of a crime under that section. Judgment (Sup. 1905), 62 Atl. 402, affirmed. State *v.* Twining, 73 N. J. L. (44 Vr.) 683, 64 Atl. 1073, 1135.

28. Temporary loan to conceal falsity of cash book.—People *v.* Helmer, 13 App. Div. 426, 43 N. Y. S. 642, 12 N. Y. Cr. R. 134, judgment reversed on other points in 154 N. Y. 596, 49 N. E. 249.

29. Persons included by statute.—People *v.* Nash, 15 Cal. App. 320, 114 Pac. 784.

30. Report substantially true—Cashier not guilty of perjury.—Commonwealth *v.* Dunham (Mass.), Thacher Cr. Cas. 538.

31. Reporting overdrafts as loans.—State *v.* Jackson, 21 S. Dak. 494, 113 N. W. 880.

32. "Exhibiting"—What constitutes—Province of court and jury.—People *v.* Helmer, 154 N. Y. 596, 49 N. E. 249, reversing 13 App. Div. 426, 12 N. Y. Cr. R. 134, 43 N. Y. S. 642.

guilty of making a false exhibit.[33]

Motive or Intent.—Where the statute prescribes that every officer, agent, or clerk of any bank, who makes any false statements or entries in its books, or subscribes or exhibits any false paper, with the intent to deceive any person authorized to examine as to the condition of such institution, or subscribes or makes false reports, shall be subject to imprisonment, etc., the prosecution is not obliged to show what particular motive prompted the accused to make the report made by him to the bank examiner, but proof of its intentional falsity is essential to a conviction.[34] On the other hand, where a report or statement of the condition of a bank is false, and known to be such, and is made with intent to deceive the bank commissioner or other persons as to the financial condition of the bank, the person making it is guilty, although he may not have intended to injure the bank or defraud its depositors.[35]

§ 61 (6) With Respect to Loans, Discounts, and Overdrafts.—Statutes making it a penal offense for the officers charged with the management of banks to violate charter or statutory provisions requiring banks to keep a certain percentage of the capital stock on deposit, or forbidding them to loan their funds in excess of a prescribed limit to the officers of the bank or to third persons may extend to all state banks within the jurisdiction or may be applicable only to a certain class of banks, as, for example, banks of issue. In any case, it is a question of the proper construction of the statutes in force in the particular jurisdiction.[36]

Loans to Firm of Which Director Is Member.—A state banking law prohibiting loans in excess of a certain amount to any director prohibits a loan to a firm of which a director is a member within the penal laws of the state punishing a director violating his statutory duty.[36a]

Overdrafts.—A bank president, not acting in good faith, has no right to permit overdrafts when he does not believe and has no reasonable ground to believe that the moneys can be repaid. And if, coupled with such wrongful act, the proof establishes that he intended by the transaction to injure

33. **Liability of one officer for acts of associate done in his presence and with his knowledge and acquiescence.**—State *v.* Twining, 73 N. J. L. 3, 62 Atl. 402, affirmed in 73 N. J. L. (44 Vr.) 683, 64 Atl. 1073.

34. **Proof of intentional falsity—Specific motive or intent.**—State *v.* Jackson, 20 S. Dak. 305, 105 N. W. 742.

35. **Same—Same.**—State *v.* Mason, 61 Kan. 102, 58 Pac. 978.

36. **Extent of statutes.**—Thornton *v.* State, 5 Ga. App. 397, 63 S. E. 301.

Pen. Code 1895, § 214, providing that any officer, agent, or director of a bank shall be punished as therein prescribed for violation of Civ. Code 1895, § 1934, requiring one-half of the cash paid in on the capital stock to be kept on deposit, or § 1948, making it unlawful for a bank to loan more than 25 per cent of the amount of its capital stock to the officers and directors thereof, of § 1949, making it unlawful for a bank to loan its funds to any person on the indorsement of its officers or directors, is applicable only to officers, agents, and directors of banks of issue, provisions for which are made by Civ. Code 1895, §§ 1929, 1952. Thornton *v.* State, 5 Ga. App. 397, 63 S. E. 301.

36a. **Loans to firm of which director is member.**—People *v.* Knapp (N. Y.), 99 N. E. 841.

and defraud the bank, the wrongful act becomes a crime.[37] But merely overdrawing an account knowingly does not constitute the offense within the meaning of a statute making it a misdemeanor for an officer of a bank to knowingly overdraw his account and thereby wrongfully obtain the money or funds of the bank. It must appear that the money was wrongfully obtained, and the transaction by which the overdraft was made must be shown. It is not enough to show merely the bank's possession of the officer's check.[38] But where upon an examination of the whole statute it appears that the mischief aimed at was the practice of bank officers to knowingly overdraw their accounts, without regard to their intention in so doing, the fraudulent intent constitutes no part of the offense, and need not be charged in the indictment.[39]

§ 61 (7) Purchase, Sale or Transfer of Stock.—In some jurisdictions banks are prohibited by law from using any part of the capital stock in the purchase of their own shares, and a president or director so using the capital is indictable for felony.[40]

§ 61 (8) Illegal Dividends.—In the absence of statute prohibiting it, it is not a crime for the president and directors of a bank to declare dividends from funds other than the profits of the bank;[41] and where such action on the part of the president and directors is declared to be a felony, it is purely statutory and does not involve moral turpitude.[42] Such a statute may forbid the declaration of such dividends by banks of issue, or it may extend the prohibition to all the state banks within the jurisdiction. It is a question of construction in each case.[43] Under such a statute, the president is guilty without respect to his motives where the evidence shows that during his incumbrance as president of the bank it suffered loss through taking papers that proved worthless, and that these bad debts and worthless paper were not charged off, but were allowed to accumulate until they were sufficient not only to offset all surplus and undivided profits, but

37. Permitting overdraft as crime.—Coffin *v.* United States, 162 U. S. 664, 683, 40 L. Ed. 1109, 16 S. Ct. 943.

38. Proof of wrongful overdraft.—People *v.* Clements, 42 Hun 286, 5 N. Y. Cr. R. 277, 3 N. Y. St. R. 700.

39. When fraudulent intent not necessary to completion of offense.—State *v.* Stimson, 24 N. J. L. 478.

40. Purchase, sale or transfer of stock.—See Crawford *v.* Roney, 126 Ga. 763, 55 S. E. 499; Robison *v.* Beall, 26 Ga. 17.

41. Wrongful dividend as a crime.—Cabaness *v.* State, 8 Ga. App. 129, 68 S. E. 849.

42. Statutory crime—Moral turpitude.—Cabaness *v.* State, 8 Ga. App. 129, 68 S. E. 849.

43. Scope of statutes.—Cabaness *v.* State, 8 Ga. App. 129, 68 S. E. 849.

The action of the president and directors of a bank in declaring a dividend from funds other than profits would be criminal, whether the bank in question be a bank of issue or not, either under Pen. Code 1895, § 210, providing that if any president and directors shall declare or pay a dividend from funds of the bank other than net profits they shall be punished by confinement in the penitentiary, or under § 691 providing that any president, director, or other officer of any joint stock company or other association who shall declare a dividend out of funds not the legitimate proceeds of its investments shall be guilty of a misdemeanor. Cabaness *v.* State, 8 Ga. App. 129, 68 S. E. 849.

also to seriously impair the original capital of the bank, and that while this state of affairs existed, and at a time when the defendant in all human probability knew it existed, he joined with the board of directors in declaring a dividend.[44]

§ 62. —— Prosecution and Punishment—§ 62 (1) Indictment or Information—§ 62 (1a) Following Words of Statute.—A difference exists as between common-law crimes and statutory offenses in the necessity for fullness of statement in the accusation. Many statutory crimes may be sufficiently charged in the language of the statute; while as to many common-law offenses, a description of what the defendant actually did is necessary to make the charge plain and legally complete. Where the offense is purely statutory, having no relation to the common law, it is, as a general rule, sufficient to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter, with this fundamental qualification, that the accused must be apprised with reasonable certainty of the nature of the accusation against him, and that an indictment not thus framed is defective, even though it follow the language of the statute.[45] In order to charge the crime defined by the statute, an indictment for a statutory offense should follow the terms of the statute, or use terms which show conclusively, or beyond a reasonable doubt, that the accused is guilty of the offense described in the statute.[46] It is not necessary that the indictment should literally pursue the terms of the statute on which it is based, and it will be good if it use words fully equivalent in meaning to those of the statute, or more comprehensive.[47] It should be sufficiently full and definite in its statement to inform the defendant of the offense with which he is charged, and exact enough to protect him from a second jeopardy.[48]

§ 62 (1b) Existence and Operation of Bank—Defendant's Official Relation.—Where the defendant is indicted under a statute applicable solely to banking institutions and their officers and agents, an indictment under such statute should allege the existence and operation of

44. **Intent or motive in declaring dividend.**—Cabaness *v.* State, 8 Ga. App. 129, 68 S. E. 849.

45. **Following words of statute—Common law and statutory offenses.**—United States *v.* Simmons, 96 U. S. 360, 24 L. Ed. 819; Youmans *v.* State, 7 Ga. App. 101, 66 S. E. 383.

46. **Necessity for following words of statute.**—Boyenton *v.* Commonwealth (Va.), 76 S. E. 945.

47. Budd *v.* State, 22 Tenn. (3 Humph) 483, 39 Am. Dec. 189.

An indictment for knowingly exhibiting a false book, under Pen. Code, § 592, which alleges that the defendant, as president of a bank, knowingly exhibited its cash book to an officer duly authorized to investigate the affairs of the bank, with intent to deceive such officer, contrary to the form of the statute, etc., is sufficient, though it omits the words "in respect thereto," used in the statute. Judgment, 13 App. Div. 426, 43 N. Y. S. 642, 12 N. Y. Cr. Rep. 134, reversed. People *v.* Helmer, 154 N. Y. 596, 49 N. E. 249.

48. **Certainty and fullness required.**—Youmans *v.* State, 7 Ga. App. 101, 66 S. E. 383; State *v.* Stimson, 24 N. J. L. 9.

the bank and the defendant's relation thereto as an officer or agent, describing and setting out the same.[49] Where the statute is not applicable to all banks or to all officials, but makes classifications and distinctions, the indictment must, of course, describe, distinguish and identify the accused and the offense accordingly, and must contain averments bringing the bank by, against or with respect to which the offense was committed, within the class to which the statute applies.[50] Where the statute distinguishes between private and incorporated banks, an indictment charging an offense against the officers of a private bank should allege the fact that it was a private institution and the names of the owners thereof;[51] and where the business is owned and conducted by a partnership the names of the individual partners should be given, even though it is conducted under a name that does not disclose that it is a private bank or a partnership.[52]

Averment of Official Relation.—Where the statute affects persons

49. Existence and operation of bank —Defendant's official relation.—Quertermous *v.* State, 95 Ark. 48, 127 S. W. 951; State *v.* Piper, 73 N. H. 226, 60 Atl. 742.

An indictment, charging that defendant was the cashier of the Bank of H., a corporation organized and incorporated under the laws of Arkansas, etc., and that as cashier aforesaid, and having in his custody the book accounts of said bank, etc., he did feloniously alter the books of account of said bank kept by said corporation, sufficiently alleged that the bank was a banking corporation. Quertermous *v.* State, 95 Ark. 48, 127 S. W. 951.

An indictment under such act alleging that accused, "being persons then and there doing a banking business, * * * did receive" from one D. certain moneys, of the property of said D., the said D. then and there not being indebted to accused, sufficiently alleges that accused was doing a banking business, and that the moneys were received as a general deposit. Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447.

An indictment under Act May 9, 1891, relating to receiving deposits by insolvent bankers, charging that defendants "were engaged in the business of carrying on a private bank," does not sufficiently allege that defendants are "bankers," within the meaning of the statute. Commonwealth *v.* Delamater (Quart. Sess.) 2 Pa. Dist. R. 118.

50. Where statute makes distinctions and classifications.—Boyenton *v.* Commonwealth (Va.), 76 S. E. 946; Davey *v.* State, 99 Ark. 547, 139 S. W. 629; Thornton *v.* State, 5 Ga. App. 397, 63 S. E. 301; State *v.* Piper, 73 N. H. 226, 60 Atl. 742; Roby *v.* State, 41 Tex. Cr. App. 152, 51 S. W. 1114.

A special presentment charging officers of a state bank with a violation of Civ. Code 1895, § 1948, making it unlawful for a bank to loan more than 25 per cent of the amount of its capital stock to the officers and directors thereof, is fatally defective where it fails to allege that such bank was a bank of issue. Thornton *v.* State, 5 Ga. App. 397, 63 S. E. 301.

Under Kirby's Dig., §§ 1813, 1814, punishing every officer of any bank organized or doing business under the law of the state who makes false reports or who receives a deposit when he knows that the bank is insolvent, an indictment alleging that an officer of a bank received a deposit after he knew that the bank was insolvent, and that the bank was a corporation doing business under the laws of the state, need not allege that it was a domestic banking corporation, since, under the law, foreign corporation may do business in the state under specified restrictions. Davey *v.* State, 99 Ark. 547, 139 S. W. 629.

An indictment need not allege that a bank was not a national bank, since the inapplicability of the statute to national banks is a matter of defense. Davey *v.* State, 99 Ark. 547, 139 S. W. 629.

51. Names of owners of private bank to be alleged.—Roby *v.* State, 41 Tex. Cr. App. 152, 51 S. W. 1114; Boyenton *v.* Commonwealth (Va.), 76 S. E. 945.

52. Same—Where business conducted by partnership.—Roby *v.* State, 41 Tex. Cr. App. 152, 51 S. W. 1114.

according to their particular office or relation to the bank the indictment should specify just what office the accused held or what relation he sustained to the bank.[53] And although it is not necessary that an indictment should literally pursue the terms of the statute on which it is based, and although the indictment will be good if it use words fully equivalent in meaning to those of the statute, or more comprehensive, yet this principle will not apply to a case where a statute affects persons as connected with specified offices; and, therefore, an indictment against a person as "clerk of the individual ledger" of a bank is not sufficient under a statute which authorizes the indictment, for the particular offense, of "any of the officers, agents, or servants" of said bank, since the term clerk is of such varied import that it can not be assumed that "clerk," especially "clerk of the individual ledger," is equivalent to officer, agent or servant, but the facts in that respect together with the fact of his employment by the bank must be alleged.[54]

§ 62 (1c) Intent—Willful or Intentional.—Where the statute penalizes the act only when done with the intent to deceive, the intent to defraud, etc., it is necessary that the indictment should charge that it was done with such intent; but otherwise where intent is not made an element of the offense.[55] And where the statute provides that proof of certain facts shall be prima facie evidence of intent, as that the failure of the bank within a certain time after the receipt of a deposit shall be prima facie evidence of an intent to defraud, an indictment is sufficient without specifically alleging that the deposit was received with intent to defraud.[56] Where the indictment is for exhibiting false books to the public examiner, an allegation that the exhibition was made "with intent to deceive him" is sufficient without the addition of the words of the statute "in regard thereto."[57]

53. Averment of official relation.—Commonwealth *v.* Loving, 29 Ky. L. Rep. 175, 92 S. W. 575; Budd *v.* State, 22 Tenn. (3 Humph.) 483, 39 Am. Dec. 189.

Under Cr. Code Prac., § 122, requiring an indictment to contain a statement of the acts constituting the offense in ordinary and concise language, an indictment charging a violation of Ky. St. 1903, § 2223a, subsec. 11, making it a misdemeanor for any officer or agent of an investment company which has no license to transact business for it, is defective, where it fails to allege what office the accused held, or whether he was an ordinary agent of the company. Commonwealth *v.* Loving, 29 Ky. L. Rep. 175, 92 S. W. 575.

54. Same—Where offense defined with reference to certain specified officers.—Budd *v.* State, 22 Tenn. (3 Humph.) 483, 39 Am. Dec. 189; State *v.* McElroy, 50 Tenn. (3 Heisk.) 69.

55. Averment of intent.—State *v.* Stimson, 24 N. J. L. 9; People *v.* Helmer, 154 N. Y. 596, 49 N. E. 249, reversing 13 App. Div. 426, 43 N. Y. S. 642, 12 N. Y. Cr. Rep. 134; State *v.* Piper, 73 N. H. 226, 60 Atl. 742.

In an indictment under Rev. St., p. 125, § 1, against a cashier of a bank for conversion of its funds, it is not necessary to charge an embezzlement, or an intent to defraud the bank. State *v.* Stimson, 24 N. J. L. 9.

56. Same—Where statute makes certain facts prima facie evidence of intent.—Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447.

57. Same—Following language of statute.—People *v.* Helmer, 154 N. Y. 596, 49 N. E. 249, reversing 13 App.

Intent of Person Aiding and Abetting.—An indictment for aiding an officer of a bank in making false entries, etc., is not defective because it charges the principal with having made the entries with intent to defraud the bank, and also with intent to deceive examining agents, whereas it merely charges the aider with an intent to deceive such agents: for it is immaterial that the principal may have had several intents, if both principal and aider were actuated by the criminal intent to deceive such agents.[58]

"Willful or Intentional."—Where the penalty is prescribed only for acts of willful and intentional fraud and mismanagement, and not for mere negligence and acts of omission, the indictment should allege such willful and fraudulent intent as will bring the case within the statute.[59]

§ 62 (1d) Joinder of Parties and Offenses.—The president and directors of a bank may be joined in an indictment for making a false return.[60] But under statutes making it unlawful and punishable as a crime for the president or directors to declare or pay over dividends except out of the net profits of the bank, or for any corporation or association to declare a dividend which is not the legitimate proceeds of its investments, and makes such act by a president, director or other officer punishable as a misdemeanor, the offense is several rather than joint, and in an indictment against the president or one of the directors it is not necessary to set out the names of other directors not indicted though they may have participated in the declaration of the dividend.[61] Where the statute makes it an offense for any banker, officer, or employee of any bank willfully and knowingly to subscribe to or make any false statement or false entry in the books of any bank or to make any false report or statement of such bank, counts charging a bank cashier (1) with making false entries in the certificate register of the bank, (2) with making false entries in a ledger of the amount due the bank from another bank, and (3) with making false entries in the report of the bank to the state commissioner of banking, as to the amount due from banks, and the amount due on time certificates of deposit, are properly joined in one information, such matters all arising out of acts of the accused in his administration of the bank's business, and

Div. 426, 43 N. Y. S. 642, 12 N. Y. Cr. Rep. 134.

58. Intent of aider and abettor.—Coffin *v.* United States, 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943.

59. Willful or intentional.—Youmans *v.* State, 7 Ga. App. 101, 66 S. E. 383; Commonwealth *v.* Dunham (Mass), Thacher Cr. Cas. 538; Hume *v.* Commercial Bank, 77 Tenn. (9 Lea) 728; Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222.

An indictment against bank directors, under Rev. St., c. 36, § 65, for making a false return of the condition of a bank, must allege that the false return was made by them willfully; otherwise, the indictment will be quashed, as setting forth no offense constituting a misdemeanor at common law. Commonwealth *v.* Dunham (Mass.), Thacher Cr. Cas. 538.

60. Joining defendants in indictment.—Commonwealth *v.* Dunham (Mass.), Thacher Cr. Cas. 538.

61. Several offense—Setting out names of other officers.—Cabaness *v.* State, 8 Ga. App. 129, 68 S. E. 849.

hence a motion to require the prosecuting attorney to elect on which count he will prosecute is properly refused.[62]

§ 62 (1e) Indictments for Particular Offenses Considered—§ 62 (1ea) Illegal and Unauthorized Banking.—Under a statute "to prohibit the issuing and circulating unauthorized bank paper," it is sufficient to charge in the indictment, in general terms, that the defendant acted as an officer of a bank not incorporated by law.[63] And it is no objection to an information against the officers of an organized banking association, under the act to suppress illegal banking associations, that it does not in terms allege them to be such association, if it is apparent that they were thus associated with a common interest, purpose, and action.[64]

§ 62 (1eb) False Entries.—Under a statute providing that every person who with intent to defraud shall make any false entry or shall falsely alter any entry made in any book of account kept by any banking corporation within the state by which any pecuniary obligation, claim, or credit shall be, or purport to be, discharged, diminished, etc., or in any manner affected, shall be punished as for forgery, an indictment alleging that there was a certain sum on deposit and entry thereof on the bank's books, and that said entry had been falsely altered and changed so as to purport to diminish and discharge the creditor, was sufficient; being equivalent to a direct allegation that the credit had not in fact been diminished or discharged.[65] But where the statute provided that if any officer of a banking company should make any false entry in any book of the institution, with intent to deceive any officer of the institution or the bank commissioners, he should be fined, etc., it was held that an indictment for violating such section should allege that defendant was an officer (describing his office) of a loan and banking company, organized under the laws of that state and engaged in the banking and loan business (describing the company and its place of business in the state); that, being such officer, he made, in a book described, owned by the institution, and entry described; that the entry was false (setting out the facts to establish its falsity); that it was made with intent to deceive the officers of the institution (describing them) or the bank officers (naming them)—and should contain averments of time and place.[66]

62. **Joinder of offenses—Election of counts.**—Ruth *v.* State, 140 Wis. 373, 122 N. W. 733.

63. **Illegal and unauthorized banking.**—Lougee *v.* State, 11 O. 68; Bonsal *v.* State, 11 O. 72; Steedman *v.* State, 11 O. 82.

64. **Same.**—Williams *v.* State, 23 Tex. 264.

65. **False entries.**—Quertermous *v.* State, 95 Ark. 48, 127 S. W. 951.

66. **Same.**—State *v.* Piper, 73 N. H. 226, 60 Atl. 742.

An indictment against a bank officer alleged that on a specified day he made a certain false entry in regard to the amount of money paid out from the funds of the bank, etc., as follows, to wit: "Thursday, Aug. 27, 1903 Checks, 5200;" meaning and intending to be understood that he (defendant), in his capacity as assistant cashier, had on that date paid from the bank's funds checks of depositors to the sum of $5,200, whereas in truth, defendant, in his said capacity,

§ 62 (1ec) False Reports and Statements.—An indictment under a statute, fixing a punishment for any officer or employee of a bank who shall knowingly subscribe or make any false statements with intent to deceive any person authorized to examine its condition, should describe the statement mentioned in the statute and the person to whom made with such particularity as to individuate the offense charged and enable the defendant to know what is intended.[67] It should specifically point out wherein the alleged statement was false;[68] and that it was made to the commissioners, examiners, or other official to whom by law it is required to be made, for if made to other persons, it is not a violation of the statute and an indictment charging that it was made to such other person or persons does not state an offense under the statute.[69] Where the statute denounces a pen-

did not pay such sum, or any part thereof, as in the entry was falsely alleged and stated, etc. Held, that the allegation that defendant, as assistant cashier, had not paid out the money, did not negative the truth of the entry, as not showing that the money had not been paid out by the bank, and that the indictment was therefore insufficient. State *v.* Piper, 73 N. H. 226, 60 Atl. 742.

Where an indictment charged that defendant made a false entry in the books of a bank in regard to the amount of money then and there withdrawn from the bank by one D., a depositor, and that D. did not withdraw $500 on the day specified according to the entry, such allegation sufficiently charged that the money was not withdrawn from D.'s account either by him or on his order. State *v.* Piper, 73 N. H. 230, 60 Atl. 432.

67. False reports and statements.—State *v.* Henderson, 135 Iowa 499, 113 N. W. 328.

68. Same—Pointing out falsity.—State *v.* Henderson, 135 Iowa 499, 113 N. W. 328.

An indictment under Code, § 1887, fixing a punishment for any officer or employee of a bank who shall knowingly subscribe or make any false statements with intent to deceive any person authorized to examine its condition, charging defendant and an officer of the bank with making false statements of its financial condition, in which he reported the overdrafts of individuals to be only $466.28, while in fact they exceeded $1,500, and that there was due from other banks a certain sum which was $1,500 more than the true amount so due, sufficiently pointed out wherein the alleged statement was false. State *v.* Henderson, 135 Iowa 499, 113 N. W. 328.

St. 1903, c. 266, required the officers of a bank whenever so required by the bank commissioners to make a written verified report showing the bank's actual financial condition at the close of any past day specified by the commissioners by stating, among other things, the total amount actually paid "in money" by stockholders for capital stock; and Pen. Code, § 558, declares that every officer of a corporation who knowingly exhibits a false statement to any officer or board authorized to examine the corporation with intent to deceive shall be punishable, etc. Held, that an indictment of a bank officer alleging that he exhibited to the bank commissioners a report which was false, in that it showed that the amount of capital of the bank actually paid "in coin" amounted to $102,245, when in truth the amount of capital of the bank theretofore paid "in coin" did not amount to more than $50,000, and that it was necessary and material for the bank commissioners to know from such report what amount of the capital stock of the bank had been paid "in coin," was not fatally defective in that the report stated the amount paid in coin instead of the amount paid "in money," since a statement that a certain amount had been paid "in coin" was in effect a statement that at least that amount had been paid in money. People *v.* Nash, 15 Cal. App. 320, 114 Pac. 784.

69. Persons to whom made.—State *v.* Henderson, 135 Iowa 499, 113 N. W. 328.

Code, § 1845, relating to savings banks, authorizes a directorate of not less than five nor more than nine persons. Section 1871 requires the board of directors to appoint from its number an examining committee to ex-

alty for exhibiting a false book or report to an officer duly authorized to investigate the affairs of the bank, an indictment which charges the defendant with having exhibited a false book to such an officer with the intent to deceive him, contrary to the form of the statute, is sufficient though it omits the words "in respect thereto," used in the statute.[70]

§ 62 (1ed) Conversion and Misappropriation of Funds.—Upon an indictment for the conversion or misappropriation of the funds of the bank by the cashier, it is not necessary to allege that he did it in his official or fiduciary capacity or that the funds were intrusted to him in such capacity, unless the statute makes these facts an essential element of the offense.[71] But an indictment under a statute which treats as guilty of larceny any officer of an incorporated bank who fraudulently converts to his own use any bullion, money, note, bill, or other security for money belonging to and in possession of such bank, whether intrusted with the custody thereof or not, etc., rightly contains an averment that the money was in the possession of the bank.[72] Generally it is sufficient in such case to charge the offense in the words of the statute.[73] And an indictment against a cashier which

amine the bank. Section 1873 empowers the state auditor to direct an examination of a savings bank at any time, and under § 1875 he may appoint bank examiners for this purpose. Held, that an indictment under Code, § 1887, fixing a punishment for any officers or employees of such a bank who shall knowingly subscribe or make any false statements with intent to deceive any person authorized to examine its condition, which charged generally that a false statement was made to the directors of the bank, was demurrable, since the directors are not among the persons authorized by statute to examine the bank's condition. State *v.* Henderson, 135 Iowa 499, 113 N. W. 328.

Oral or in writing.—Such an indictment is not demurrable, however, because omitting to allege whether the false statement was in writing or oral. State *v.* Henderson, 135 Iowa 499, 113 N. W. 328.

70. Following language of statute.—People *v.* Helmer, 154 N. Y. 596, 49 N. E. 249, reversing 13 App. Div. 426, 43 N. Y. S. 642, 12 N. Y. Cr. Rep. 134.

71. Conversion and misappropriation of funds—In official capacity.—State *v.* Stimson, 24 N. J. L. 9.

Where the statute provides, "that if any director of any incorporated bank in this state, or any cashier, bookkeeper, or other officer or agent of any such bank, shall knowingly overdraw his account with the bank of which he shall be director, cashier, bookkeeper, officer, or agent, for his own private use or benefit, or shall purloin, embezzle, or convert to his own use any money, bank bill or note the property of the said corporation, with intent to defraud the said corporation, or wrongfully to make use of the same, in every such case the person so offending shall be judged guilty of a high misdemeanor," it is not necessary that the indictment should charge that defendant committed the act "as cashier," or that the funds were entrusted to him in such capacity, since the commission of the act in his fiduciary capacity is not made essential to the completion of the crime. State *v.* Stimson, 24 N. J. L. 9.

72. That money or funds in possession of bank.—Commonwealth *v.* Warner, 173 Mass. 541, 54 N. E. 353.

73. Words of statute sufficient.—State *v.* Stimson, 24 N. J. L. 9.

An indictment charging that accused, as president and director of a trust company organized under Laws 1883, p. 133, c. 107, and the laws amendatory thereof (Laws 1885, p. 123, c. 74), did feloniously become indebted in the sum named, which he appropriated to his own use states a cause of action under Rev. Laws 1905, § 3045. State *v.* Barnes, 108 Minn. 230, 122 N. W. 11; S. C., 108 Minn. 527, 122 N. W. 12.

charges that defendant "converted the property of the bank," with intent wrongfully to make use of it, is sufficient.[74] Some degree of certainty and individuality, however, must be given to the offense with which the defendant is charged. It is difficult to state with precision just how far the indictment should go in this respect, but it may be stated that the certainty should be such as to identify the offense, so that the defendant may know what crime he is called upon to answer, and may be able to plead the conviction or acquittal as a bar to a future indictment for the same offense; but the particularity required is not such to screen him from conviction, or to embarrass the prosecution with useless technicalities.[75] It will not be sufficient, for instance, for such an indictment to charge, in the words of the statute, that the defendant converted to his own use money and bank notes the property of the bank. There must be some description either of number or denomination or value by which the particular offense may be to some extent at least identified.[76] Where the charge is that the defendant embezzled or misappropriated so many dollars in coin or money, it is not necessary to allege the value thereof, since the statement of the number or amount of such coin is equivalent to an allegation of its value; but where the averment is that the property converted consisted of notes or securities which may be worth more or less than their face value, the indictment should state what that value is.[77]

§ 62 (1ee) Indictment for Aiding and Abetting.—Under the Revised Statutes of the United States, § 5209, a third person, unconnected with the bank in any official capacity, can not commit a violation of its provisions without the concurring act of an officer or agent of the bank, and under the statute the officer or agent must be prosecuted as the principal and the outsider as an aider and abettor. The indictment in such case must connect the acts charged against the aider and abettor with the offense stated against the principal offender, and this is sufficiently done where the indictment charges the principal offender with misappropriating or misapplying a specific sum in a certain manner, and then alleging that the defendant charged with aiding and abetting did aid and abet the principal offender, "as aforesaid," to misappropriate and misapply the funds of the bank in a specific sum, identical in amount with that charged to have been misapplied by the principal offender.[78]

74. **Averment of conversion with wrongful intent sufficient.**—State *v.* Stimson, 24 N. J. L. 9.

75. **Degree of certainty and precision in describing offense.**—State *v.* Stimson, 24 N. J. L. 9.

76. **Description of money or funds converted.**—State *v.* Stimson, 24 N. J. L. 9.

77. **Averment of value.**—State *v.* Stimson, 24 N. J. L. 9.

A count in an indictment brought under Rev. St., p. 125, § 1, against the cashier of a bank for converting its funds, which charges a conversion of "$19,000 of money and $19,000 of bank notes," is bad for uncertainty. State *v.* Stimson, 24 N. J. L. 9.

78. **Indictment for aiding and abetting.**—Coffin *v.* United States, 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943.

An indictment for aiding and abetting one H., the president of a bank, in the criminal misapplication of its

§ 62 (1ef) Overdrawing Account.—Where the statute makes it a criminal offense for a cashier, director or officer knowingly to overdraw his account with the bank of which he is such officer, an indictment which states that the defendant was the cashier of an incorporated bank; that he kept an account of his dealings with the bank; that at a certain day there was no money due him from the bank, and that knowing the premises, he knowingly drew from the bank a certain sum of money for his own benefit, and thereby overdrew his account, sufficiently describes the offense against the statute; it is not necessary to state the manner, or by whose checks, or in how many checks he overdrew his account; nor is it necessary to state in what funds the overdraft was made.[79]

§ 62 (1eg) Fraudulent Insolvency.—Upon an indictment for the statutory offense of having brought about the fraudulent insolvency of the bank, the material facts and circumstances embraced in the statutory definition of the offense must be stated, or the indictment will be defective, the chief of said facts being that the insolvency was brought about by the fraudulent acts and practices of the defendant, since it is only fraudulent insolvency that is made criminal.[80]

§ 62 (1eh) Receiving Deposits after Knowledge of Insolvency.—Averment of Insolvency.—As there can be no offense under a statute of this kind unless the bank was insolvent at the time the deposit was received, it is essential that the fact of insolvency should be specifically and affirmatively alleged;[81] and if the indictment is wanting in an averment of this

funds, charged that, on a specified date, the said H. misapplied a named sum, by causing the same to be paid out on the checks of a company having no moneys in the bank. The aiding and abetting clause charged that the accused did "on [specifying the same date] aid and abet said H., as aforesaid, to wrongfully," etc., misapply the moneys of the bank, "to wit," specifying an identical sum. Held, that the language sufficiently connected the acts charged against accused with the offense against H. Coffin *v.* United States, 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943.

79. **Indictment for overdrawing account.**—State *v.* Stimson, 24 N. J. L. 478.

80. **Indictment for fraudulent insolvency.**—Youmans *v.* State, 7 Ga. App. 101, 66 S. E. 383.

An indictment charging that defendant being the president of a bank, and as such charged with the fair administration of its affairs, such bank did then and there become fraudulently insolvent, was sufficiently definite to inform defendant of the offense with which charged, and exact enough to protect him from second jeopardy. Youmans *v.* State, 7 Ga. App. 101, 66 S. E. 383.

81. **Averment of insolvency.**—Fleming *v.* State, 62 Tex. Cr. App. 653, 139 S. W. 598; State *v.* Bardwell, 72 Miss. 535, 18 So. 377; Murphy *v.* People, 19 Ill. App. 125; Boyenton *v.* Commonwealth (Va.), 76 S. E. 945.

An indictment, alleging that accused was the president of a bank, that as president he received as a deposit a bank check on another bank, payable to the order of a third person, that the check was deposited by the third person, that the president received the deposit after he knew that the bank was in failing circumstances and insolvent, does not charge the offense denounced by Acts 25th Leg., c. 100, punishing any officer of any bank who receives a deposit with knowledge that the bank is insolvent, because it does not allege affirmatively the insolvency of the bank at the time of the deposit, and because it does not show that the

fact, it is insufficient, even though it charge the offense in the words of the statute.[82] Where the bank was a private institution owned and operated either by individuals or by a copartnership, the indictment should aver the ownership or agency and the insolvency of the individuals, especially the insolvency of the individuals composing a copartnership, the partnership itself not being a legal entity independent of the individuals composing it.[83]

check was transferred as a deposit to the bank. Fleming *v.* State, 62 Tex. Cr. App. 653, 139 S. W. 598.

Act 1879, "for the protection of bank depositors," makes it a criminal offense for a person doing a banking business, when insolvent, to receive a deposit, which is lost by reason of the insolvency. Held, that as knowledge of the fact of insolvency and a fraudulent intent are not made elements of the offense, they need neither be alleged nor proved, but that allegation and proof of insolvency are essential. Murphy *v.* People, 19 Ill. App. 125.

Act Feb. 12, 1894 (Acts 1893-94, c. 210), makes it an offense for any private banker or his employee to receive money from a depositor with knowledge that such banker was insolvent. Held, that an indictment against accused as a private banker, charging that the "Bank of Upperville" was a private bank of which accused was cashier, and that he, knowing that the "bank" was insolvent, feloniously accepted a deposit, etc., but failing to allege the owner or owners of the bank, or that accused was a private banker, or an employee of a private banker, or to charge that "accused" was insolvent when he received the deposit, or that the owner or owners of the bank, or the private banker or bankers, were then insolvent, was fatally defective. Boyenton *v.* Commonwealth (Va.), 76 S. E. 945.

82. Same—Charging offense in words of statute.—State *v.* Bardwell, 72 Miss. 535, 18 So. 377.

An indictment under a statute declaring it an offense if an officer of a bank shall receive a deposit, "knowing, or having good reason to believe, the establishment to be insolvent," is not sufficient where it does not allege the insolvency, but merely follows the words of the statute, as there would be no offense if the bank was not insolvent, though the officer believed it was. State *v.* Bardwell, 72 Miss. 535, 18 So. 377.

83. Same—Insolvency of members of copartnership.—State *v.* Krasher, 170 Ind. 43, 83 N. E. 498; Boyenton *v.* Commonwealth (Va.), 76 S. E. 945; Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447; Brown *v.* State (Tex. Cr. App.), 151 S. W. 561.

An indictment under such an act alleging that accused were doing a banking business under the name of "Meadowcroft Bros.," and that they were insolvent at the time they received the deposit, is sufficient, without alleging that the partnership of Meadowcroft Bros. was insolvent, as a partnership is not a legal entity, independent of the persons composing it. Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447.

Burns' Ann. St. 1901, § 2031, provides that, if any banker or any officer of a banking company shall fraudulently receive from any person not indebted to it any money on deposit, when at the time of receiving such deposit the banker or banking company is insolvent, whereby the deposit shall be lost to the depositor, the banker or officer so receiving the deposit shall be guilty of embezzlement. Held that, where an indictment for violating such section alleged that defendants who were doing a banking business as president and cashier of a banking company organized as a copartnership, etc., fraudulently received a deposit of money from prosecutor, who was not indebted to the bank, its president, or cashier, or any member thereof, at a time when defendants were insolvent, etc., it was fatally defective for failure to allege the names of the persons who composed the partnership; the condition of insolvency referred to in the statute as applied to a partnership bank being referable to the insolvency of the individual partners, which must be alleged and proved. State *v.* Krasher, 170 Ind. 43, 83 N. E. 498.

Counts of an indictment charged that accused and J. B. were partners and carried on a private banking business under the style of the "Bank of U.," that accused took and received money from a depositor named with actual knowledge that the firm doing

Knowledge of Insolvency.—Knowledge of insolvency need not be alleged or proved where not made an element of the offense.[84] And this is true even though, in such case, want of knowledge is a defense upon the issue of fraudulent intent.[85]

Receipt of Money or Other Thing as a Deposit.—As it is the receipt of deposits which is forbidden by the statute, the indictment should allege that the money or other thing was received as a deposit.[86] For example, where the thing received is a check, the indictment should state that it was transferred to the bank as a deposit.[87]

Receipt of Deposit in Official Capacity, by Virtue of Office, etc.—Under a statute imposing criminal liability upon bank officers who shall receive deposits with knowledge of the bank's insolvency, an indictment stating that the money, check, or other thing was received for the bank by its president, naming him, and accepted on deposit, sufficiently alleges the receipt of the deposit by an officer of the bank in his capacity as such.[88] Where the receipt of deposits under such conditions is declared by the statute to constitute embezzlement, the fact that it came into the defendant's possession by virtue of his office and was received by him in his official capacity should ordinarily be alleged;[89] but it is otherwise where, under

business as the Bank of U. was insolvent, also that accused permitted such depositor to deposit a specified sum with actual knowledge that the firm trading as the Bank of U. was insolvent. Held, that such counts were fatally defective for failure to charge that accused at the time of receiving the deposit had actual knowledge that he and his partner, or either of them, was insolvent; the insolvency of the partnership being insufficient to render accused guilty of a violation of the act. Boyenton *v.* Commonwealth (Va.), 76 S. E. 945.

An indictment alleging that accused unlawfully received a deposit in the "unincorporated" bank named, of which he was president, while it was insolvent to his knowledge, charged that the bank was a private bank, and was bad under Pen. Code 1911, art. 532 (Acts 25th Leg. c. 100), for not alleging that accused was its owner, agent, or manager, or the names of the owners, and that they were insolvent. Brown *v.* State (Tex. Cr. App.), 151 S. W. 561.

84. **Knowledge of insolvency.**—Murphy *v.* People, 19 Ill. App. 125.

85. **Same.**—State *v.* Cadwallader, 154 Ind. 607, 57 N. E. 512.

Under Burns' Rev. St. 1894, § 2031, prohibiting the receipt by an insolvent bank of a deposit, whereby such deposit is lost to the depositor, but which does not make knowledge of insolvency an element of the offense, the prosecution need not aver and prove that the officer receiving the deposit knew that the bank was insolvent, as want of such knowledge is matter of defense, which accused may show to justify his act in receiving the deposit. State *v.* Cadwallader, 154 Ind. 607, 57 N. E. 512.

86. **Receipt of money or other thing as a deposit.**—Fleming *v.* State, 62 Tex. Cr. App. 653, 139 S. W. 598.

An indictment under such act alleging that accused, "being persons then and there doing a banking business, * * * did receive" from one D. certain moneys, of the property of said D., the said D. then and there not being indebted to accused, sufficiently alleges that accused was doing a banking business, and that the moneys were received as a general deposit. Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447.

87. **Same.**—Fleming *v.* State, 62 Tex. Cr. App. 653, 139 S. W. 598.

88. **Receipt of deposit in official capacity, by virtue of office, etc.**—Ellis *v.* State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A., N. S., 444.

89. **Same—Where receipt of deposit declared to constitute embezzlement.**—State *v.* Winstandley, 154 Ind. 443, 57 N. E. 109.

Defendants were indicted under

the statute, the offense is complete without regard to whether the money came rightfully into the defendant's possession by virtue of his office, and was then fraudulently converted, or whether it was feloniously taken from the vault of the bank for no other purpose than to steal it.[90] It is not a material error in the latter case, however, to allege that the defendant, did "have, receive, and take into possession," a great quantity of money, etc., "by virtue of his office" as president, cashier, or treasurer, as the case may be, since such averment may be rejected as surplusage.[91] Of course, it is essential in every case to show either that the accused was the person who received the deposit, or such guilty knowledge, participation or assent as will bring him within the condemnation of the statute.[92] Thus where the statute provides that any officer having authority to close the bank or to prevent the receipt of deposits, and who fails to exercise such authority, when he knows that the bank is insolvent, shall be deemed to have assented to the receipt of deposits, an indictment seeking to hold the defendant liable on such ground should allege his authority to close the bank or to prevent the receipt of deposits.[93] But it is not essential, in such case, to

Burns' Rev. St. 1894, § 2031 (Horner's Rev. St. 1897, § 6598), declaring officers of incorporated banks, who fraudulently received money from persons not indebted thereto, when the bank was insolvent, so that the money was lost to the depositors, guilty of embezzlement. The indictment stated that defendants were president and cashier of a bank, that the bank was insolvent, and that defendants, knowing of such insolvency, fraudulently received moneys from a person not indebted to the bank, whereby such moneys were lost to such depositor. Held, that the indictment was insufficient, since it failed to aver that the money was received by defendants in their official capacity, and contained no allegation from which such fact, or the receipt of the money by the bank, would inevitably follow. State *v.* Winstandley, 154 Ind. 443, 57 N. E. 109.

90. Same—Same.—Commonwealth *v.* Warner, 173 Mass. 541, 54 N. E. 353.

91. Same—Same, surplusage.—Commonwealth *v.* Warner, 173 Mass. 541, 54 N. E. 353.

92. Same—Necessity for showing individual guilt.—Ex parte Rickey, 31 Nev. 82, 100 Pac. 134.

An indictment alleging that accused was the president of a bank, and that he feloniously, through the receiving teller, received a deposit knowing the bank was insolvent, does not charge accused with receiving the deposit within Act March 29, 1907 (St. 1907, p. 414, c. 189), penalizing every officer of any bank who receives any deposits knowing that the bank is insolvent; and the indictment does not charge accused with the offense under the doctrine of agency, since the receipt in law was by the bank. Ex parte Rickey, 31 Nev. 82, 100 Pac. 134.

93. Same—Same—Authority to close bank or to prevent receipt of deposits.—Ex parte Smith, 33 Nev. 466, 111 Pac. 930; Ex parte Griffin, 33 Nev. 490, 111 Pac. 939.

An indictment charging the accused with assenting to the receipt of bank deposits was framed under Act March 13, 1909 (St. 1909, c. 92), which by section 1 makes it a crime for a bank officer to receive deposits or to assent to the receipt of deposits when the bank is known to be insolvent, and by § 2 provides that any officer of an incorporated bank, having authority to close the bank or to prevent the receipt of deposit, who shall not exercise such authority when he knows that the bank is insolvent, shall be deemed to have assented to the receipt of deposits. The indictment contained no allegations that the accused had any authority to close the bank, or to prevent the receipt of deposits, or that the accused personally received deposits knowing the bank to be insolvent. Held that, under § 2, considered with the direct definition of § 1 as to the offense of assenting to the receipt of deposits, the "assent" required by the statute implied per-

allege the name or style of the office in the bank held by the person who actually received the deposit, since if it was received by the bank with the defendant's knowledge and assent, he knowing at the time that the bank was insolvent, the offense in this particular is complete without regard to the name or office held by the person receiving it.[94]

Person from Whom Received.—The indictment should allege with sufficient certainty the person, corporation, or association from whom the deposit was received.[95]

Description of Deposit—Amount, Character, Items, etc.—The indictment should describe and identify the deposit with such certainty as will apprise the accused of the particular charge which he is called upon to defend and enable him to prepare his evidence accordingly; and if this is done, it is not necessary, unless made so by the terms of the statute prescribing or defining deposits with reference to some particular kinds of money, notes, or bills, to give a specific description of each separate item of which it was composed.[96] This implies, of course, that the amount or value

mission, and presupposed some inherent power to withhold assent. Ex parte Smith, 33 Nev. 466, 111 Pac. 930.

94. Same—Same—When unnecessary to aver name or style of office of person actually receiving deposit.—Parrish *v.* Commonwealth, 136 Ky. 377, 123 S. W. 339.

95. Person from whom received.—State *v.* Eifert, 102 Iowa 188, 65 N. W. 309, 71 N. W. 248, 38 L. R. A. 485, 63 Am. St. Rep. 433; State *v.* Smith, 91 Ark. 1, 120 S. W. 156; State *v.* Sattley, 131 Mo. 464, 33 S. W. 41.

An allegation that the deposit was received from Y. was a sufficient averment that the deposit was made by Y. State *v.* Smith, 91 Ark. 1, 120 S. W. 156.

Under Code 1873, § 4305, providing that an indictment shall be sufficient if it states the act complained of in such manner as to enable a person of common understanding to know what is intended to be charged, an indictment under Acts 18th Gen. Assem., c. 153, § 2, making it a penal offense for a banker, knowing himself to be insolvent, to receive a deposit, which alleges that defendant did accept and receive a deposit of money from M., sufficiently shows that the money belonged to M. State *v.* Eifert, 102 Iowa 188, 65 N. W. 309, 71 N. W. 248, 38 L. R. A. 485, 63 Am. St. Rep. 433.

Where, in a prosecution for receiving money as cashier of a bank which was in failing circumstances, the evidence discloses that the person making the deposit was the president of a voluntary charitable association, and that the money belonged to such association, and that she had been intrusted with the money of such association, the indictment and instructions properly alleged the ownership in her as against all wrongdoers. State *v.* Sattley, 131 Mo. 464, 33 S. W. 41.

96. Description of deposit—Amount, character, items, etc.—Parrish *v.* Commonwealth, 136 Ky. 377, 123 S. W. 339; State *v.* Smith, 91 Ark. 1, 120 S. W. 156; State *v.* Quackenbush, 98 Minn. 515, 108 N. W. 953.

An indictment of the president of a bank for receiving a deposit knowing the bank to be insolvent, which alleged the receipt of a deposit of the value of $130, was sufficient to show that the deposit was in money, checks, or drafts aggregating the amount specified; the word "deposit" being used in its popular sense to imply that the depositor had placed in the bank money, or evidences or representatives of money such as banks of deposit are authorized to, and do, receive; so that the indictment was not defective for failure to accurately describe the items. Parrish *v.* Commonwealth, 136 Ky. 377, 123 S. W. 339.

An indictment for receiving a check for deposit knowing the bank to be insolvent, in violation of Kirby's Dig., § 1814, which stated the names of the drawee, the payee, and the amount of the check alleged to have been received, sufficiently identified the check, though the name of the drawer and the date of the check were not stated. State *v.* Smith, 91 Ark. 1, 120 S. W. 156.

Kirby's Dig., § 1814, making it a

should be stated.[97]

Purpose or Intent.—It is not necessary to allege or prove a fraudulent intent in the receipt of the deposit where such intent is not made an element of the offense.[98] And under a statute making it criminal for any person doing a banking business to receive deposits, knowing the bank to be insolvent, whereby the deposit is lost to the depositor, and providing that the subsequent failure of the bank shall be prima facie evidence of an intent to defraud, an indictment alleging that the accused corruptly, willfully, fraudulently, and feloniously received a deposit, etc., is sufficient, without specifically alleging that the deposit was received with intent to defraud.[99]

Loss of Deposit.—The loss of the deposit need not be alleged unless the statute makes the loss thereof an element of the offense.[1]

Formal and Unnecessary Matter.—Superfluous and unnecessary matter and formal conclusions, where the same are inappropriate or plainly not required, may, in general, be treated as surplusage, not affecting the valid-

felony for a cashier of a bank to receive on deposit money, bills, or drafts circulating as money knowing the bank to be insolvent, makes no distinction between general and special deposits, and it is sufficient to allege in the indictment for violation thereof that the money, etc., were deposited, without alleging the deposit to be general or special. State *v.* Smith, 91 Ark. 1, 120 S. W. 156.

An allegation that the check was accepted by accused in lieu of money was not equivalent to an allegation that it was a draft circulating as money. State *v.* Smith, 91 Ark. 1, 120 S. W. 156.

An indictment drawn under the section, alleging the receiving of a check drawn payable to a certain person, but not alleging either in general terms that the check was a "note or draft circulating as money or currency" or that the check was indorsed by the payee so that the legal title might pass by delivery, was insufficient. State *v.* Smith, 91 Ark. 1, 120 S. W. 156.

Defendant was indicted for having received as a banker on deposit, knowing himself to be insolvent, certain money, to wit, "the sum of one hundred dollars ($100.00), the property of the said E., good and lawful money, and current as such under the laws of the state of Minnesota, and of the value of one hundred dollars ($100.00), a better description of said money is to the grand jury unknown." Held, that the description of the property, deposited was sufficient. State *v.* Quackenbush, 98 Minn. 515, 108 N. W. 953.

97. **Same—Amount or value.**—Brown *v.* People, 173 Ill. 34, 50 N. E. 106.

Act June 4, 1879, provides: "That if any banker * * * shall receive from any person * * * not indebted to said banker * * * any money * * * when at the time of receiving such deposit, said banker is insolvent, where the deposit so made shall be lost to the depositor, said banker * * * shall be guilty of embezzlement, and upon conviction thereof, shall be fined a sum double the amount so embezzled." Held, that an indictment under this statute must state the "value" of the money received, and an indictment charging a receipt by the defendants as bankers of $380.50, without more, was not a sufficient allegation of value to support a conviction. Brown *v.* People, 173 Ill. 34, 50 N. E. 106.

98. **Purpose or intent.**—Murphy *v.* People, 19 Ill. App. 125.

An indictment under Gen. Laws, 1895, p. 504, c. 219 (Rev. Laws 1905, § 5118), for receiving money as a banker while the bank is insolvent, need not allege an intent to defraud. State *v.* Quackenbush, 98 Minn. 515, 108 N. W. 953.

99. **Same.**—Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447.

1. **Loss of deposit.**—State *v.* Myers, 54 Kan. 206, 38 Pac. 296.

An information under Laws 1891, c. 43, § 16, charging an officer of a bank with knowingly accepting deposits when his bank is insolvent, need not allege that loss occurred to any one by reason of such deposit. State *v.* Myers, 54 Kan. 206, 38 Pac. 296.

ity of the indictment;[2] such, for example, as that the accused received the money in his official capacity and was in possession of it by virtue of his office, etc., where it is immaterial under the statute whether he so received and was in possession of it or not;[3] or the concluding of each count with the words "did take, steal, and carry away."[4]

Joinder of Offenses.—In a prosecution of an officer of a bank for knowingly receiving deposits when the bank is insolvent, the receipt of separate deposits from different depositors may be charged in separate counts in one information; and a trial and conviction may be had and sentences imposed on such counts as the proof warrants, although each of the counts charges a separate and distinct felony.[5] And in the prosecution of a bank president, under a statute, providing that any bank president who receives or assents to the reception of a deposit with knowledge of the bank's insolvency is guilty of larceny, an information under such statute is not invalid by reason of the fact that it charges the receiving and assenting to the reception of a deposit in one count.[6]

Where Statute Declares Violation of Act to Be Embezzlement.—The sufficiency of an indictment under a statute which declares every officer of an incorporated bank guilty of embezzlement, who fraudulently receives money from a person not indebted thereto, when the bank is insolvent, so that the money is lost to the depositor, must be determined by the rules of pleading applicable to charges of official extortion, embezzlement, and other abuses of official duties.[7] Under such an act an indictment which charges that defendant, being a banker, and knowing he was insolvent, received money from a depositor, is sufficient.[8]

§ 62 (1ei) Illegal Loans, Discounts and Overdrafts.—Under the general provisions of the code of the state requiring an indictment to contain a plain statement of the act constituting a crime, an indictment for making an excessive or otherwise illegal loan, which alleges that the accused, as a director of a trust company permitted and procured such company to make an excessive loan to a firm of which he was a member is sufficient, and need not allege specifically in what manner he permitted the prohibited loan.[8a]

2. **Formal and unnecessary matter.**—State *v.* Sattley, 131 Mo. 464, 33 S. W. 41; Commonwealth *v.* Warner, 173 Mass. 541, 54 N. E. 353.

3. **Same.**—Commonwealth *v.* Warner, 173 Mass. 541, 54 N. E. 353.

4. **Same.**—State *v.* Sattley, 131 Mo. 464, 33 S. W. 41.

5. **Joinder of offenses.**—State *v.* Warner, 60 Kan. 94, 55 Pac. 342.

6. **Same—Joinder in same count.**—McClure *v.* People, 27 Colo. 358, 61 Pac. 612.

7. **Where statute declares violation of act to be embezzlement.**—State *v.* Winstandley, 154 Ind. 443, 57 N. E. 109.

8. **Same.**—Commonwealth *v.* Rockafellow, 163 Pa. 139, 29 Atl. 757.

8a. **Illegal loans, discounts and overdrafts.**—People *v.* Knapp (N. Y.), 99 N. E. 84.

An indictment framed under Laws 1909, c. 222, §§ 29, 30, alleging that defendants, as directors and officers of a bank, permitted shareholders, including themselves, to become indebted to it at one time in excess of 50 per cent. of its capital, held to charge of an offense. State *v.* McPherson (S. D.), 139 N. W. 368.

§ 62 (2) Evidence—§ 62 (2a) Presumption and Burden of Proof.—It is the general rule that the material averments in the indictment must be proved by the prosecution.[9] An exception exists however in the case of matters of which the court and jury may take judicial knowledge. For example, where all banking institutions in the state are chartered by public statutes of which the court and jury must take notice, it is unnecessary, under an indictment charging the defendant with having engaged in unauthorized banking and having acted as an officer of such bank, to prove that the bank or association was not incorporated, since from their presumptive knowledge of the law as a public law, it is within the legitimate exercise of their powers for the court and jury to take notice of the fact that such bank or association was not incorporated.[10] If, however, the question arose in regard to a foreign association for which the defendant exercised his office, the rule would not hold, since the private acts or statutes of other states would not be judicially noticed.[11] Another exception exists with respect to matters peculiarly within the knowledge of the officers of the bank and which they must have known, or which it was their duty to know. In either case the presumption of law is that they did know.[12] And even where the facts may not raise a presumption of law, they may still be such as to warrant an inference by the jury and support a verdict based thereon, as where the guilty intent of an officer of a trust company becoming indebted to it in violation of statute is inferred from the fact of the debt.[13]

Presumption of Previous Knowledge from Subsequent Acts.—As a rule, presumptions never go backward, but where bank officers largely indebted to it and possessing property interests in a corporation to a very significant amount as compared with such indebtedness conveyed such prop-

9. **Material averments must be proved.**—Brown *v.* State, 11 O. 276.

10. **Matters of judicial knowledge—Nonincorporation of bank.**—Brown *v.* State, 11 O. 276.

11. **Same—Foreign banking associations.**—Brown *v.* State, 11 O. 276.

12. **Matters peculiarly within defendant's knowledge or which he should have known.**—State *v.* Cadwallader, 154 Ind. 607, 57 N. E. 512; State *v.* Quackenbush, 98 Minn. 515, 108 N. W. 953; Parrish *v.* Commonwealth, 136 Ky. 377, 123 S. W. 339.

The solvency of a bank is a matter peculiarly within the knowledge of its directors and other managing officers, and, in a prosecution for accepting deposits when the bank is insolvent and the insolvency is known to defendant, or he has good reason to know such fact, the presumption is that he has such knowledge. State *v.* Quackenbush, 98 Minn. 515, 108 N. W. 953.

Where, on a prosecution for violating Burns' Rev. St. 1894, § 2031, prohibiting the receiving by an insolvent bank of a deposit, whereby it is lost to the depositor, the officer receiving such deposit having been president and director for three years previous to the receipt of the deposit, and in continuous control of the bank, it will be presumed that he knew of its insolvency, but such presumption may be rebutted by proof. State *v.* Cadwallader, 154 Ind. 607, 57 N. E. 512.

Where a bank remained open for the transaction of business and the reception of deposits, the law would presume that the president assented to the reception of such deposits as were shown by the bank's books. Parrish *v.* Commonwealth, 136 Ky. 377, 123 S. W. 339.

13. **Same—Inferences of fact.**—State *v.* Barnes, 108 Minn. 227, 122 N. W. 4.

erty to the bank on account of such indebtedness pursuant to an understanding of long standing, it was held that the situation before the conveyance should be regarded substantially the same as that thereafter, as regards the knowledge and mental state of such officers respecting the condition of the bank as to solvency. In other words, the fact of the conveyance had an evidentiary or probative value, as tending to show, and raising a presumption, that the officers had knowledge, previous to the conveyance of their property, of the bank's condition, since, otherwise, they would not have made such a conveyance.[14]

Statutes Shifting Burden of Proof.—It is within the power of the legislature to formulate rules of evidence, and in so doing it may reverse the presumption of innocence which usually obtains in criminal cases so as to place upon the accused the burden of proving his innocence under any given state of the facts. For example, under a statute making it an indictable offense for the officers or directors to bring about the fraudulent insolvency of a bank, it is entirely competent for the legislature to enact that the proof of insolvency shall of itself raise a presumption of fraud and place upon the defendant the burden of rebutting such presumption. There is no hardship in such a rule, since the facts are all in possession of the officers of the bank, whereas it would often be difficult, if not impossible, for the prosecution to prove that the insolvency was the result of fraud.[15] So it is entirely competent for the legislature to prescribe that the failure of the bank within thirty days after the receipt of a deposit shall be prima facie evidence of knowledge of insolvency at the time the deposit was received.[16] Such a statute is not unconstitutional, either as an

14. **Presumption of previous knowledge from subsequent acts.**—Ellis v. State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A., N. S., 444

15. **Statutes shifting burden of proof—Constitutionality.**—Youmans v. State, 7 Ga. App. 101, 66 S. E. 383.

16. **Same—Presumption of knowledge of insolvency.**—Ex parte Smith, 33 Nev. 466, 111 Pac. 930; Ex parte Griffin, 33 Nev. 490, 111 Pac. 939.

Under an indictment for assenting to the receipt of deposits by an officer of an incorporated bank, contrary to Act March 13, 1909 (St. 1909, c. 92), which by section 1 makes it a crime for any bank officer to receive or to assent to the receipt of deposits knowing the bank to be insolvent, and by § 2 provides that any bank officer having authority to close the bank or to prevent the receipt of deposits, who does not exercise such authority when the bank is known to be insolvent, shall be deemed to have assented to the receipt of deposits, and making the failure of such bank within thirty days after the receipt of any deposits prima facie evidence of such officer's knowledge of its insolvency, the presumption of knowledge of insolvency by its terms applies only to such officers as have power to close the bank or to prevent deposits. Ex parte Smith, 33 Nev. 466, 111 Pac. 930; Ex parte Griffin, 33 Nev. 490, 111 Pac. 939

The title of Act March 13, 1909 (St. 1909, c. 92), in addition to referring to the offenses declared, states that its purpose is to establish a rule of evidence in connection therewith. Section 2 makes the failure of a bank within thirty days after the receipt of deposits prima facie evidence of the officers' knowledge of its insolvency, and in a previous part it is provided that any officer having authority to close the bank or to prevent the receipt of deposits, who does not exercise such authority, shall be "deemed" to have assented to the receipt of deposits. Held, that only the part of the section relating to the knowledge imputed from the bank's failure is evi-

attempt to enforce imprisonment for debt nor as a legislative assumption of judicial functions.[17] But a statute which makes the fact of the bank's failure prima facie evidence of knowledge on the part of an officer or agent of its insolvency when he received a deposit is nugatory where the title or caption thereof makes no mention of any rule or procedure.[18]

§ 62 (2b) Admissibility of Evidence.—Proof of Incorporation, Corporate Name, etc.—Where the indictment is for making a false entry in the books of a banking corporation, it is sufficient to prove a corporation de facto, and evidence of general reputation of its corporate existence is competent to prove it;[19] and the name of the corporation as alleged in the indictment may be shown by evidence that it was known by such name.[20] But where the indictment is for acting as an officer of an illegal banking association, individual notes, intended to pass as currency, or money, are not competent evidence against the person issuing them without proving that there was a company or association of individuals formed for the purpose of putting such notes in circulation.[21] Where the prosecution is for the conversion, misappropriation, larceny or embezzlement of the money or property of the bank, records of the bank, sufficiently proved, written by the defendant, and signed by him as recording officer, are admissible to prove the organization of the bank and that defendant was duly elected,[22] and the fact that some of such records were signed by the defendant as secretary and others as clerk is immaterial where, under the banking law or charter, he might properly be called either clerk or secretary.[23] Where the name of the bank is properly laid in the indictment, it is not error to receive in evidence a certificate of incorporation of a bank of that same name with the addition of the names of a certain town and state, since the latter words are only descriptive of the bank's place of location, and do not constitute a variance between the proof and the name of the bank as set forth in the indictment.[24]

Competency of Witnesses Whose Names Are Not on the Indictment.—This is a question of general law, and proper notice of the intention to introduce such witnesses and of the facts expected to be proved by them,

dential in character, while the word "deemed," as used in the section, means "adjudged," in the sense of constituting a crime, instead of a rule of evidence. Ex parte Smith, 33 Nev. 466, 111 Pac. 930; Ex parte Griffin, 33 Nev. 490, 111 Pac. 939.

17. **Same.**—Youmans *v.* State, 7 Ga. App. 101, 66 S. E. 383.

18. **Same—Title or caption of statute.**—Roby *v.* State, 41 Tex. Cr. App. 152, 51 S. W. 1114. See, also, Fleming *v.* State, 62 Tex. Cr. App. 653, 139 S. W. 598.

19. **General reputation to prove corporate existence.**—Mears *v.* State, 84 Ark. 136, 104 S. W. 1095.

20. **Proof of corporate name.**—Mears *v.* State, 84 Ark. 136, 104 S. W. 1095.

21. **Individual notes inadmissible without proof of corporate existence, when.**—Steedman *v.* State, 11 O. 82.

22. **Records written by the defendant.**—Commonwealth *v.* Warner, 173 Mass. 541, 54 N. E. 353.

23. **Same—Where records signed in different capacities.**—Commonwealth *v.* Warner, 173 Mass. 541, 54 N. E. 353.

24. **Variance as to name alleged and name proven.**—State *v.* Burlingame, 146 Mo. 207, 48 S. W. 72.

must be served as required by law.[25]

Illegally Declaring Dividend.—In the prosecution of a bank president for illegally declaring a dividend on a certain date, evidence tending to show that the conditions which made the declarations of the dividend illegal had existed for some time prior thereto is admissible as tending to establish the condition of the bank's affairs on the day in question, and to show the president's opportunities for knowledge of such conditions; and proof of the fact that while such condition was in existence prior dividends had been declared, is admissible to show that the profits of the bank, instead of having been used to restore it to the condition justifying a dividend, had been distributed to the stockholders.[26] It is not error in such a case to allow one witness to testify as to the correctness of a list of insolvent papers carried among the bank's assets, though he was ignorant of the solvency or insolvency of the papers, and to allow another witness who could not swear to the correctness of the list to testify as to the solvency or insolvency of the particular papers mentioned; the testimony of the two witnesses taken together presenting a state of facts supported by their several credibility.[27] Solvency or insolvency, in such a case, is a matter admitting of opinion evidence under the general rules on that subject.[28]

Exhibiting False Books, etc.—On the trial of an indictment for knowingly exhibiting to a bank examiner a cash book in which checks on other banks were falsely entered as cash on hand, evidence that other banks ordinarily carried such checks on their books as cash is inadmissible on the question of intent, where it appears that such was not the practice of defendant's bank.[29] It is immaterial in such case that the cash book was kept in the same manner in which it had been kept and presented to bank examiners for years.[30]

25. Competency of witnesses whose names are not on the indictment.—State v. Yetzer, 97 Iowa 423, 66 N. W. 737.

In a prosecution for fraudulent banking, a notice by the state that it would on the trial introduce certain witnesses whose names were not on the indictment stated that it expected to prove by such witnesses that a certain bank was on a certain day a bank of deposit, and defendant was a stockholder and director and managing party thereof; that it was insolvent; and that defendant permitted and connived at the receiving of deposits, etc. Held, that such notice complied with Code 1873, § 421, providing that the state shall not use a witness whose name is not indorsed on the indictment unless defendant is given notice in writing, stating the name, etc., of the witness, and the substance of what it expects to prove by him on the trial. State v. Yetzer, 97 Iowa 423, 66 N. W. 737.

26. Proof of condition prior to declaration of illegal dividend.—Cabaness v. State, 8 Ga. App. 129, 68 S. E. 849.

27. Identification of papers by one witness and proof of their worthlessness by another.—Cabaness v. State, 8 Ga. App. 129, 68 S. E. 849.

28. Opinion evidence as to value of securities.—Cabaness v. State, 8 Ga. App. 129, 68 S. E. 849.

29. Proof of intent—Custom of other banks.—People v. Helmer, 13 App. Div. 426, 43 N. Y. S. 642, 12 N. Y. Cr. Rep. 134, judgment reversed on other points, 154 N. Y. 596, 49 N. E. 249.

30. Proof that book was always kept in same manner.—People v. Helmer, 13 App. Div. 426, 43 N. Y. S. 642, 12 N. Y. Cr. App. 134, judgment reversed on other points, 154 N. Y. 596, 49 N. E. 249.

Forgery and False Entries, Fraudulent Alterations, etc.—Upon the trial of a bank cashier for forgery in fraudulently altering entries in the bank's books so as to make a deposit account appear discharged, evidence as to the state of defendant's account and his indebtedness to the bank on notes is competent on the question of intent.[31]

Conversion, Misappropriation, Larceny and Embezzlement.—Records of the bank, sufficiently proved, written by the accused and signed by him as recording officer are competent evidence in a prosecution for misappropriating or embezzling the funds of the bank, as admissions of the truth of the facts therein stated;[32] and the fact that some of such records were signed by the accused in one capacity and some in another, is immaterial where he was entitled to act in either capacity.[33] A check and evidence showing that the persons to whose order it was drawn received no money thereon, they being the only persons in the county of that name, is admissible in such a case;[34] and it was also proper for the jury to consider, as bearing on questions in the case, to supply deficiencies in the proof as to irregular transactions, and to convince them that they were fraudulent, that there was a large deficiency in the assets, that defendant was treasurer for many years, that his sworn reports were grossly false, that when he heard that the bank was about to be examined he fled to a distant state, and remained there under an assumed name until discovered and arrested, and that when he went he left a written statement showing that the loss was very large and in which he admitted his guilt and intimated flight and suicide.[35]

Receiving Deposits after Insolvency—Admissibility of Evidence on Issue of Insolvency.—To show insolvency of a bank at the time an officer was charged with having received a deposit, knowing at the time that the bank was then insolvent, evidence as to the general condition of the bank at that time, such as the amount of its deposits and obligations, and the character and value of its securities and other resources, the amount of worthless paper held by it, etc., is admissible.[36] And where the defendants, as

31. Forgery and fraudulent entries—Intent—Condition of account.—Quertermous *v.* State, 95 Ark. 48, 127 S. W. 951.

32. Conversion and misappropriation—Records signed by accused, as admission.—Commonwealth *v.* Warner, 173 Mass. 541, 54 N. E. 353.

33. Same—Records signed in different capacities.—Commonwealth *v.* Warner, 173 Mass. 541, 54 N. E. 353.

34. Same—Check, and evidence that payee never received money thereon.—Commonwealth *v.* Warner, 173 Mass. 541, 54 N. E. 353.

35. Same—Existence of deficiency, false reports, statements of loss, flight, etc.—Commonwealth *v.* Warner, 173 Mass. 541, 54 N. E. 353.

36. Receiving deposits after insolvency—Admissibility of evidence on issue of insolvency—Amount of liabilities and character and value of assets.—State *v.* Shove, 96 Wis. 1, 70 N. W. 312.

In the prosecution of a bank cashier for receiving a deposit after the bank's insolvency, the testimony of a witness that one of his long overdue notes, given to the bank, was accommodation paper, and the introduction of his written assumption of its payment, executed concurrently with the note, are admissible as pertinent to the issue of insolvency. State *v.* Stevens, 16 S. Dak. 309, 92 N. W. 420.

a firm, operated two banks, it is proper, in determining the question of their insolvency, to investigate the affairs of both banks, though the deposit was only received at one of them; the assets and liabilities of both banks being those of the one firm, whose insolvency is charged in the indictment.[37] Evidence as to the character and value of assets and amount of liabilities should, of course, relate to the time of the receipt of the deposits, or near thereto;[38] and where the proof relates to a date prior to the time of receiving the deposits, it should further show that the bank continued insolvent down to the date of receiving the deposit.[39] Where the accused has made an assignment, the deed of assignment, the inventory, the appraisement, the returns of sales made by the assignee and approved by the court, and generally, all proceedings under the assignment, where the same was sufficiently near in point of time to the deposit, are admissible in evidence as an aid to the jury in determining the issue of insolvency at the time of receiving the deposit.[40] But an assignee's account merely filed is not independent evidence, in a prosecution against the assignor as an insolvent banker for receiving deposits with knowledge of insolvency, that the various items and amounts therein indicated as lost or uncollectible were of no value as assets for payment of creditors.[41] And much less admissible are the far-fetched statements, partially from memory, made by a receiver relative to the unauthenticated indebtedness of the bank to other banks, and testimony as to numerous transactions pertaining to the adjustment thereof. Such evidence is incompetent, because of a secondary character; the bank books being the best evidence.[42] But it is proper, as bearing on the issue of insolvency, to permit a witness who has been appointed receiver of the bank

37. **Same—Same—Same—Where defendants operated two banks.**—State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700.

38. **Same—Same—Same—Evidence not to be too remote as to time.**—State *v.* Sattley, 131 Mo. 464, 33 S. W. 41.

In a prosecution for receiving a deposit as cashier of a bank when such bank was in failing circumstances, and after defendant had knowledge of its condition, on the issue as to the value of certain stock held by the bank at the date of its assignment the court properly refused to permit a witness to state the value of a building owned by the corporation which issued such stock, based on his knowledge of its cost, as the inquiry should have been confined to the market value of the real estate at the date of the bank's assignment, it having been shown that the stock had a value. State *v.* Sattley, 131 Mo. 464, 33 S. W. 41.

39. **Same—Same—Same—Continuance of insolvency down to date of deposit.**—Commonwealth *v.* Hazlett, 14 Pa. Super. Ct. 352.

40. **Same—Same—Same—Deed of assignment and proceedings thereunder.**—State *v.* Beach, 147 Ind. 74, 43 N. E. 949, 46 N. E. 145, 36 L. R. A. 179; Commonwealth *v.* Hazlett, 14 Pa. Super. Ct. 353; State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700.

Though the receipt of such deposit is charged to have been in May 1888, a deed of assignment for the benefit of creditors made by defendants the following October, is admissible as tending to show insolvency at the time it was made, from which, in connection with other evidence, defendants' financial condition in the preceding May may be determined. State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700.

41. **Same—Same—Same—Assignee's account.**—Commonwealth *v.* Hazlett, 14 Pa. Super. Ct. 352.

42. **Same—Same—Same—Statements of receiver—Best and secondary evidence.**—State *v.* Stevens, 16 S. Dak. 309, 92 S. W. 420.

after its voluntary closing to relate in detail what he has done to collect the various notes coming into his hands, and to state whether he is able to tell when any of them will be paid.[43] Schedules filed by the accused in involuntary bankruptcy and testimony of an expert accountant based upon an examination of the accused's banking books which he has turned over to the trustee in bankruptcy are admissible in evidence upon the issue of insolvency, and their admission does not constitute a violation of the defendant's privilege against self-incrimination as guaranteed by the federal bankrupt act or by state and federal constitutional provisions.[44] Evidence of the value of defendants' respective homesteads, as bearing upon the question of their solvency, is inadmissible where, in making the assignment, they expressly reserve such homesteads.[45] So it is admissible to receive the reports of the bank examiner,[46] and the conclusions of a witness as to defendant's insolvency based on calculations made upon an examination of the defendant's books with a view to determine the amount and character of assets and liabilities.[47] Acts of bankruptcy and transactions tending to show insolvency are also admissible upon this issue;[48] but not transactions had and done among others and in which the accused was not

43. Same—Same—Testimony of receiver as to efforts to realize on assets.—State *v.* Stevens, 16 S. Dak. 309, 92 S. W. 420; State *v.* Hoffman, 120 La. 949, 45 So. 951.

In a prosecution under Act No. 108, p. 144, of 1884, making it a crime for a bank officer to assent to the reception of deposits after he knows the bank is insolvent, the history of the bank's assets subsequent to the day the deposits were received, showing what efforts were made by the liquidating commissioners to realize on them and with what success, is relevant circumstantial evidence on the question of the probable value of the assets of the bank on the day the deposits were received. State *v.* Hoffman, 120 La. 949, 45 So. 951.

44. Same—Same—Same—Schedules filed in bankruptcy.—Commonwealth *v.* Ensing, 228 Pa. 400, 77 Atl. 657.

45. Value of homestead not included in assignment.—State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700.

46. Same—Same—Same—Reports of bank examiner.—State *v.* Salmon, 216 Mo. 466, 115 S. W. 1106.

47. Same—Same—Same—Conclusions of witness who has examined books.—State *v.* Cadwell, 79 Iowa 432, 44 N. W. 700.

48. Same—Same—Same, acts of bankruptcy and transactions indicating insolvency.—Commonwealth *v.* Tryon, 31 Pa. Super. Ct. 146; State *v.* Yetzer, 97 Iowa 423, 66 N. W. 737; State *v.* Sattley, 131 Mo. 464, 33 S. W. 41.

On the trial of an indictment against a banker for accepting a deposit when insolvent, it was proper to permit the commonwealth to show that the defendant was engaged in a mercantile business, and that, as soon as any money was received in such business, he hastened to transfer it to the bank in order to meet incoming checks. Commonwealth *v.* Tryon, 31 Pa. Super. Ct. 146.

In a prosecution for fraudulent banking, defendant, on cross-examination, was asked, as touching his expenditures, if there had not been a bastardy proceeding against him a few years before that cost him a great deal of money to settle. After the examination proceeded for some time, the court struck out the testimony as too remote. Held that, though the evidence should not have been offered, defendant was not prejudiced. State *v.* Yetzer, 97 Iowa 423, 66 N. W. 737.

On the trial of a bank officer for receiving deposits, knowing that the bank was insolvent, evidence that depositors demanded their money, and of the refusal of the bank employees to pay them, is admissible whether or not defendant personally heard the demands, to show the failure of the bank to meet its obligations in the ordinary course of business. State *v.* Sattley, 131 Mo. 464, 33 S. W. 41.

shown to have been interested nor in any way connected.[49] Proof of a custom of the banks in the state in times of great money stringency to limit the amount which any one customer might draw out, is wholly irrelevant where such custom is not shown to have existed until three years after defendant's bank had failed, or that if it did, defendant's bank did not avail itself of the same, but closed its doors.[50]

Same—Admissibility of Evidence on Issue of Knowledge of Insolvency.—On trial of an insolvent banker for receiving deposits with knowledge of his insolvency, the state is bound to prove such knowledge, and can do so by circumstantial evidence.[51] For example, an affidavit, made by the cashier of the bank on the day following the receipt of the deposit, stating that the bank was insolvent; letters written to accused by persons interested in the bank, suggesting that it was not being prudently managed; the fact that depositors who attempted to withdraw their deposits were not allowed to do so; evidence of excessive loans made to accused, to other members of his family, and to further activities in which he was interested; the fact that the bank paid a high rate of interest on deposits; the value and character of insolvent and worthless paper carried by the bank, and the amount ultimately realized from the disposal of all the bank's assets administered in a prudent and businesslike way; fraudulent methods resorted to by accused in making reports to the Secretary of State; failure to keep on hand the reserve required by the statute; loans to individuals in excess of the amount permitted by law—are all admissible to prove that accused had notice that the bank was insolvent when he received the deposit.[52] On the other hand, the books of the bank, while evidence to show the condition of the bank, are not evidence to prove the defendant's knowledge of such condition unless accompanied by proof that they were kept under his direction or that it was his duty to be familiar with them.[53] A witness for the state may be permitted to testify as to facts relating to the value of the defendant's property which the witness had communicated to the

49. **Same—Same—Same—Same—Transactions had and done among others.**—State *v.* Burlingame, 146 Mo. 207, 48 S. W. 72.

The state, over accused's objection, on a prosecution for receiving a deposit when the bank was insolvent, was permitted to introduce conveyances made by debtors of the bank shortly after the deposit was received. Held error, as accused was not shown to be in any way interested therein. State *v.* Burlingame, 146 Mo. 207, 48 S. W. 72.

In a prosecution of a private banker for receiving a deposit when insolvent, conversations between a third person and the secretary of state as to the postponement of an examination of his bank were inadmissible, as the law does not contemplate postponement or delay in such cases. State *v.* Salmon, 216 Mo. 466, 115 S. W. 1106.

50. **Same—Same—Custom of limiting withdrawals in time of stringency.**—State *v.* Hoffman, 120 La. 949, 45 So. 951.

51. **Same—Knowledge of insolvency—Circumstantial evidence.**—Commonwealth *v.* Hazlett, 14 Pa. Super. Ct. 352.

52. **Same—Same—Same.**—Parrish *v.* Commonwealth, 136 Ky. 377, 123 S. W. 339.

53. **Same—Same—Books of bank as proof of knowledge of insolvency.**—State *v.* Hoffman, 120 La. 949, 45 So. 951.

defendant prior to the alleged commission of the offense charged.[54] The accuse on his own behalf may testify as to his belief that the bank was solvent,[55] and it is error to refuse to permit him to introduce evidence to show what steps he had taken to inform himself regarding the bank's solvency.[56] Evidence that he closed the bank on account of ill-health and upon the advice of a physician is competent to disprove that he closed it on account of knowledge of its insolvency.[56a] Evidence by the state as to representations by the accused as to the solvency of the bank of which he was president to persons he was soliciting as depositors and to others is not prejudicial to him, but corroborates his own evidence that he believed that the bank was solvent.[57]

Same—Knowledge of Receipt of Deposits.—Evidence as to deposits made previously to the one in controversy by other parties is inadmissible to prove guilty knowledge of the receipt of deposits, as the receipt of each deposit is a separate and distinct offense. Such evidence is inadmissible for any purpose.[58]

Same—Fraudulent or Criminal Intent.—On a prosecution for receiving deposits as a banker, knowing the bank's insolvency, evidence of a continual depletion of the resources of the bank, continued for several years, is competent on the question whether an unlawful scheme existed to wreck the concern, and as showing a motive for a sham dissolution, whereby one of the partners could withdraw therefrom a portion of the funds.[59] The question being as to the criminal intent of the defendant in receiving a deposit knowing his insolvency, it was error to reject his offer to show an alleged partnership in the banking business, that the other partners were liable, and that they had property.[60] The value of land has a bearing on the criminal intent of a defendant indicted as an insolvent banker, and the commonwealth having introduced evidence of a sale by the defendant's assignees at a certain price per acre, as tending to prove value, in association with other and independent proof of values, it was error to exclude

54. **Same—Same, facts communicated to defendant with reference to value of his property.**—Commonwealth *v.* Hazlett, 16 Pa. Super. Ct. 534.

55. **Same—Same—Accused may testify as to his belief that bank was solvent.**—Paulsen *v.* People, 195 Ill. 507, 63 N. E. 144.

56. **Same—Same, steps taken by accused to inform himself as to bank's condition.**—McClure *v.* People, 27 Colo. 358, 61 Pac. 612.

56a. **Same—Same—Reason for closing bank.**—Commonwealth *v.* Hazlett, 14 Pa. Super. Ct. 352.

57. **Same—Same—Representations of solvency made by accused.**—Parrish *v.* Commonwealth, 136 Ky. 377, 123 S. W. 339.

58. **Same—Knowledge of receipt of deposits.**—State *v.* Burlingame, 146 Mo. 207, 48 S. W. 72.

In a prosecution of a bank president for receiving deposits on Monday with knowledge of the bank's insolvency, evidence that on the preceding Saturday other deposits were made was not admissible. Brown *v.* State (Tex. Cr. App.), 151 S. W. 561.

59. **Same—Fraudulent or criminal intent—Proof of unlawful scheme to loot bank.**—State *v.* Clements, 82 Minn. 434, 85 N. W. 229.

60. **Same—Same—Existence of partnership, and property owned by other members.**—Commonwealth *v.* Hazlett, 14 Pa. Super. Ct. 352.

an offer by the defendant to show a sale made by the vendee of the assignee the next day at an increased price.[61]

Same—Same—Matters of Excuse or Mitigation.—It is not error to exclude evidence, offered by the accused, as to a panic in banking circles, resulting in the failure of many banks about the time of the failure of the bank in question, since the fact that the failure was produced by a financial panic was no excuse for receiving money knowing the bank to be insolvent.[62]

Same—Indebtedness of Depositor to Bank.—Evidence that at the time the deposit was received the depositor making the same was overdrawn in an amount larger than the deposit is admissible as tending to show that the deposit was made and accepted as an application on the depositor's indebtedness to the bank.[63]

§ 62 (2c) Weight and Sufficiency—Variance.—Corporate Name and Existence of Bank.—Under a statute providing that in criminal prosecutions corporate existence may be shown by general reputation, it is sufficient, upon the trial of an officer for making false entries in the books of a banking corporation, to show that there was a corporation de facto.[64] And in the prosecution of a bank cashier for receiving a deposit after the bank's insolvency, under an indictment alleging that the bank was a corporation, it is sufficient proof of de facto corporate existence to show that an attempt was made to organize a corporation, and that the institution was conducted and held out to the public as a corporation, and that a statute existed at the time of the indictment authorizing such incorporation, though no such statute existed when the attempt to organize was made.[65]

Exhibiting False Book, etc.—Where the prosecution is for exhibiting a false book to the public bank examiner, it is sufficient, upon an issue as to the defendant's knowledge of its falsity, to prove that during the examination the defendant borrowed enough cash to make up the amount shown by the book, exhibited it to the examiner as cash on hand, and, as soon as the examination was finished, returned the identical money to the bank from which he borrowed it.[66]

Illegal Declaration of Dividend.—Under a statute making it criminal for the president and directors of a bank to declare dividends from funds other than profits, a conviction of the president for participating in the declaration of a dividend when there were no profits and when he had

61. **Same—Same—Proof of value of land conveyed to assignee.**—Commonwealth *v.* Hazlett, 14 Pa. Super. Ct. 352.

62. **Same—Same—Matters of excuse or mitigation.**—State *v.* Burlingame, 146 Mo. 207, 48 S. W. 72.

63. **Same—Indebtedness of depositor to bank.**—Nichols *v.* State, 46 Neb. 715, 65 N. W. 774.

64. **Sufficient to show corporation de facto, when.**—Mears *v.* State, 84 Ark. 136, 104 S. W. 1095.

65. **Same—Proof of de facto corporate existence.**—State *v.* Stevens, 16 S. Dak. 309, 92 N. W. 420.

66. **To show defendant's knowledge of falsity.**—People *v.* Helmer, 13 App. Div. 426, 43 N. Y. S. 642, 12 N. Y. Cr. Rep. 134, judgment reversed on other grounds in 154 N. Y. 596, 49 N. E. 249.

full knowledge of the insolvency of the bank is amply shown by evidence that during the defendant's incumbency as president of the bank it suffered losses through taking papers that proved to be worthless; that these bad debts and worthless papers were not charged off, but were allowed to accumulate until they were sufficient not only to offset all surplus and undivided profits, but to impair seriously the original capital of the institution; and that defendant's long service and intimate knowledge of the bank's affairs was such that he must have known of this condition of its affairs at the time he joined with the directors in declaring the alleged unlawful dividend. And it is wholly unnecessary in such case to impute to the defendant corrupt or malign motives in order to prove a violation of the statute. Nor is it any defense that he held only a few shares of the stock and that not he, but others, received the chief benefit of the dividend declared.[67]

Receiving Deposits after Insolvency—Generally.—Generally speaking, in a prosecution of a bank officer for receiving a deposit knowing that the bank was insolvent, the state must prove that the deposit described in the indictment was actually received; that at the time it was received the bank was insolvent; that accused had knowledge of its insolvency, and, with such knowledge, received or assented to receiving the deposit.[68] Neither knowledge of insolvency nor fraudulent intent need be proved, however, where not made elements of the offense by the statute under which the prosecution is had.[69] Testimony of an accomplice as to a scheme to loot the bank and defraud depositors will warrant a submission of the case to the jury when sufficiently corroborated.[70]

Same—Proof of Insolvency.—In a prosecution under an act making it a crime for a bank officer to assent to the reception of deposits after he knows the bank is insolvent, any estimate the examiner of state banks may have made of the value of the assets of the bank is not conclusive on the question of its solvency or insolvency, which is a question

67. **To prove defendant guilty of participating in declaration of wrongful dividend.**—Cabaness *v.* State, 8 Ga. App. 129, 68 S. E. 849.

68. **Receiving deposits after insolvency—Generally.**—Parrish *v.* Commonwealth, 136 Ky. 377, 123 S. W. 339.

69. **Same—Where knowledge of insolvency and fraudulent intent not made elements of the offense.**—Murphy *v.* People, 19 Ill. App. 125.

70. **Same—Same—Testimony of accomplices.**—State *v.* Clements, 82 Minn. 434, 85 N. W. 229.

On a prosecution for receiving deposits as a banker, knowing the bank's insolvency, an accomplice of accused confessed that he had been a party to a systematic scheme adopted by accused and himself to withdraw gradually the funds of the depositors and place them in accused's hands in an unlawful trust for both. A bookkeeper in the bank testified to numerous instances where, in his absence, accused's name had been erased by chemicals from the bank journals and such accomplice's name inserted in its place, and that he saw accused handling and examining the books. The testimony also tended to show a withdrawal of a large sum of money in the aggregate, which had a direct influence towards the insolvency of the bank. Held, that there was sufficient corroborating evidence, independent of the testimony of such accomplice, to warrant a submission of the case to the jury. State *v.* Clements, 82 Minn. 434, 85 N. W. 229.

of fact, to be determined by the jury, and not the bank examiner.[71] But evidence that a banker closed his bank, refused to pay his depositors money due and payable when demanded, and made an assignment for the benefit of his creditors after preferring some of them, is sufficient, if found by a jury, to establish the banker's insolvency.[72]

Same—Knowledge of Insolvency.—Proof of active participation in the management of the bank's affairs and in fraudulent devices to deceive the public auditor as to the true character of the payments made on its capital stock and to keep the public in ignorance as to the true state of its affairs is sufficient to show knowledge of insolvency.[73] And under a statute providing that failure of a bank within thirty days after receipt of a deposit shall be prima facie evidence of knowledge of the bank's insolvency on the part of the defendant, proof that the bank failed within three days after the receipt of the deposit alleged in the indictment is sufficient, in the absence of any controverting evidence, to sustain a conviction.[74]

Same—Receipt of Deposit or Assent Thereto.—A bank president who continues to keep his bank open after knowledge of its insolvency must be held to authorize and assent to the receipt of deposits by his subordinates during the time it is so kept open; hence, it is not necessary in such a case to prove the name of the person who actually received the deposit, the position he held in the bank, or the name of the person who made it.[75] The contrary has been held in other courts, however, on the ground that the president of an incorporated bank is not the owner, as is generally the case in private banks, and that a charge of receiving the deposit is not sustained by proof of assent to a deposit or proof of the president's presence in the bank or in a back room at the time the deposit was received, even though it be fully shown that he had knowledge of the bank's insolvency at the time.[76]

Same—That Depositor Was Indebted to Bank.—Where the statute contains an exception as to deposits received from persons indebted to the bank, the fact that the depositor from whom a deposit was alleged to have been received was so indebted is a matter of defense, and the state need not prove that he was not so indebted.[77]

71. **Same—Proof of insolvency.**—State *v.* Hoffman, 120 La. 949, 45 So. 951.

72. **Same—Same.**—Commonwealth *v.* Hazlett, 16 Pa. Super. Ct. 534.

73. **Same—Knowledge of insolvency.**—Paulsen *v.* People, 195 Ill. 507, 63 N. E. 144.

74. **Same—Same.**—McClure *v.* People, 27 Colo. 358, 61 Pac. 612.

75. **Same—Receipt of deposit or assent thereto.**—Parrish *v.* Commonwealth, 136 Ky. 377, 123 S. W. 339. See, also, McClure *v.* People, 27 Colo. 358, 61 Pac. 612.

76. **Same—Same.**—State *v.* Wells, 134 Mo. 238, 35 S. W. 615; State *v.* Warner, 60 Kan. 94, 55 Pac. 342; State *v.* Strait, 99 Minn. 327, 109 N. W. 598.

Under Rev. St., § 3581, making it a crime for any bank officer to "receive or assent" to the reception of any deposit of money, knowing the bank to be insolvent, a conviction can not be had on an indictment charging merely that defendant did "receive" the deposit, on proof of an "assent" to the reception of the deposit. State *v.* Wells, 134 Mo. 238, 35 S. W. 615.

77. **Same—That depositor was indebted to bank.**—State *v.* Cadwallader, 154 Ind. 607, 57 N. E. 512.

Variance—Proof of Time Laid in Indictment.—An indictment not alleging any time when the offense was committed is bad; but, when laid, it is unnecessary to prove the particular time as laid, unless the time be material. Thus where the acts charged in the indictment are laid as having been committed on a certain day, evidence that they were committed on a subsequent day is admissible.[78]

Same—Proof of Conversion, Misappropriation, etc.—Where a bank president was indicted in his own state for unlawfully converting the moneys of his bank, evidence that he obtained the money from a bank in another state, with which his own bank had deposits, by means of a check drawn and collected in the other state; that he had no authority to draw such checks; and that the withdrawal of the money was ratified by the officials of his own bank on false representations by him as to the use made of the money, is sufficient to justify the court in leaving to the jury whether there was such infirmity in the checks as made the subsequent ratification in his own state one of the efficient causes of the absorption of the bank's credit, so that the same might be regarded as the consummation of the offense in that state.[79]

Same—Proof of False Entry.—A charge in an information of having made or caused to be made a false entry in the account of an individual with the bank, in that the defendant entered an overdraft of such individual in such manner as to make it falsely appear that such overdraft was a loan owing to the bank, the intent being to deceive the state bank examiner, is not sustained by proof that such entry was of an overdraft drawn upon an account of such individual in which he was designated, not merely by his individual name, but as township treasurer; and such variance is rendered none the less fatal by the fact that in the account he was designated as "treasurer" or simply "Tr.," when such abbreviation evidently meant the same as treasurer; nor was such variance rendered any the less fatal by the fact that in such account there was included private money of the individual referred to as treasurer.[80] But where the accused is charged with having made false entries in the report of the bank as to the amount due from other banks and as to the amount due on time certificates of deposit, there is no merit in a contention that because these two items are embraced together in the information a verdict of guilty can not be upheld unless the proof shows that the report was false as to both items, since a falsification of the report as to either item constitutes a violation of the law, independently of the other item.[81]

78. **Variance—Proof of time as laid.**—Brown *v.* State, 11 O. 276.

In an indictment for acting as an officer of an unauthorized bank, time is not material, and the offense may be proved to have been committed after the day laid. Brown *v.* State, 11 O. 276.

79. **Same—Proof of conversion, misappropriation, etc.**—Putnam *v.* United States, 162 U. S. 687, 40 L. Ed. 1118, 16 S. Ct. 923.

80. **Same—Proof of false entry.**—Williams *v.* State, 51 Neb. 630, 71 N. W. 313.

81. **Same—Same—Proof of one of two averments.**—Ruth *v.* State, 140 Wis. 373, 122 N. W. 733.

Same—Receiving Deposits While Insolvent.—Where the prosecution is for receiving deposits after knowledge of insolvency, the state must prove the actual receipt of the deposit described in the indictment.[82] Thus where the state, in a prosecution of this kind, elects to try the case on the issue of the receipt of a particular deposit set out in a certain count of the indictment, evidence as to the receipt of other deposits at other times is inadmissible.[83] Proof of the receipt of money as a general deposit will not sustain a charge that defendant received it "on deposit and for safe-keeping."[84] But a charge that the defendant received a certain sum stated in dollars and cents is sufficiently proved by evidence showing that part of the amount consisted of checks, certificates of deposit, etc.[85]

Same—Same—Proof of Person Making Deposit.—Evidence that the deposit was made by a different person from the one named in the indictment will not support a conviction.[86]

§ 62 (3) Instructions.—As to Purpose or Intent—Generally.—Where under the terms of the statute, intent to defraud is an essential element of the offense of making a false entry in the books of a bank, an instruction making proof of such intent unnecessary is fatally defective.[87]

82. **Same—Receiving deposits while insolvent—Must prove deposit described in indictment.**—Parrish *v.* Commonwealth, 136 Ky. 377, 123 S. W. 339.

83. **Same—Same—Same.**—Davey *v.* State, 99 Ark. 547, 139 S. W. 629.

Where the state on the trial of an officer of a bank for receiving a deposit with knowledge of the insolvency of the bank elected to try the case on a deposit made two days before the failure of the bank, it was error to permit the state to subsequently rely on a deposit made nearly a year before that time, especially in the absence of a witness who, as disclosed by the application of accused for a continuance, knew more of the condition of the bank than any one else. Davey *v.* State, 99 Ark. 547, 139 S. W. 629.

84. **Same—Same—General and special deposits.**—Koetting *v.* State, 88 Wis. 502, 60 N. W. 822.

85. **Same—Same—Where deposit made up of money, checks, certificate of deposit, etc.**—State *v.* Shove, 96 Wis. 1, 70 N. W. 312; Morris *v.* State (Ark.), 145 S. W. 213.

On the question whether an officer of a bank received on deposit, knowing the insolvency of the bank, $300, for which a certificate of deposit was given, it is immaterial that the proof shows that part of the amount was a certificate of deposit given by the bank, and then due, with accrued interest thereon, which was then surrendered. State *v.* Shove, 96 Wis. 1, 70 N. W. 312.

Proof that accused received $11 in currency on deposit in an insolvent bank, together with checks, sustains a conviction under an indictment charging receipt of $100 in gold, silver, and paper money. Morris *v.* State (Ark.), 145 S. W. 213.

86. **Same—Same—Proof of person making deposit.**—State *v.* Oleson, 35 Wash. 149, 76 Pac. 686.

Where an information charged an officer of a bank with receiving a deposit, after knowledge of the fact that the bank was insolvent, from the "Byron Grocery Company, a corporation," and the proof showed that the deposit was made by a partnership known as Byron & Shumway, and that the corporation named in the information was not in existence at the time the deposit was made, the variance is fatal to a conviction, notwithstanding 2 Ballinger's Ann. Codes & St., § 6846, providing that when a crime involves the commission or attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured is not material. State *v.* Oleson, 35 Wash. 149, 76 Pac. 686.

87. **Omitting element of intent.**—Mears *v.* State, 84 Ark. 136, 104 S. W. 1095.

Same—Specific Intent—Effect of Other Intent.—The question of intent is for the jury, and where, under the statute, the existence of a specific intent is essential to the criminality of the acts charged, it is competent, and a good defense for the defendant to show that in committing the act charged, he was actuated by an entirely different intention, even though such other intention was within itself unlawful. It is error in such a case, therefore, to charge the jury that the existence of such other intention on the part of the defendant would constitute no defense, and that the intention to perform one unlawful act could not excuse another.[88]

Where Statute Mentions Several Intents.—Where the court has several times stated to the jury that the indictment charges the making of false entries in the books of the bank, with intent to deceive the bank examiner, and the making of false reports, with intent to deceive the comptroller, it is not misleading to thereafter say that defendant is guilty if he made such false entries and report "with the intent mentioned in the statute," although the statute mentions several other intents.[89]

Authorizing Conviction upon Proof of Different Intent—Variance.—Where the indictment charges the defendant with having made a false entry with intent to defraud the bank, an instruction authorizing a conviction if the intent was to defraud the officers of the bank is not erroneous.[90]

Defining Fraudulent Intent.—And an instruction telling the jury that if the entry was made by the defendant "with the intention of circumventing, misleading and deceiving the officers of the bank," to his own advantage and benefit; such intention was fraudulent, was held to define correctly fraud as applicable to the facts in evidence.[91]

88. **Specific intent—Effect of other intent.**—People *v.* Comstock, 115 Mich. 305, 73 N. W. 245.

General Banking Law, § 58 (3 How. Ann. St., § 3208f7), provides for the punishment of every bank officer who embezzles the funds of the bank, or who, without authority of the directors, draws any order or bill of exchange, with "intent to injure or defraud the bank." Section 52 restricts the indebtedness of individual debtors of the bank. Under an information charging respondent with having, while acting as clerk and manager of a certain bank, drawn an order or bill of exchange with intent to defraud said bank, respondent was convicted of drawing and issuing a draft to pay an acceptance of his father's without the express authority of the board of directors, the father being at the time indebted to the bank in excess of the amount fixed by the statute. On the trial the respondent testified that he intended to charge the draft to his father's account, that he believed his father would pay it, and that he thought the bank would not lose by the transaction. Held, that it was error to charge the jury that such intent on the part of respondent would constitute no defense, and that the intention to perform one unlawful act could not excuse another. The question of intent was for the jury, as it is not every infraction of the banking law which is a fraud upon and injury to the bank, within the statute. People *v.* Comstock, 115 Mich. 305, 73 N. W. 245.

89. **As to intent where statute mentions several intents.**—United States *v.* Peters, 87 Fed. 984.

90. **Intent to defraud directors or intent to defraud bank—Variance.**—Shipp *v.* Commonwealth, 101 Ky. 518, 19 Ky. L. Rep. 634, 41 S. W. 856.

91. **Instruction defining fraudulent intent.**—Shipp *v.* Commonwealth, 101 Ky. 518, 19 Ky. L. Rep. 634, 41 S. W. 856.

Offense Committed by More than One Person—Participation or Consent—Aiders and Abettors.—On a trial for forgery, in fraudulently altering entries in the bank's books, an instruction that the fact that others than the defendant consented to or assisted in the alteration is no defense, if the change was falsely made with intent to defraud a certain depositor, is not objectionable as leading the jury, to believe that, if the bank's directors consented to the change and did so with intent to defraud said depositor, the defendant would be guilty, though he had no such fraudulent intent; the purport of the instruction being that the consent of the directors to the transaction would not exonerate the defendant if he participated with fraudulent intent.[92] Under an indictment for aiding a bank president in violating the banking laws, an instruction that, to make defendants guilty, they must have done something "showing their consent to or participation in" the unlawful acts of the president could not have misled the jury to understand that the acts of the president were to be treated by them as criminal acts; nor could they have been misled by the use of the disjunctive "or" into supposing that mere consent of defendants to his unlawful acts would be sufficient to render them guilty.[93] Where the charge was that defendants aided the president in misapplying the funds of the bank and in making false entries in its books, and the jury were charged that if the president did knowingly make, or cause to be made, the false entries, they could not find defendants guilty as aiders, unless defendants, with like intent, did something showing their consent to and participation in the "unlawful and criminal acts" of the president, such instruction was not open to the objection that the expression "unlawful and criminal acts" might have been understood as relating to unlawful acts of the president generally.[94]

Restricting Words to Connection in Which Used.—Where in one count of an information the defendant is charged with making false entries in the report of the bank as to the amount due from other banks and as to the amount due on time certificates of deposit, and the court reads such count to the jury, and states that it is for them to determine whether there are any false statements or false entries as to the resources and liabilities of the bank in such report, and whether or not it contains any false statements or entries as to any of the books of the bank, it will be presumed that the jury applied the words "any false statements or false entries" in view of what immediately preceded, namely, that the prosecution was for falsifying the report in the two respects alleged in the information

92. Forgery and fraudulent entries—Instruction as to effect of consent or assistance of other officers.—Quertermous *v.* State, 95 Ark. 48, 127 S. W. 951.

93. Instruction as to consent or participation by person aiding and abetting.—Coffin *v.* United States, 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943.

94. Same—Reference to unlawful acts of principal.—Coffin *v.* United States, 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943.

read to them, and that hence the instruction is sufficiently restrictive, and not prejudicial to the accused.[95]

Exhibiting False Books—Weight of Evidence.—The question whether a defendant has knowingly exhibited false books to the bank examiner is purely one of fact to be determined by the jury from the evidence before it, unprejudiced by any statement as to what another court may have said upon the subject in a previous trial; hence in charging the jury upon the question of the defendant's knowledge in such case, it is reversible error to instruct the jury that, as held by the court upon a former trial of the case, certain evidence is sufficient to satisfy the jury that there was an exhibition or presentation of the books to the examiner by the defendant.[96]

Officer Becoming Indebted to Bank.—An instruction that "it is not, of itself, a crime for the president of a bank to borrow money of the bank of which he is president," is not objectionable because of the presence of the words "of itself."[97]

Receiving Deposits after Insolvency—Insolvency and Failing Circumstances.—In a prosecution for receiving money on deposit with knowledge of the bank's insolvency, the court should charge as to the rule for determining insolvency;[97a] and in those jurisdictions where insolvency is defined to be the inability to pay checks and other obligations in the ordinary course of business, it is not error to instruct that a bank is in failing circumstances when unable to meet the demands of its depositors in the ordinary and usual course of business, even though an inability to so meet demands upon it was caused by a stringency in the money market.[98] And even where the contrary doctrine prevails, an instruction defining insolvency as meaning inability to meet liabilities in the usual course of business is not objectionable, as being too broad in its application to such insolvency as would fasten guilty knowledge on accused, where it was followed by a further charge that, if the assets of a banking firm and of the individual members thereof were insufficient in value to pay the debts of the firm, then the firm was insolvent.[98a] Where there was no effort made by the prosecution to prove that the bank was insolvent merely because it did not have sufficient cash on hand to pay its depositors, and evidence was offered demonstrating that when the bank received the deposit, all its assets, prudently administered, were only sufficient to pay a very small dividend to its depositors, an instruction that a bank is "insolvent," within the meaning of

95. **As to false statements and entries—Restricting words to connection in which used.**—Ruth *v.* State, 140 Wis. 373, 122 N. W. 733.

96. **As to knowingly exhibiting false books—Invading province of jury.**—People *v.* Helmer, 154 N. Y. 596, 49 N. E. 249.

97. **Officer becoming indebted to bank.**—State *v.* Darrah, 152 Mo. 522, 54 S. W. 226.

97a. **Receiving deposits after insolvency—Insolvency and failing circumstances.**—Brown *v.* State (Tex. Cr. App.), 151 S. W. 561.

98. **Same—Same.**—State *v.* Darrah, 152 Mo. 522, 54 S. W. 226.

98a. **Same—Same.**—State *v.* Clements, 82 Minn. 434, 85 N. W. 229.

the law creating such offense, when its property and assets are such that it can not meet its demands in the ordinary course of business should be construed as requiring that the evidence should show that all the bank's assets were insufficient to pay its debts, and was not, therefore, erroneous as authorizing a finding of insolvency in case the bank had insufficient monetary funds to pay depositors on demand.[99] As regards the proof of insolvency it is not error to refuse an instruction that testimony as to the value of assets must not be considered when based on information gained from others, since the only way of ascertaining the value of such assets is to take the estimate at which they are generally held in the market.[1] An instruction discrediting the testimony of the defendant and all his witnesses should not be given because certain witnesses for the defense made their estimates of value upon an improper basis.[2] Where evidence is properly receivable only for the purpose of aiding the jury in determining the condition of the bank, it is proper to limit its effect to that purpose.[3]

Same—Knowledge of Insolvency.—Where knowledge of insolvency is made an essential element of the offense, this fact should be clearly presented to the jury;[4] and where the statute requires that the defendant should have had actual knowledge of insolvency, an instruction authorizing or permitting a conviction on proof of anything less is erroneous.[5]

99. **Same—Same.**—Parrish *v.* Commonwealth, 136 Ky. 377, 123 S. W. 339.

1. **Same—Proof of insolvency.**—State *v.* Darrah, 152 Mo. 522, 54 S. W. 226.

2. **Same—Same.**—Commonwealth *v.* Hazlett, 16 Pa. Super. Ct. 534.

On the trial of an indictment against a banker for receiving deposits when insolvent, where, on the question of insolvency, various witnesses for the defendant have testified as to the value of defendant's property, and two witnesses for the defendant based their estimate on what they would have paid for it in depreciated certificates of the bank, it is error for the court to charge that, if the jury believed the testimony of the two witnesses, then under all the evidence, including the defendant's testimony, the estimates of value were not found upon a proper basis, as such instruction vitiated the testimony of the defendant, and all the other witnesses of the defendant. Commonwealth *v.* Hazlett, 16 Pa. Super. Ct. 534.

3. **Same—Same.**—State *v.* Darrah, 152 Mo. 522, 54 S. W. 226.

It was not error, as commenting upon evidence, on the trial of a president of a bank for assenting to the reception of deposits after knowledge of the bank's insolvency, and where it had been shown that the president had borrowed money of the bank, to instruct that the fact that the president borrowed money of the bank could be considered in determining the condition of the bank, and for no other purpose. State *v.* Darrah, 152 Mo. 522, 54 S. W. 226.

4. **Same—Knowledge of insolvency.**—Commonwealth *v.* Tryon, 31 Pa. Super. Ct. 146.

On the trial of an indictment against a banker for accepting a deposit when insolvent, the prisoner can not complain that the trial judge failed to give due prominence to the question of the prisoner's knowledge of the insolvency, where the court in the course of its charge said: "If he did not have such knowledge, if he believed honestly, as a prudent man in his position would, that he had sufficient assets to be converted into cash that would meet his obligations, then he would not be guilty of the offense charged. This is a question of fact for you from the testimony in the case." Commonwealth *v.* Tryon, 31 Pa. Super. Ct. 146.

5. **Same—Same—Where statute requires actual knowledge.**—State *v.* Dunning, 130 Iowa 678, 107 N. W. 927.

On a prosecution under Code 1885, making it a felony for any banker to knowingly receive deposits when insolvent, unless actual knowledge of

Same—Presumption and Burden of Proof of Knowledge of Insolvency.—An instruction that so long as the defendant retained the presidency of the bank he was presumed to know, and it was his duty to know, its condition as to solvency, is erroneous, since the president is only bound to exercise reasonable care and diligence to ascertain and keep himself informed regarding the bank's financial condition.[6] Even where the statute makes the failure, or failing condition, of the bank prima facie evidence of knowledge of insolvency, it is improper, after declaring the law in that respect, to further emphasize its provisions by telling the jury that it was the defendant's duty to know its financial condition, and that the law presumed that he did know it at the time the deposit was received.[7] An instruction, in the language of the statute, that the failure of a bank is prima facie evidence of knowledge on the part of its president that the same was in failing circumstances, coupled with a statement that prima facie evidence is such as raises such a degree of probability in its favor that it must prevail unless it be rebutted, or the contrary proved, is not erroneous.[8] The fact that the statute creates a prima facie presumption of knowledge from the subsequent failure of the bank does not, however, shift the burden of proof from the state to the defendant, and it is error for the court to refuse, upon request, to give an instruction to that effect, and to make it clear that the defendant may still show the condition of the bank and circumstances tending to exonerate him from criminal liability, and that, on the whole case, the burden of proof would still rest on the state.[9] Failure to so instruct is not cured by other general instructions that the jury must be satisfied of the defendant's guilt, and that the law presumes his innocence.[10]

Receipt or Assent to Receipt of Deposit.—Instructions relating to the receipt of deposits, or assent to receipt of deposits, are not erroneous where, taken as a whole, they make it clear that the deposit must have been

the insolvency is shown, an erroneous instruction that if defendant had acted as a reasonable and prudent man in the conduct of his business as a banker, and, based on his so acting, he had a right to believe and did believe that he and the bank were solvent, he must be acquitted, was prejudicial, though other instructions had positively declared that the deposit must have been received when the bank and the defendant were in fact insolvent, and that it must be shown that the defendant then knew of such insolvency. State *v.* Dunning, 130 Iowa 678, 107 N. W. 927.

Rev. Laws 1905, § 5118, makes it a criminal offense for a banker to receive deposits when he is insolvent. Accused, a private banker, was convicted of such offense. Held error to instruct the jury that it was sufficient if the state proved beyond a reasonable doubt that accused had good reason to know he was insolvent. State *v.* Drew, 110 Minn. 247, 124 N. W. 1091.

6. **Same—Presumption and burden of proof of knowledge of insolvency.**—McClure *v.* People, 27 Colo. 358, 61 Pac. 612.

7. **Same—Same.**—State *v.* Salmon, 216 Mo. 466, 115 S. W. 1106.

8. **Same—Same—Defining prima facie evidence in language of statute.**—State *v.* Buck, 120 Mo. 479, 25 S. W. 573; State *v.* Sattley, 131 Mo. 464, 33 S. W. 41; State *v.* Darrah, 152 Mo. 522, 54 S. W. 226.

9. **Same—Same—Shifting of burden of proof.**—State *v.* Darrah, 152 Mo. 522, 54 S. W. 226.

10. **Same—Same—Same.**—State *v.* Darrah, 152 Mo. 522, 54 S. W. 226.

received either actually by the defendant, or with his knowledge and consent, or that knowing of the unlawful receipt of the deposit, he accepted and received it and placed it among the funds of the bank.[11]

§ 62 (4) Verdict.—Where an indictment, contains a count for receiving a deposit, knowing that the bank is insolvent, and another count for assenting to the creation of an indebtedness by the bank, with such knowledge, and the evidence shows but one transaction, which consisted in receiving a deposit and issuing a certificate therefor, a general verdict of guilty, without specifying on which count, is sufficient.[12] Where the statute fixes the punishment for receiving a deposit while insolvent, which is lost to the depositor, at a fine in double the amount of the deposit, and, in addition, imprisonment—the imprisonment being optional—a general verdict fixing the amount of the fine and the term of imprisonment, without finding as to the amount of the deposit, is not invalid.[13] And a verdict of guilty in such case, against F. and C., codefendants, and fixing the "punishment of said F. and C. at a fine of twenty-eight dollars, and, in addition thereto, at imprisonment for one year," is not defective, as fixing a joint, instead of several, punishment.[14]

§ 62 (5) Sentence and Punishment.—Under a statute making it a felony for an insolvent banker to receive deposits, a judgment of conviction, sentencing the accused to the penitentiary at hard labor for the term of five years, is not reversible as providing excessive punishment.[15]

11. Receipt, or assent to receipt, of deposit.—State v. Eifert, 102 Iowa 188, 65 N. W. 309, 71 N. W. 248, 38 L. R. A. 485, 63 Am. St. Rep. 433.

On trial of an indictment of a banker for receiving deposits when insolvent, it was proper to charge that, though the deposit was received by defendant's son after defendant had instructed him to refuse deposits, if defendant, on learning that the deposit was so received, placed it among the funds of the bank, he "knowingly accepted and received" it, within the statute. State v. Eifert, 102 Iowa 188, 65 N. W. 309, 71 N. W. 248, 38 L. R. A. 485, 63 Am. St. Rep. 433.

An instruction on trial of a banker for receiving deposits when insolvent, that it is enough that the deposit, though not received by him personally, was received under his authority, is not error, though the evidence is that it was received against his order, where such charge is but part of the instruction, and aids in making plain a pertinent charge following, as to defendant's accepting the deposit after it had been so received. State v. Eifert, 102 Iowa 188, 65 N. W. 309, 71 N. W. 248, 38 L. R. A. 485, 63 Am. St. Rep. 433.

On trial of a banker for receiving deposits when insolvent, it is proper to instruct that though the deposit was received against defendant's orders, if, on learning that it had been received, he placed it among the funds of the bank, he "knowingly accepted and received" it, within the statute, such instruction resting the acceptance on defendant's own acts, not on a ratification of the acts of others. State v. Eifert, 102 Iowa 188, 65 N. W. 309, 71 N. W. 248, 38 L. R. A. 485, 63 Am. St. Rep. 433.

12. Verdict—Failure to distinguish between counts.—State v. Sattley, 131 Mo. 464, 33 S. W. 41.

13. Same—Failure to find amount of deposit.—Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447.

14. Same—Fixing joint instead of several punishment.—Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447.

15. Sentence and punishment, excessive sentence.—State v. Boomer, 103 Iowa 106, 72 N. W. 424.

Restitution.—To authorize a judgment of restitution under a statute requiring, in addition to the prescribed punishment, in crimes which include in their perpetration the obtaining of money, that the defendant shall be adjudged to restore such money to its owner, the indictment must show that the defendant obtained the money.[16]

Costs.—Where the receipt of deposits after insolvency is made a misdemeanor, and the question of costs in such cases left to the jury, they should dispose of the same in their verdict.[17]

16. **Restitution.**—Huntzinger *v.* Commonwealth, 97 Pa. 336.

Therefore a judgment of restitution can not be supported by an indictment alleging that defendants, being the president and cashier of a bank, a corporation, did conspire to cheat and defraud K. of $24,000 by means of falsely and fraudulently representing to said K. that said bank was solvent, and thereby inducing him to deposit in said bank the said $24,000, whereas defendants well knew said bank was wholly insolvent. Huntzinger *v.* Commonwealth, 97 Pa. 336.

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CHAPTER VI.

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§ 85. —— Prosecution and Punishment.

E. INSOLVENCY AND DISSOLUTION.[1]

§ 63. Constitutional and Statutory Provisions—§ 63 (1) Constitutionality of Statutes.—It is under art. 1, § 10, of the federal constitution that most of the constitutional questions respecting banks have arisen, and these controversies usually grow out of alleged violations of the sanctity of the bank's charter by subsequent state legislation. It has been truly said that no provision of the federal constitution has received more frequent consideration than this one.[2] For example, the statutory modes prescribed for winding up banking corporations constitute a contract with the creditors, and a statute taking them away entirely impairs the obligation of the contract.[3] In like manner a law authorizing and requiring a corporation to distribute its property among its stockholders, or to transfer it to its sole stockholder, leaving its bills unredeemed, impairs the obligation of the contract contained in those bills.[4] And a law which withdraws from the reach of legal process the real property of a bank, which at the time

1. As affecting power to borrow money, see post, "Borrowing Money," § 97.

Enforcement of liability of stockholders, see ante, "Actions and Proceedings to Enforce," § 49.

Of national banks, see post, "Insolvency and Its Effect in General," § 285.

Power to impose penalty for conduct of business by insolvent bank, see ante, "Power to Control and Regulate," § 3.

Of savings banks, see post, "Insolvency and Receivers," § 309.

Of trust companies, see post, "Functions and Dealings," § 315.

Insolvency of collecting bank, effect on liabilities as to proceeds of collections, see post, "Insolvency of Collecting Bank," § 166.

Temporary receivership as affecting liability for interest on deposits, see post, "Interest on Deposits," § 132.

Enforcement of liability of loan, trust and investment companies, see post, "Insolvency and Receivers," § 317.

Action against receiver on fraudulently certified check, see post, "Actions by Payees or Holders of Checks against Bank," § 155.

2. See Barnitz v. Beverly, 163 U. S. 118, 41 L. Ed. 93, 16 S. Ct. 1042.

3. Bank Comm'rs v. Bank (Mich.), 1 Har. 106.

Contract to suspend forfeiture proceedings.—Act May 4, 1841—which suspended proceedings against nonspecie paying banks for the forfeiture of their charter on condition of their paying specific sums in relief notes into the state treasury—was a contract between the state and the accepting banks, which was binding on the state until the loan was repaid. Long v. Farmers' Bank (Pa.), 1 Clark 284.

The act of the legislature of 1843 provided that, on judgment of forfeiture against a bank when its debts could not be extinguished, trustees should be appointed to collect them. Held, that the Act of 1846, providing that trustees appointed under such Act of 1843 should sell to the highest bidder the property and evidence of debts of banks to whom charters were forfeited under that act, in so far as it prohibited the right of such trustees to enforce payments of the debts, and destroyed the trust character of the fund for the benefit of creditors, was unconstitutional. Commercial Bank v. Chambers (Miss.), 8 Smedes & M. 9.

The Act of 1840 which provides for the appointment of a receiver to take charge of the assets of banks where the charters thereof may be declared forfeited by judicial proceedings, and the several acts amendatory thereof, do not impair the rights of the debtors to the bank. The statute being remedial in its character, is not unconstitutional. Hall v. Carey, 5 Ga. 239.

4. Curran v. Arkansas (U. S.), 15 How. 304, 14 L. Ed. 705.

"The state had no right to pass these laws, under the circumstances, either as a creditor of the bank or as a trustee taking possession of the real estate for the benefit of all the creditors." Curran v. Arkansas (U. S.), 15 How. 304, 14 L. Ed. 705.

of the execution of the contract was liable to be subjected to the satisfaction of such contract, and which provides no substitute remedy, thereby reducing the creditors of the bank to a condition in which their rights "live but in grace, and their remedy is entreaty only," impairs the obligation of their contracts and is therefore invalid.[5] Likewise, a statute appropriating the bank's assets to the payment of debts due the state in preference to other creditors,[6] or a statute which deprives creditors of the right to follow the assets of an insolvent bank into the hands of any one not a bona fide purchaser, without notice and appropriates the property to other uses,[7] or a statute subsequently enacted which allows a debtor to a bank to discharge his obligations to it in a different medium from that in which they were soluble when contracted,[8] impair the obligation of contract and are invalid. And when a bank becomes insolvent, the conflicting rights of its various creditors and stockholders are questions for the courts, to be determined in accordance with the laws then in force. It is not the province

5. Withdrawing assets from creditors.—Curran *v.* Arkansas (U. S.), 15 How. 304, 14 L. Ed. 705.

In 1836, the legislature of Arkansas incorporated a bank with the usual banking powers of discount, deposit, and circulation, the state being the sole stockholder. The bank went into operation, and issued bills in the usual form, but in November, 1839, suspended specie payments. The bills of the bank being payable on demand, there was a contract with the holder to pay them; and laws, which withdrew the assets of the bank into a different channel, impaired the obligation of this contract. Curran *v.* Arkansas (U. S.), 15 How. 304, 14 L. Ed. 705.

Nor does the repeal or modification of the charter of the bank by the legislature prevent this conclusion from being drawn. Curran *v.* Arkansas (U. S.), 15 How. 304, 14 L. Ed. 705.

6. Preferences given the state in the assets.—Though the stock of a bank be altogether owned by a state, if the bank is insolvent its assets can not be appropriated by legislative act or otherwise to pay the debts of the state, as distinguished from the debts of the bank. Those assets are a trust fund first applicable to the payment of the debts of the bank. Baring *v.* Dabney (U. S.), 19 Wall. 1, 22 L. Ed. 90.

An act of the legislature requiring the managers of an insolvent bank belonging to the state to hold its assets appropriated to the payment of certain specified debts, creates a trust in favor of the creditors holding said debts, and, if assented to by them, amounts to a contract with them to carry out said trust. Baring *v.* Dabney (U. S.), 19 Wall. 1, 22 L. Ed. 90. If such an act, however, has the effect to appropriate the assets of the bank to pay the debts of the state, to the prejudice of bill holders and other creditors of the bank, it is repugnant to that clause of the constitution which prohibits a law impairing the obligation of contracts, and is void. Baring *v.* Dabney (U. S.), 19 Wall. 1, 22 L. Ed. 90.

The fact that a state is the sole stockholder in an incorporated bank does not change the nature of the relation of such bank to its creditors, and therefore, when such bank becomes insolvent, an act of the general assembly authorizing and requiring the governor, for and on behalf of the state, to take possession of the assets, is unconstitutional, as depriving the creditors of the bank of their right to such assets. State *v.* State, 1 S. C. 63.

A provision in a state statute for a preference in favor of a savings bank in the distribution of the funds of an insolvent national bank is void because in conflict with the federal statutes requiring the distribution ratably to the creditors. Davis *v.* Elmira Sav. Bank, 161 U. S. 275, 40 L. Ed. 700, 16 S. Ct. 502.

7. Statutes taking away right to follow assets.—State *v.* Bank, 64 Tenn. (5 Baxt.) 1.

8. Right of debtor to pay debt in notes of bank.—Woodrull *v.* Trapnall (U. S.), 10 How. 190; Miller *v.* Andrews, 43 Tenn. (3 Coldw.) 380.

of the legislature to legislate upon the subject. A law assuming to declare or settle the conflicting rights growing out of these past transactions is manifestly ex post facto.[9] But where the general assembly has reserved the right to alter or repeal the bank's charter, an act placing upon the same footing all creditors not having specific liens is not obnoxious to the charge of interfering with vested rights or impairing the obligation of contracts.[10] And a statute making the circulating notes of a bank an offset to its claims is unobjectionable.[11]

Summary Remedies by Execution.—It has been held, that an act of a state legislature giving a bank a summary process against debtors on paper expressly made negotiable at the bank is not unconstitutional.[12]

Statutes Restricting Powers of Trustee.—In authorizing the appointment of a trustee where a banking corporation is dissolved, the state undoubtedly has a right to restrict his power within such limits as it thinks proper. And the trustee may exercise no power over the assets or credits of the bank beyond that which the law authorizes.[13]

Constitutionality of Acts Allowing Suits.—Acts allowing banks, or the trustees of banks, which have been dissolved or whose charters have expired, to prosecute suits against their debtors, are constitutional.[14]

Waiver of Constitutional Objections.—A creditor of a bank who voluntarily submits his claim to the determination of an officer appointed

9. State v. Bank, 64 Tenn. (5 Baxt.) 1.

Bank notes are entitled to a priority of payment out of the assets of the bank, whether issued before or after the 6th of May, 1861, the date at which the ordinance of secession was passed, and the provisions of the amended constitution of 1865 and accordant state legislation repudiating the liability of the bank for deposits received and notes issued after that date, are held void as impairing the obligation of contracts. State v. Bank, 64 Tenn. (5 Baxt.) 1.

10 Robinson v. Gardiner, 59 Va. (18 Gratt.) 509.

11. Statute allowing set-off of circulating notes.—Acts 1842, Nos. 98, 157, and 1843, No. 92, provide specially for holders of notes of banks in liquidation, and make the circulation of each a good offset to its claims; and, in compelling the commissioners to allow such offsets, they violate no vested right, and impair the obligation of no contract. Exchange & Banking Co. v. Mudge (La.), 6 Rob. 397.

12. Attachment against parties to paper negotiable at bank.—The act of assembly of Maryland, of 1793, c. 30, incorporating the Bank of Columbia, and giving to the corporation a summary process, by execution in the nature of an attachment, against its debtors who have, by an express consent, in writing, made the bonds, bills or notes, by them drawn or indorsed, negotiable at the bank, is not repugnant to the constitution of the United States or of Maryland. Bank v. Okely, 4 Wheat. 235, 4 L. Ed. 559. See Bank v. Sweeney, 2 Pet. 671, 7 L. Ed. 557.

But the last provision in the act of incorporation, which gives this summary process to the bank, is no part of its corporate franchises, and may be repealed or altered, at pleasure, by the legislative will. Bank v. Okely, 4 Wheat. 235, 4 L. Ed. 559.

13. Restriction of trustee's authority.—Robertson v. Coulter (U. S.), 16 How. 106, 113, 14 L. Ed. 864.

And if the statute clothes him with the power to collect the debts and deal with the assets of the bank to a certain amount only, and for certain purposes, such a limitation of his authority does not interfere in any degree with the obligation of contracts. Robertson v. Coulter (U. S.), 16 How. 106, 14 L. Ed. 864.

14. Statutes authorizing suits against trustees.—Lewis v. McElvain, 16 O. 347; Cuyahoga Falls Real Estate Ass'n v. McCaughy, 2 O. St. 152; Bates v. Lewis, 3 O. St. 459.

under the authority of a statute, to take proof of claims, and at the hearing makes no objection to the proceeding, waives his right to question the constitutionality of the statute making the decision of such officer final.[15]

§ 63 (2) Interpretation and Construction of Statutes.—Statutes authorizing the institution of insolvency proceedings against banks are to be strictly construed.[16] Hence, statutes providing for the forfeiture of charters of insolvent banks do not operate retroactively.[17] Repeals by implication are not favored,[18] but an act covering the subject matter of a former act refines it.[19]

§ 64. Voluntary Liquidation and Dissolution—§ 64 (1) Voluntary Liquidation—§ 64 (1a) Definitions.—Liquidation of a banking corporation implies the winding up of its affairs.[20]

§ 64 (1b) Methods of Liquidation.—The banking laws in most ju-

15. Waiver of constitutional objections.—Dowd *v.* City Sav. Bank, 59 N. H. 391.

16. Construction of statutes allowing insolvency proceedings.—A banking association, organized under the Act of 1838, "to authorize the business of banking," is not a corporation, within the meaning of the statute, liable to be proceeded against for insolvency or other causes specified therein. Parmly *v.* Tenth Ward Bank (N. Y.), 3 Edw. Ch. 395.

17. Forfeiture of bank charters.—The provisions of the statute of April 21, 1825, providing for the forfeiture of the charters of insolvent banks, do not apply to cases of forfeiture happening before it was passed. People *v.* Niagara Bank (N. Y.), 6 Cow. 196.

18. Implied repeals.—The power conferred on the board of currency by St. Feb. 5, 1842, § 2, and St. March 14, 1842, §§ 15, 27, 28, 29, of requiring that the books, papers, and minutes of the proceedings of the board of managers and directors appointed to liquidate the affairs of the Citizens' Bank should be subject to examination by them and of supervising the proceedings of the managers and directors, was not repealed by the subsequent statutes (St. April 5, 1843, § 8, and St. April 6, 1847). Board *v.* Managers, 3 La. Ann. 346.

The Act of 1850, which directed a sale of the remaining assets of the Planters' & Merchants' Bank of Mobile, does not repeal, by implication, the Act of 1845, which authorized the appointment of trustees to settle its affairs, and gave them power to use all the remedies to which the bank, while in existence, was entitled; and a sale, pursuant to the act, of notes then in suit, does not affect the further prosecution of it for the benefit of the purchaser. Jemison *v.* Planters', etc., Bank, 23 Ala. 168.

Implied repeal by repugnancy.—Where one act directed the appointment of trustees, to sue for and collect the debts, and sell the property of charter forfeited banks, and a subsequent act directed a sale of debts and property in a prescribed mode, it was held that there was a direct repugnancy between the two acts. Commercial Bank *v.* Chambers (Miss.), 8 Smedes & M. 9.

An act provided that, when the charters of banks were declared forfeited, the debts due by and to them should not be extinguished, but that trustees should be appointed to sue for and collect the debts due to them. An act was subsequently passed directing the trustees to sell all the debts due to the banks to the highest bidder for cash. Held, that the last law, if constitutional, repealed the former by implication. Commercial Bank *v.* Chambers (Miss.), 8 Smedes & M. 9.

19. Act March 24, 1909 (Laws 1909, c. 191), § 22, making it a felony to publish any false statement of the amount of the assets or liabilities of any bank, was repealed by Act March 22, 1911 (Laws 1911, c. 150), which makes it an offense to make such false statements. Eureka County Bank Habeas Corpus Cases (Nev.), 126 Pac. 655.

20. Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. S. 798.

risdictions prescribe the method of winding up the affairs of a bank, and this method, when so prescribed, is exclusive.[21] Thus a bank may be dissolved by a resolution of its board of directors,[22] or by a surrender of its charter or seizure of its franchises,[23] or by a transfer of its business to another man.[24] The owners of two-thirds of the stock may vote for liquidation.[25] And this means three-fourths of the stock represented at the meeting called to consider the question of dissolution, not three-fourths of the entire stock.[26]

21. Methods of liquidation.—Verplanck *v.* Mercantile Ins. Co., 1 Edw. Ch. 84; Hitch *v.* Hawley, 132 N. Y. 212, 30 N. E. 401; Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. S. 798.

Liquidation agreements.—An agreement by one bank to liquidate another providing for a personal guaranty against loss to the first bank does not imply release of the second bank from liability. Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. S. 798.

One bank agreeing to liquidate another was not entitled to the fixed compensation until full performance. Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. 798.

An agreement by one bank to liquidate another implied repayment covering its advances and expenses. Assets Realization Co. *v.* Howard, 70 Misc. Rep. 651, 127 N. Y. 798.

22. Dissolution by resolution of board.—A banking association, organized under the general banking laws of this state, has the power, by a resolution of its board of directors, voluntarily to dissolve itself and close its business, and to distribute a portion of its capital and surplus earnings among the stockholders. People *v.* Olmsted (N. Y.), 45 Barb. 644.

23. Dissolution by surrender of charter.—Cooper *v.* Curtis, 30 Me. 488.

Effect of seizure of corporate franchises.—A seizure of the franchises of a corporation effects its dissolution. But a judgment of seizure of the franchises for a violation of the charter of a corporation should not direct a seizure of the corporate possessions. The better opinion is that such a judgment does not dissolve the corporation, though the seizure of the franchises by execution issued upon the judgment may work such dissolution. State Bank *v.* State (Ind.), 1 Blackf. 267, 12 Am Dec. 234.

Abuse of corporate franchises works a forfeiture of the franchises, but not of the lands or chattels of the corporation. State Bank *v.* State (Ind.), 1 Blackf. 267, 12 Am. Dec. 234.

Voluntary surrender of charter.—A banking corporation can not, by a voluntary surrender of its franchises, dissolve itself at will. Subsequent legislative assent is necessary. Mechanics' Bank *v.* Heard, 37 Ga. 401.

What constitutes surrender of franchise.—The closing of a bank and calling on the superintendent of banks to take charge of its assets, resulting from fright or overcaution in view of the financial situation existing, or from ignorance of the bank's actual solvency, were not a surrender of the bank's corporate franchise, since surrender of a corporate franchise can not be inferred even from insolvency and suspension of business for a less period than that designated by the statute, unless the circumstances are such as to make it appear that the corporation has not power to continue or resume its business. People *v.* Oriental Bank, 124 App. Div. 741, 109 N. Y. S. 509.

24. Dissolution by transfer of assets.—A bank, desiring to quit business, may transfer its accounts to another bank, and pay its depositors with borrowed money, and pledge its assets for such purpose. Overstreet *v.* Citizens' Bank, 12 Okl. 383, 72 Pac. 379.

25. Who may vote for liquidation of national bank.—Whenever the owners of two-thirds of the shares should agree that they do not desire to continue the business, they may, under the forms prescribed, terminate the existence of the bank, and wind up its affairs; that is, provide for payment of its debts and distribution of the surplus of its assets among the shareholders. Green *v.* Bennett (Civ. App.), 110 S. W. 108, 115, citing Watkins *v.* National Bank, 51 Kan. 254, 32 Pac. 914; Windmuller *v.* Standard Distilling, etc., Co., 114 Fed. 491.

26. Dreifus *v.* Colonial, etc., Trust Co., 123 La. 61, 48 So. 649.

Suspension of Specie Payment.—During periods of great financial depression, banks are frequently authorized by statute to suspend specie payments.[27]

§ 64 (1c) Time of Dissolution.—The duration of banking corporations is often prescribed in the charter.[28]

§ 64 (1d) Estoppel.—Persons consenting to a voluntary liquidation of a bank are thereafter precluded from questioning its validity.[29]

§ 64 (2) Involuntary Liquidation.—Under the Act of the Virginia Legislature of February 12, 1866, the banks of the commonwealth were required to go into liquidation, when insolvent, and execute deeds conveying all their property, including debts due to them, to trustees for the payment of their debts.[30]

§ 65. Reorganization—§ 65 (1) In General.—The method of effecting the reorganization of a bank is prescribed by statute in most jurisdictions.[31]

27. Suspension of specie payment.—The charter of the bank of the state of Indiana (§ 45) does not authorize a suspension of a specie payment within Const., art. 11, § 7. Wright *v.* Defrees, 8 Ind. 298.

Right to premium on specie payments.—The banks of this commonwealth in which the public moneys were on deposit, paid the interest falling due in January, 1840, upon public loans, in specie or its equivalent. Under the proviso to the second section of the Act of March 28, 1838 (Sess. Acts of 1838, p. 27, ch. 13), they claimed credit in account with the commonwealth for the premium which they had to pay to the public creditors for the then difference between specie and the notes of the banks. Held: 1. That under the acts in 2 R. C., 1819, ch. 174, § 6, p. 2, and in Sess. Acts of 1838, p. 27, ch. 14, the claim of any bank for such premium may properly be presented to the first auditor. 2. That, upon the disallowance of such claim, the bank may file a petition for redress to the court of chancery for Henrico and Richmond, created by the Act of March 13, 1840-41, p. 65, ch. 48. 3. That according to the true construction and effect of the Act of December 11, 1839, in Sess. acts of 1839-40, p. 52, ch. 63 (especially the first proviso thereto), the claim of any bank for the premium so paid must be disallowed; dissentiente Brooke, J., on the last point. Commonwealth *v.* Farmers' Bank (Va.), 2 Rob. 737.

28. Time of dissolution.—A clause in the charter of a bank providing that the corporation shall not be dissolved before the time specified for the expiration of its charter, until all its debts are paid, does not prevent the seizure of its franchise for violation of its charter. State Bank *v.* State (Ind.), 1 Blackf. 267, 12 Am. Dec. 234.

29. Estoppel by agreement to dissolution.—A depositor in an insolvent bank who consented to a liquidation agreement whereby another bank took over the assets of the insolvent institution can not, at a later date, question its validity. Wilde *v.* Oregon Trust, etc., Bank, 59 Ore. 551, 117 Pac. 807.

But where a creditor's claim against an insolvent bank has been approved, he is already in court, and need not petition for permission to intervene before attacking a liquidation agreement. Wilde *v.* Oregon Trust, etc., Bank, 59 Ore. 551, 117 Pac. 807.

30. Exchange Bank *v.* Knox, 60 Va. (19 Gratt.) 739, reaffirmed in Saunders *v.* White, 61 Va. (20 Gratt.) 327; Bank *v.* Marshall, 66 Va. (25 Gratt.) 378.

31. Hunt *v.* Roosen, 87 Minn. 68, 91 N. W. 259.

A dismissal by the court of a petition for reorganization of a bank under chapter 89, Gen. Laws 1897, without prejudice, disposes of the matter until it is reinstated upon notice to parties interested therein; and a subsequent judgment rendered on such petition is without merit, unless based

§ 65 (2) Effect of Reorganization—§ 65 (2a) In General.—The old bank continues to exist for the purpose of winding up its affairs and to that end may sue and be sued.[32]

§ 65 (2b) On Liability for Debts of Old Corporation.—Where the reorganized bank is the same as the original bank, it is liable for the unpaid debts of the latter.[33] But when a new banking corporation, with different stockholders, is formed out of another, it can not be sued by the creditors, or be held liable for the debts of the old corporation, except upon some special ground, such as having received assets of the old corporation without giving value therefor.[34]

upon the express consent of the parties interested. Abel *v.* Allemania Bank, 79 Minn. 419, 82 N. W. 680.

32. Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

33. Liability of reorganized bank for debts of old bank.—Where certain persons enter into an agreement with the shareholders of an insolvent bank, by which they bind themselves to open the bank and continue its business and to pay its debts to a specified amount, if such shareholders will release and surrender to them all the stock and assets of the bank, it was held that the bank as reorganized is in law the same as the original bank, and becomes liable for its unpaid debts. Island City Sav. Bank *v.* Wales, 3 Tex. App. Civ. Cases, § 244; Island City Sav. Bank *v.* Sachtleben, 67 Tex. 420, 3 S. W. 733.

Rights of depositors.—A special deposit of money was made with a branch bank, and this branch being withdrawn, and a new bank established with the same officers, the deposit went into the possession of the new bank, and was embezzled by its cashier. Held, that the depositor should have been notified of the transfer, and, unless he assented thereto, the old bank must bear the loss; but if, before the loss, he acquiesced in the arrangement, he must be presumed to have consented either that the new bank should hold the deposit on its own account, or as the agent of his bailee. If the deposit was so held by the new bank in its own right, the old bank was released from all liability. Ray *v.* Bank, 73 Ky. (10 Bush) 344.

Where an insolvent banking association, after suspension of business, compromised with all its depositors, save one, on the basis of a payment of seventy-four cents on a dollar, and transferred all its assets, including its name and franchise, to a new association, and obligated itself to pay back to the new association any amount it might be compelled to pay in excess of the seventy-four per cent compromise, which compromise the new association agrees to pay, and such new association resumed its business under the old name and franchise, using the seal of the insolvent bank, there is a mere change of membership and not a change of the corporation itself; and the bank as reorganized is liable to a depositor who refused to compromise for the full amount of his debt with interest from the date of demand. Island City Sav. Bank *v.* Sachtleben, 67 Tex. 420, 3 S. W. 733. See, also, Island City Sav. Bank *v.* Wales, 3 Tex. App. Civ. Cases, § 244.

But a banking firm, by accepting the assets of a bank and agreeing to pay its debts, did not act in a fiduciary capacity with respect to the deposits of the bank and the repayment thereof to depositors, since a depositor, by placing money in the bank, was not entitled to demand of the bank the return of the identical money, but only a sum of money equal to that deposited; and hence the agreement of the firm, on the assets being turned over to it, was to pay the deposit out of the assets, but not to return the specific deposit. Hoskins *v.* Velasco Nat. Bank, 48 Tex. Civ. App. 246, 107 S. W. 598.

34. Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

When a bank becomes insolvent, it may, under proper contract, transfer its assets to a new association, which may continue a similar business without incurring liability for the debts of the insolvent corporation. Island City Sav. Bank *v.* Sachtleben, 67 Tex. 420, 3 S. W. 733. See, also, Island City Sav. Bank *v.* Wales, 3 Tex. App. Civ. Cases, § 244.

The mere receipt by the officers of

§ 65 (2c) On Rights and Liabilities of Stockholders.—The rights of stockholders upon reorganization depend largely upon the terms of the reorganization scheme.[35]

a new bank, of the bills of an old bank of the same name, and paying out the same bills, does not make the new bank responsible to pay all the bills of the old bank. Bellows *v.* Hallowell, etc., Bank, Fed. Cas. No. 1,279, 2 Mason 31.

Where a new bank is incorporated with the same name as an old one, whose charter is about to expire, the new bank is not responsible for the notes of the old, though a major part of the stockholders are the same in each. Bellows *v.* Hallowell, etc., Bank, Fed. Cas. No. 1,279, 2 Mason 31.

Under St. Feb. 5, 1842, No. 22, reviving the charters of the banks in New Orleans, only the debts due them at the date of the act can be considered a part of their "dead weight." Debts subsequently contracted, though between the date of the passage of the act and its promulgation, or acceptance by the banks, are not included in the "dead weight." City Bank *v.* Barbarin (La.), 6 Rob. 289.

Proof that a bank issued the notes of a former bank of the same name will not make it responsible therefor, unless it issued them as its own notes, nor then, except as to the very notes issued. Wyman *v.* Hallowell, etc., Bank, 14 Mass. 58, 7 Am. Dec. 194.

Where a banking company, incorporated by the same name with a former one, appoints the same president and cashier, and the officers receive and issue the notes of the former company, and declare that there is no difference between the notes thus issued and those of the new company, the new company, never having authorized these proceedings, is not liable to pay such notes. Wyman *v.* Hallowell, etc., Bank, 14 Mass. 58, 7 Am. Dec. 194.

The pleadings.—A petition seeking to charge a newly-organized corporation for the debts of a bank to whose business and property it had succeeded, which did not allege a contractual liability, or that the corporation did not in good faith, in the usual course of business, purchase and pay for the rights and property of the bank, but showed merely that the corporation, by some undisclosed means, acquired the assets, business, and good will of the bank, and that the bank's business was at one time conducted in the room occupied by the corporation, and by men who had been officers and stockholders of the bank, and who became stockholders and officers of the corporation, was insufficient. Austin *v.* Tecumseh Nat. Bank, 49 Neb. 412, 68 N. W. 628, 35 L. R. A. 444, 59 Am. St. Rep. 543.

35. Rights of stockholders.—Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556.

Where upon the reorganization of an insolvent bank, new stock is issued and the holders of the new shares assume control of the bank, paid up stock of nonconsenting shareholders was not subject to further assessment for any purpose. The corporate existence of the old organization continued, notwithstanding its insolvency and suspension of business, and the legal rights of shareholders could not be taken from them by a majority, however large. Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556.

Where upon the reorganization of a bank one of the old stockholders is refused recognition as a stockholder in the new organization, the conversion of his stock took place at the date of demand by him for recognition as a stockholder. Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556.

Where the owner of stock in a bank which is reorganized delays for four years in demanding recognition as a stockholder and sues for the value of his stock, the aid of equity to reinstate him in the enjoyment of the privileges of a stockholder in the new organization should be withheld. The managers of the bank have been allowed to go on and establish it in accordance with the arrangements made four years before, and the business of the bank is doubtless readjusted to its changed conditions, and the plaintiff can be compensated in money for any damage he has sustained, and that should be his remedy. Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556.

Where the stock of an old bank which has been reorganized is transferred to the plaintiff it was held that he was not an innocent holder and that he acquired only such rights by his purchase as the original owners

§ 65 (3) Validity of Reorganization Proceedings.—The fact that creditors are not made parties to a reorganization agreement does not affect its validity.[36] Nor can the irregularity of reorganization be set up as a defense to an action brought by the new bank.[37]

§ 65 (4) Reorganization Agreements.—An agreement by stockholders of a bank to supply a deficiency of the assets to cover liabilities as a part of a plan of reorganization, may be enforced by the receiver in accordance with its terms.[38] Nor is such agreement invalid because the

had, but he had a right to maintain a suit for reinstatement as a stockholder or for conversion of the stock upon the lien transferred by the original owners of their stock. Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556.

Stockholders of reorganized savings bank.—The depositors of a membership savings bank, which was in need of funds, met and agreed to reorganize as a capital bank, whereupon subscription books were opened, the old depositors being preferred in the right to subscribe for stock, and their subscriptions being made payable by their funds in the savings bank. A large amount of stock was taken in the manner, amounting nearly to the amount of the bank's deposits, and such subscribers, before all the stock was taken, incorporated and organized the bank, and proceeded to operate it. These subscriptions were unconditional in form, and soon thereafter the bank suspended, and turned over its assets to a board of directors for liquidation. The board collected the assets, and proceeded to pay dividends on deposits, excluding such as had been applied in payment for stock. Held, that such stockholders could not now claim their subscriptions to have been conditional on the subscription of the entire capital of the bank, and be relegated to their rights as depositors. Dallemand *v.* Odd Fellows' Sav. Bank, 74 Cal. 598, 16 Pac. 497.

36. Validity of reorganization proceedings.—That creditors of an insolvent bank were not made parties to an agreement included in a plan for its reorganization, binding the stockholders to give their notes to the bank to the amount of their respective holdings of stock, to be collected in case there was a deficiency of assets, and providing that payment thereof should discharge the payor's statutory liability existing at the date of the agreement, did not affect its validity. Thompson *v.* Gross, 106 Wis. 34, 81 N. W. 1061.

37. Where a new charter was granted to a bank, and it thereupon ceased to operate under its old charter, and was in fact reorganized under the new one, the fact that such reorganization was irregularly accomplished, or that a condition precedent to its full corporate existence thereunder was not complied with, can not be set up by an indorser of usurious notes discounted by the old bank, and renewals thereof, accepted by it after reorganization, as a defense to an action, thereon by the new bank. Spahr *v.* Farmers' Bank, 94 Pa. 429, 434.

Estoppel.—Where creditors of an insolvent bank were permitted, under Laws 1897, c. 89, to reorganize, and the receivers were discharged, and the officers of the bank resumed control, and issued certificates of deposit to the creditors, which they accepted, and at no time questioned the validity of the reorganization, or the judgment authorizing it, though the judgment adopting and approving the plan of reorganization was void, because based on a petition which had formerly been dismissed by a judge other than the one granting the order, but without his knowledge, the creditors who acquiesced therein and retained the benefits accruing therefrom are estopped from questioning the validity of the proceedings. Hunt *v.* Roosen, 87 Minn. 68, 91 N. W. 259.

38. A plan for the reorganization of an insolvent bank included the execution and delivery of an agreement binding its stockholders to give their notes to the bank to the amount of their respective holdings of stock, to be collected only in case there was a deficiency of "present assets" to cover the liabilities then existing, and providing that the payment of such notes, or any portion thereof, should, pro tanto, discharge the payor's statutory liability existing at the date of the

creditors were not made parties thereto,[39] nor is it void for want of consideration.[40]

An action to enforce an agreement binding stockholders of an insolvent bank to give their notes to it, to be collected in case there was a deficiency in assets to discharge liabilities existing at the date of the agreement, was not prematurely brought where it appeared from the complaint that there was such a deficiency when the action was commenced, and that an accounting was necessary to determine the exact amount thereof.[41]

§ 66. Effect on State Bank of Reorganization as National Bank. —When a state bank reorganizes as a national bank the change does not relieve it from any former liabilities to individuals with whom it has had dealings. It passes from one jurisdiction to another; but its identity is not thereby necessarily destroyed. It remains substantially the same institution under another name. The transition does not disturb the relation of either the stockholders or officers of the corporation, nor enlarge or diminish the assets of the institution. These all remain the same under the national as they were under the state organization.[42]

agreement. The plan was carried out, and the bank resumed business, and continued until it again became insolvent. Held, that an action to enforce the agreement was properly brought by the receiver of the bank, since it did not take the place of the statutory liability of stockholders, but merely bound them to pay the notes on the contingency mentioned. Thompson *v.* Gross, 106 Wis. 34, 81 N. W. 1061.

39. That the creditors of an insolvent bank were not made parties to an agreement included in a plan for its reorganization, binding the stockholders to give their notes to the bank to the amount of their respective holdings of stock, to be collected in case there was a deficiency of assets, and providing that payment thereof should discharge the payor's statutory liability existing at the date of the agreement, did not affect its validity. Thompson *v.* Gross, 106 Wis. 34, 81 N. W. 1061.

40. An agreement between an insolvent bank and its stockholders, binding them to give their notes to it to the amount of their holdings of stock, to be collected in case there is a shortage of assets to cover liabilities, and providing that payment thereon should pro tanto discharge the payor's statutory liability, is not void for want of consideration, since payments thereunder constitute a trust fund in the hands of the bank, in which creditors can not participate except by releasing pro tanto their rights against the stockholders under the statute. Thompson *v.* Gross, 106 Wis. 34, 81 N. W. 1061.

The reorganization of an insolvent bank, and the mutual agreement between its stockholders to effect that result by increasing its capital stock and canceling part of its liabilities by allowing creditors to subscribe for stock in satisfaction of their claims, is a sufficient consideration for an agreement binding the stockholders to give their notes to the bank, to be collected in case there is a deficiency of assets to cover the remaining liabilities. Thompson *v.* Gross, 106 Wis. 34, 81 N. W. 1061.

41. Premature suits.—Thompson *v.* Gross, 106 Wis. 34, 81 N. W. 1061.

42. Effect on state bank of reorganization as national bank.—Coffey *v.* National Bank, 46 Mo. 140, 2 Am. Rep. 488; City Nat. Bank *v.* Phelps, 86 N. Y. 484; City Nat. Bank *v.* Phelps, 97 N. Y. 44; Kelsey *v.* National Bank, 69 Pa. 426.

The conversion of a state bank into a national bank is not a "closing of its business," within the meaning of the statute of 1859, providing for the redemption of a state bank's circulation, and releasing it from liability on such notes as are not presented within six years after the giving of the prescribed

notice; and any notes not so presented constitute a valid claim against the national bank. Metropolitan Nat. Bank v. Claggett, 141 U. S. 520, 35 L. Ed. 841, 12 S. Ct. 60.

Laws 1865, c. 97, § 2, provides that any state bank becoming a national bank shall be deemed to have surrendered its charter on compliance "with the requirements of this act," but that it shall continue a body corporate for three years afterwards for the purpose of closing its concerns, but not for the purpose of the business for which it was established. Section 6 provides that, when authorized to commence business as a national bank, all assets of the old bank shall vest, without any conveyance, in the national bank, which, on returning the bills of the state bank to the banking department of the state, may receive the stock pledged to secure the redemption of the same, and that it shall be subjected to the same rules as the state banks with regard to the final redemption of the circulating notes of "such state banks so converted into national associations." Section 8 provides that the act shall not be construed so as to release the national bank from any obligation incurred before becoming such association. Held, that the conversion of a state bank into a national bank did not constitute such a "closing of the business" of the state bank that it could limit its liability to redeem its circulating notes by proceedings under Laws 1859, c. 236, authorizing state banks intending to close business to publish notice that any persons having any of the circulating notes of the bank should present them for redemption within six years; and, failing to do so, the bank would no longer be liable on such notes. Claggett v. Metropolitan Nat. Bank, 56 Hun 578, 10 N. Y. S. 165, 31 N. Y. St. Rep. 937, affirmed in 125 N. Y. 729, 26 N. E. 757.

Act March 9, 1865 (Laws 1865, p. 169), § 2, provides that, where a state bank is merged in a national bank, it shall be deemed to have surrendered its state charter, but that "every such bank shall, nevertheless, be continued a body corporate for the term of three years, * * * for the purpose of prosecuting and defending suits by and against it, and of enabling it to close its concerns." A state bank was converted into a national bank, and the national bank failed two years later, and went into the hands of a receiver. Held, that the receiver could prosecute an appeal from a judgment against the state bank, taken within the three years, under Code, § 121, providing that no action shall abate by disability of a party, or by the transfer of any interest, if the cause of action survive. Claffin v. Farmers', etc., Bank (N. Y.), 54 Barb. 228.

When a state bank has surrendered its charter to the state, and has organized as a national bank, the right of the state to continue to exact a bonus imposed by the charter for the exercise of the franchise is terminated. State v. National Bank, 33 Md. 75.

The conversion of a state bank into a national bank, under Act Cong. June 3, 1864, is not equivalent in law to a paying off in fact of its stock, so as to adeem a residuary legacy in certain shares of the bank's stock, limited on a life estate in such shares, which is to become absolute in case the bank should pay off its stock. Maynard v. Mechanics' Nat. Bank (Pa.), 1 Brewst. 483.

Form of suit.—Under Act 1865, c. 144, authorizing a change of the state banking institutions into national banks, and providing that they might continue to use their corporate name for the purpose of "prosecuting and defending suits" instituted by or against them, and of winding up their business, the Farmers' Bank of Maryland was converted into the Farmers' National Bank of Annapolis, in June, 1865. Held that, on a judgment obtained by it in 1864, a scire facias might properly issue in the old corporate name of the bank against the original defendants. Thomas v. Farmers' Bank, 46 Md. 43.

Where a state bank, after paying to its president money falsely represented by him to have been paid to an agent to whom the bank was indebted, is duly changed into a national bank, the new association, upon being sued by the agent who recovers a judgment against it, can maintain an action in its own name against the president for money had and received, under St. 1870, c. 217, setting forth in the writ the fact of sale by the state bank, and purchase of the chose in action by plaintiff. Atlantic Nat. Bank v. Harris, 118 Mass. 147.

Liability for costs.—Under the provisions of Act 1865, c. 144, a state bank organized as a national bank in June, 1865; and in 1874 it sued out, in its old corporate name, a scire facias on a judgment obtained in 1861. Held, that the new bank was substantially

§ 67. Consolidation[42a]**—§ 67 (1) Right to Consolidate.**—With legislative authority and the assent of stockholders, banks are allowed to consolidate.[43]

§ 67 (2) What Constitutes.—One banking corporation may, in contemplation of closing up its business, sell its assets, property, and business to another corporation, and make arrangement for the liquidation of its liabilities, but this does not constitute a consolidation.[44]

§ 67 (3) Effect of Consolidation.—Where two banks consolidate, a new corporation is thereby formed, composed of two, and the stockholders of each become ipso facto stockholders in the new bank and are entitled to a proportionate share in its stock.[45]

the plaintiff, and, as such, was therefore liable for costs in case of judgment for the defendant. Thomas *v.* Farmers' Bank, 46 Md. 43.

Service of process.—Where a state bank, on a proper application made by it, is duly changed into a national bank, whereby it surrenders its charter as a state bank (Laws 1865, c. 97; Laws 1882, c. 409, § 168), and the period during which it may do business as a national bank, as prescribed by the certificate issued by the comptroller of the currency, has expired, its corporate existence, both as a state bank and as a national bank, is at an end, and the authority of the cashier thereof is terminated, and service of summons on such cashier in an action against the two banks will be set aside as to each defendant. Hayden *v.* Bank, 59 Hun 620, 15 N. Y. S. 48.

42a. Of national banks, see post, "Consolidation," § 283.

43. Rule in Oklahoma.—"Corporations can not consolidate without authority of law, and there was no law in this territory, at the time of doing the acts complained of, authorizing banking corporations to merge or consolidate." Overstreet *v.* Citizens' Bank, 12 Okl. 383, 72 Pac. 379.

Consolidation under invalid statute.—Of national banks, see post, "Consolidation," § 283.

Where a consolidation of banks is made pursuant to an invalid statute, such consolidation is inoperative and void. Boor *v.* Tolman, 113 Ill. App. 322.

Right of nonassenting stockholder.—Under Banking Laws (Laws 1892, p. 1842, c. 689, as amended by Laws 1895, p. 222, c. 382), § 36, providing that any stockholder not voting in favor of merger may, on application therefor, procure the appointment of appraisers to appraise the value of his stock, and that, when the corporation has paid the appraised value thereof, the stock shall be canceled, one owning stock which stands on the books of the corporation in the name of another person can not maintain the proceeding. In re Rogers, 102 App. Div. 466, 92 N. Y. S. 465.

44. Overstreet *v.* Citizens' Bank, 12 Okl. 383, 72 Pac. 379.

A banking corporation desiring to quit business may transfer its depositors' accounts to another bank, and may borrow money from such other bank to pay its depositors, and may pledge its assets as security for the money so borrowed; and such action is not a consolidation or merger, nor does it release the first bank from liability, nor render the second liable to the other creditors of the first bank. Overstreet *v.* Citizens' Bank, 12 Okl. 383, 72 Pac. 379.

45. Green *v.* Bennet (Civ. App.), 110 S. W. 108.

Where a debtor bank, on consolidating with another corporation, caused trustees to be appointed to wind up its affairs, the corporation formed by the consolidation was not liable for the debts of the bank on general grounds. Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

Banking Law, § 37, as amended by Laws 1895, p. 223, c. 382, provides that on the merger of any corporation in the manner prescribed all the rights and interests of the corporation merged in property and things in action shall be deemed to be transferred to the merging corporation without any other deed or transfer, and the latter corporation shall hold the same in the same manner as if the corporation merged should have continued to retain title and transact the business of

§ 68. Grounds of Forfeiture of Franchise or Dissolution.[46]—Because of the well-settled general rule that forfeitures are not favored, the forfeiture of a bank charter will not be declared, except where there is a plain abuse of power by which the corporation ceases to fulfill its functions.[47] But when the corporation is insolvent[48] or fails or refuses to pay

such corporation; and § 38, as amended by Laws 1900, p. 428, c. 199, provides that the rights of creditors and others having relations with the merged corporation shall not be impaired by any such merger. Held that, where defendant was liable on a guaranty to a bank which was subsequently merged under such act in plaintiff bank, plaintiff, by virtue of the statute, acquired the right to enforce the guaranty. Bank *v.* Young, 101 App. Div. 88, 91 N. Y. S. 849.

Void consolidation.—Where the defendant was a stockholder in a banking corporation organized under a special act of the legislature which imposed a stock liability equal to the amount of his stock, and such corporation subsequently is sought to be consolidated with another banking corporation, such special stock liability will not be enforced in an action against such supposed consolidated corporation where it appears that such attempted consolidation was void. Boor *v.* Tolman, 113 Ill. App. 322.

46. Waiver or remission of forfeiture, see post, "Special Deposits," § 153.

47. Expansions and contractions of circulation work no forfeiture of the franchises of a bank where another adequate remedy or penalty was provided by the charter of the bank. State *v.* Commercial Bank, 10 O. 535.

48. Insolvency as ground for dissolution.—State *v.* Mechanics', etc., Bank, 35 La. Ann. 562; Attorney General *v.* Oakland County Bank (Mich.), Walk. Ch. 90.

Under the act incorporating the Bank of Niagara, the bank did not forfeit its charter by insolvency and closing its operations, if payment of its debts were resumed before prosecution. Aliter, if a prosecution were commenced before payment was resumed. People *v.* Niagara Bank, 6 Cow. 196; People *v.* Bank (N. Y.), 6 Cow. 211.

Suspension of specie payments by a bank, continued a great length of time, without being produced by the fault of the state, and adopted without any sufficient excuse or necessity or when done in violation of positive statute, is good cause of forfeiture of its charter. State *v.* Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; State *v.* Commercial Bank, 10 O. 535; Bank *v.* Iglehart, Fed. Cas. No. 860, 6 McLean 568; Lane *v.* Morris, 8 Ga. 468; Lumpkin *v.* Jones, 1 Ga. 27; Planters' Bank *v.* State (Miss.), 7 Smedes & M. 163; Commercial Bank *v.* State (Miss.), 6 Smedes & M. 599, 45 Am. Dec. 280; State *v.* Commercial Bank, 10 O. 535; Long *v.* Farmers' Bank (Pa.), 1 Clark 284; unless such cause of forfeiture is waived, State *v.* Bank (S. C.), 2 McMullan 439, 39 Am. Dec. 135; or cured by a subsequent resumption of specie payment. Lumpkin *v.* Jones, 1 Ga. 27.

But a mere suspension of specie payments by a bank does not work a forfeiture of its charter. State *v.* Commercial Bank, 10 O. 535; especially if the bank has good cause for refusing payment. Long *v.* Farmers' Bank (Pa.), 1 Clark 284.

Though a bank charter contains no provision for its forfeiture in the event of a failure to pay specie, yet, where there was in force at the date of the charter a general law to the same effect, the forfeiture can, under that law, be enforced. Palfrey *v.* Paulding, 7 La. Ann. 363; Atchafalaya Bank *v.* Dawson, 13 La. 497.

The Act of 1821, declaring the charter of the Tombeckbee Bank liable to forfeiture for a failure to pay specie on demand for its notes, did not affect the bank, as its charter contained no such provision. State *v.* Tombeckbee Bank (Ala.), 2 Stew. 30.

A bank incurred no forfeiture by mere suspension, where another penalty for suspension was given to the holder of its notes, both by its charter and the general law. State *v.* Commercial Bank, 10 O. 535.

Redemption in treasury notes.—The act of congress making treasury notes a legal tender is within the constitution, and valid; and hence the state banks, by redeeming in treasury notes, do not expose their franchises to forfeiture, under charter provisions that they shall not at any time suspend or refuse payment in gold or silver of their obligations or moneys received

its debts,[49] or when it has violated any provision of its charter or any law binding on it, though such violation be unintentional,[50] or where it aban-

on deposit. Reynolds v. Bank, 18 Ind. 467.

By statute in Pennsylvania, a bank refusing specie payment is compelled to make an involuntary assignment for creditors. But as such statute is penal it will be strictly construed. General Banking Laws April 16, 1850, § 24, provide that, if a bank refuse or fail to redeem its bills when presented, it shall forfeit its charter. Section 25 provides that the cashier of any bank refusing to pay specie for the bank's liabilities shall, if the demand is on a note or bill, indorse thereon, over his signature, the date of the demand. Section 27 provides that if, upon a hearing, the court or judge shall be satisfied that the bank has refused to redeem, and that the provisions of § 25 have been violated, the directors shall make an assignment. On an application for an order directing an assignment, on the ground that the bank has refused to redeem its notes, held, that it must appear that the officers of the bank not only refused to pay the notes in gold or silver, but that they also refused to indorse the day and year when they were presented for payment. Commonwealth v. Bank, 9 Am. Law Reg. 379.

Act April 16, 1850, § 24, declares that a bank's failure to redeem its notes in specie upon demand shall be an absolute forfeiture of its charter. Section 25 provides that the cashier of a bank refusing to pay its notes in specie shall indorse thereon the day and year of the demand. Section 27 provides that, if "the provisions of the twenty-fifth section of this act have been willfully violated," then the directors shall make an assignment to trustees, and thus forfeit the charter. Held, that the statute must be construed as penal, and hence an assignment could not be required, unless the officer refused to make the indorsement. The court could not presume that the legislature intended a reference in § 27 to § 24, instead of § 25. Commonwealth v. Bank, 9 Am. Law Reg. 379.

Rule in Louisiana.—Since Act March 14, 1839, relieving banks from the forfeiture of their charters occasioned by the previous suspension of specie payments, no bank can suspend specie payments even for a day without exposing its charter to forfeiture. State v. New Orleans Gas, etc., Co. (La.), 2 Rob. 529.

49. Failure of bank to pay debts as ground for dissolution.—Bank Comm'rs v. Bank (N. Y.), 6 Paige 497.

Failure to pay circulating notes.—To subject a banking association to a forfeiture of its charter, under the Act of 1840, for allowing its circulating notes to remain unpaid for twenty days after presentation at an agency of the bank, such notes must be allowed to remain with the agent until the expiration of the twenty days, or must be presented a second time at or after the expiration of that time. Bank Comm'rs v. James Bank (N. Y.), 9 Paige 457.

Failure to pay interest on state bonds.—That a bank has failed to pay the interest on state bonds is no cause of forfeiture. State v. Real-Estate Bank, 5 Ark. 595, 41 Am. Dec. 109.

Refusal to redeem obligation.—A general refusal by an incorporated bank to redeem its issues and other obligations in gold and silver coin is per se a sufficient cause of forfeiture of its charter. Commercial Bank v. State (Miss.), 6 Smedes & M. 599, 45 Am. Dec. 280; State v. Bank (S. C.), 1 Speer 433.

50. Violation of law or charter provisions as ground for dissolution.—Bank Comm'rs v. Bank (N. Y.), 6 Paige 497; Miami Exporting Co. v. Clark, 13 O. 1; Franklin Bank v. Commercial Bank, 36 O. St. 350, 38 Am. Rep. 594.

Contracting debts or issuing bills to a larger amount than a charter allows, or issuing, with a fraudulent intention, more paper than the bank can redeem, or embezzling large sums deposited for safe-keeping, or making large dividends of profits, while it refuses to pay specie for its bills, subjects a bank to a forfeiture of its charter. State Bank v. State (Ind.), 1 Blackf. 267, 12 Am. Dec 234.

The establishment of an agency or office by a bank at a place not authorized by the charter is a violation of it and works a forfeiture of the franchise. Attorney General v. Oakland County Bank (Mich.), Walk. Ch. 90.

Failure to comply with clearing house regulations.—Act March 14, 1839, § 3, No. 22, requiring the banks in the city of New Orleans to settle and pay in gold and silver the balances due each other, every Monday, imposed no duty not previously required

dons its corporate franchise and surrenders its assets for the purpose of

by law; and if the party, in whose favor it was stipulated, chooses to waive the right, the state can not complain without showing some injury to the community. State v. New Orleans Gas, etc., Co. (La.), 2 Rob. 529.

Failure to maintain legal reserve.—Under Gen. St., c. 57, § 19, it is the duty of a bank so to conduct its business as to keep on hand an amount of specie equal to 15 per cent of its liability for circulation and deposits; and, for a neglect or omission substantially to comply with this requisition, a bank is liable to be enjoined, on the application of the bank commissioners, from the further prosecution of its business, so far as may be needful to prevent a violation of this provision of the statute. Commonwealth v. Bank (Mass.), 4 Allen 1.

Failure to elect directors.—The failure to elect directors or other officers could not produce a dissolution of the corporation. Blake v. Hinkle, 18 Tenn. (10 Yerg.) 218.

But where the charter of an incorporated bank provides for the election of directors annually, the failure to hold an election for five years is a cause of forfeiture of its charter. State v. Commercial Bank, 33 Miss. 474.

Failure to pay up full capital stock.—Where a bank has failed to comply with the law requiring its full capital stock to be paid up within one year from the date of its organization, its charter will be forfeited. People v. City Bank, 7 Colo. 226, 3 Pac. 214.

Act March 29, 1869, incorporating a banking company, provided that the capital stock should be a certain amount, and that no increase should be made unless the amount thereof was paid in; that, before the corporation began business, the stockholders should pay their subscriptions in full; and that the act should become void unless the corporation organized and proceeded to business within two years. Held, that a failure to subscribe and pay in the amount of capital stock within two years forfeited the charter. People v. National Sav. Bank, 129 Ill. 618, 22 N. E. 288.

Failure to sell for nonpayment of stock subscription.—The charter of a bank provided that, "should any stockholder refuse or fail to pay any installment on his stock when called for, the company shall sell said stock, on giving thirty days' notice in some gazette, on account of and at the risk of the stockholder." Held, that a failure on the part of the bank to comply with the provision of its charter, respecting the sale of stock upon which any stockholder should fail to pay any installment, was not a cause of forfeiture of the charter; the authority to sell the stock being a mere cumulative remedy given to coerce the payment of stock. Commercial Bank v. State (Miss.), 6 Smedes & M. 599, 45 Am. Dec. 280.

Failure to file financial statement.—Where an independent banking company, organized under the act passed February 26, 1846 (§ 59), requiring that a statement of its condition be transmitted to the auditor of state, refused to transmit such statement, held, that it forfeited its corporate franchise. Attorney General v. Seneca County Bank, 5 O. St. 171.

Subscription to its stock.—A bank's charter provided that no person should on any one day subscribe, directly or indirectly, for more than fifty shares of stock. The act of incorporation directed that the books should be opened for subscription to the capital stock on a certain day under the superintendence of eight commissioners named in the act. Section 6 of the act provided that, as soon as $500,000 should be subscribed, the subscribers should be a body corporate. Held, that a violation of the charter by indirect subscriptions for more than fifty shares, while the books were still in the hands of the commissioners, who were the agents of the state, was no ground for forfeiture of the charter. Commercial Bank v. State (Miss.), 6 Smedes & M. 599, 45 Am. Dec. 280.

Excessive loans to officers.—A bank's charter will not be forfeited because a large portion of their loans have been made to their officers, in the absence of a statute requiring forfeiture on account of disproportionate loans to its officers. State v. Commercial Bank, 10 O. 535.

But in some jurisdictions there are statutes expressly providing that excessive loans to directors shall work a forfeiture of the franchise and dissolution of the bank. Bank Comm'rs v. Bank (N. Y.), 6 Paige 497; Attorney General v. Seneca County Bank, 5 O. St. 171, 172.

All loans and discounts made by the officers of a bank will be presumed to have been made by the authority of the directors, unless they show that

liquidating its debts,[51] or where the affairs therefore are being mismanaged by such officers have been guilty of fraud or embezzlement, and that they have removed such officers on the discovery of the fraud. Bank Comm'rs *v.* Bank (N. Y.), 6 Paige 497.

It is a violation of the act to incorporate banking companies for one of the independent banks chartered by it to make loans to a director before the adoption, by the stockholders, of by-laws to regulate the liabilities of directors; and such violation may be a cause of forfeiture of the charter, and render each director who knowingly assents to it individually liable for all damages which the company, shareholders, or others shall sustain in consequence thereof. But the court are not prepared to say that no debt is created by such loan; yet even if such debt be void, and be paid, a creditor at large of the payer can reach the money or property with which it is paid, such creditor having at the time no lien on nor interest in the money or property. Conant, etc., Co. *v.* Reed, 1 O. St. 298.

A loan knowingly made by a bank for the benefit of a director is a loan to the director, within a statute provision prohibiting loans to the officers of the bank beyond a certain amount, though the name of such director does not appear upon the paper discounted, and though he has not guarantied the payment. Bank Comm'rs *v.* Bank (N. Y.), 6 Paige 497.

It is no excuse for a violation of the act incorporating a bank by loaning to the officers to an amount prohibited by the act that the directors had neglected to keep themselves informed of the amount of the loans to officers of the corporation. Bank Comm'rs *v.* Bank (N. Y.), 6 Paige 497.

Illegal loans to directors.—Under the act to incorporate the State Bank of Ohio and other banking companies, it was ground for forfeiture of its charter for a bank incorporated under such act to make loans to its directors before the adoption of by-laws to regulate the liabilities of directors. Conant, etc., Co. *v.* Reed, 1 O. St. 298; Arnold *v.* Reid, 1 O. Dec. 347; Attorney General *v.* Seneca County Bank, 5 O. St. 171.

Contracting by a bank to take usurious interest works no forfeiture of its charter; where the charter contains no restrictions as to the rate of interest. State *v.* Commercial Bank, 10 O. 535.

When an incorporated company is, by its charter, authorized to lend money, without restriction as to the rate of interest, it does not work a forfeiture of its charter to receive more than the legal rate. Corwin *v.* Urbana, etc., Ins. Co., 14 O. 7.

And even where there is a restriction upon the rate of interest chargeable by a bank, the charging or taking of usurious interest does not, in the absence of charter or statutory provision to the contrary, afford ground for forfeiture of franchises. State *v.* Commercial Bank, 10 O. 535.

But by statute in some jurisdictions, persons exercising the privilege of banking are prohibited from exacting usury under penalty of forfeiting their privileges. Commonwealth *v.* Commercial Bank, 28 Pa. 383; Wetmore *v.* Brien, 40 Tenn. (3 Head) 723; Perkins *v.* Watson, 61 Tenn. (2 Baxt) 173.

On the other hand it has been held that the violation by an incorporation bank of the provisions of its charter, and the general banking law, by the reservation of more than the legal rate of interest, does not forfeit the contract or security, but merely prevents the recovery of the illegal excess of interest. Bank *v.* Bingham, 33 Vt. 621.

Failure to make report to auditor.—Where an independent banking company, organized under the act of February 26, 1845, refused to make and transmit to the auditor of state a statement of its condition, as required by § 59 of said act, it thereby incurred the penalty of forfeiture of corporate franchises. Attorney General *v.* Seneca County Bank, 5 O. St. 171.

Violation of charter by cashier.—The directors of a bank may, through their cashier, violate the charter of the bank. If, however, they can show that, in the particular act of the cashier alleged to be in violation of the charter, he departed from his duties as prescribed by them, such act will not cause a forfeiture of the charter. State *v.* Commercial Bank (Miss.), 6 Smedes & M. 218, 45 Am. Dec. 280.

Unintentional violations.—If violations of Gen. St. c. 57, §§ 19, 63, 67, have been committed by a bank under a mistake or misapprehension of the law, and with no willful intent to violate the same, and it is not alleged that any other or further similar acts are threatened or intended by it, a temporary injunction which had been granted upon it may be dissolved upon payment of costs. Commonwealth *v.* Bank (Mass.), 4 Allen 1.

51. Abandonment of corporate franchise as ground for dissolution.—At-

aged,[52] or where one of the members of a voluntary association dies[53] dissolution and forfeiture of charter results. But a cashier of a bank can not cause a forfeiture of its charter by a direct and palpable violation of his authority or instructions.[54] Neither the opinion of the superintendent of banks, nor

torney General *v.* Seneca County Bank, 5 O. St. 171.

But a mere omission alone to exercise corporate powers, Attorney General *v.* Bank (N. Y.), 1 Hopk. Ch. 354; or a brief temporary cessation of business operations will not work a forfeiture of its charter. State *v.* Louisiana Sav. Co., 12 La. Ann. 568.

And it has even been held that a nonuser of the corporate franchise of a bank for sixteen years does not of itself work a dissolution of the corporation. Richards *v.* Minnesota Sav. Bank, 75 Minn. 196, 77 N. W. 822.

But if a bank abandons its franchise and ceases to do business as a bank its charter is thereby forfeited. Henderson Loan, etc., Ass'n *v.* People, 163 Ill. 196, 45 N. E. 141; Attorney General *v.* Seneca County Bank, 5 O. St. 171. See, also, State *v.* Commercial Bank, 10 O. 535.

Where a bank became insolvent and suspended operations in 1840, and did not resume again until 1864, and only fourteen months of its chartered existence remained unexpired when it resumed business after such suspension, the court, if it has a discretion so to do under the statute, will not impose a fine instead of adjudging a forfeiture of the charter. People *v.* Bank, 12 Mich. 527.

In Tennessee a (banking) corporation is not dissolved by the nonuse, or assignment to others, in whole or in part, of its powers, franchises and privileges, unless all the corporate property has been appropriated to the payment of its debts; and, in such cases, says the Code (§ 3431), "any creditor, for himself and other creditors, whether he has recovered a judgment or not, or any stockholder, for himself and other stockholders, may file a bill, under the provision of this chapter, to attach the corporate property, and have such property applied to the payment of the corporation debts, and any surplus divided among the stockholders." Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471.

Assignment for benefit of creditors.—An assignment by a bank of its property to trustees is not a dissolution of the corporation or a surrender of its franchises; but though such an assignment, if fair, will be sustained, and will not be held as misuser, so as to work a forfeiture of its charter, yet if it place the bank in a position where it can not comply with the terms of its charter, or fulfill its purposes, it may work a forfeiture for nonuser. State *v.* Commercial Bank (Miss.), 13 Smedes & M. 569, 53 Am. Dec. 106; Town *v.* Bank (Mich.), 2 Doug. 530.

But if a bank makes a valid assignment of all its assets and property to trustees, for the benefit of its creditors, it is good cause of forfeiture. State *v.* Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109.

Where a bank becomes insolvent, and assigns so much of its property to trustees for payment of its debts as to prevent its resuming banking business, it is equivalent to a surrender of its corporate rights; such act destroying the end and object for which the bank was instituted. People *v.* Hudson Bank (N. Y.), 6 Cow. 217.

52. Mismanagement as ground for dissolution.—To justify the action of the bank commissioners, or of the court against a bank, under Rev. St. c. 126, § 47, on the ground that "it is so managing its concerns that the public, or those having funds in its custody, are in danger of being defrauded thereby," it is not necessary that either should be satisfied that there is a formed design on the part of the managers to cheat the bill holders or the depositors, but only that the condition of the bank, from its gross and illegal mismanagement, and the temptation to and danger of fraud growing out of it, are such that the commissioners and the court ought to interfere to prevent it. Bank Comm'rs *v.* Rhode Island Cent. Bank, 5 R. I. 12.

53. The death of any member of a banking association operates as a dissolution thereof as between all the members. First Nat. Bank *v.* Payne & Co., 85 Va. 890, 9 S. E. 153, 3 L. R. A. 284.

54. State *v.* Commercial Bank (Miss.), 6 Smedes & M. 218, 45 Am. Dec. 280.

In a proceeding by information in the nature of a quo warranto against a bank, the court was asked to charge the jury that, if they believed from the evidence that the cashier, or teller, or clerks of the bank, as officers and agents of the bank, received, either directly or indirectly, from any one, the notes of nonspecie-paying banks, in

of the attorney general, that it is unsafe or inexpedient to allow a bank to transact business, is a sufficient basis for a judgment dissolving the bank and distributing its assets through the medium of a receiver, or otherwise.[55] And where another penalty is provided for the commission or omission of a specified act by a bank, the presumption is that such commission or omission was not intended by the legislature to be a ground of forfeiture of franchises.[56]

§ 69. Waiver or Remission of Forfeiture.—The state may waive[57] or remit the forfeiture of a bank charter.[58]

Relief against Forfeiture.—While a state legislature may relieve a bank chartered by it from the penalty of forfeiture of its charter for breach of its legal obligations, it can not do more or relieve against the other legal consequences thereof as to private contracts.[59]

payment for any part of the capital stock of the bank, they must find for the plaintiff. Held, that the charge was too broad; that, to make a payment binding on a corporation, it should be made to some agent authorized to receive it; and that the charge, as asked, was properly rejected. State *v.* Commercial Bank (Miss.), 6 Smedes & M. 218, 45 Am. Dec. 280.

55. People *v.* Oriental Bank, 124 App. Div. 741, 109 N. Y. S. 509.

56. State *v.* Commercial Bank, 10 O. 535.

57. Waiver or remission of forfeiture.—If the state borrow money of a bank, knowing a cause of forfeiture to exist, this is a waiver of the forfeiture. State *v.* Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109.

Where a banking corporation became insolvent and suspended operations in 1840, and did not attempt to resume business until 1864, and no proceedings were taken by the state during that time to enforce the forfeiture of the charter of the corporations, under Comp. Laws, § 4854, it was held that the forfeiture was not waived thereby, and that the state might institute proceedings, and claim a forfeiture, within a reasonable time after discovering the intention of the corporation to resume. People *v.* Bank, 12 Mich. 527.

The act approved November 23, 1857, entitled "An act in relation to certain bank paper in this state," was a waiver by the state of all forfeitures imposed upon the banks of this state, incurred under the provisions of Act 1855, p. 287, § 5, for dealing in the paper of the suspended banks of this state prior to the date of said waiver. An answer, therefore, which pleaded the violation of said fifth section of the Act of 1855, in relation to illegal banking, in bar of the right of the plaintiff to sue, was held to be properly stricken out on motion. Bank *v.* Bredow, 31 Mo. 523.

Where a bank had forfeited its corporate franchises by a violation of the act of incorporation, the court, being satisfied of the integrity of the officers, that the institution could go on without danger to the creditors or the public, and that the suspension of the operations of the bank would cause great public inconvenience, permitted the bank to go on, notwithstanding the forfeiture. Bank Comm'rs *v.* Bank (N. Y.), 6 Paige 497.

Forfeiture for suspension of specie payment.—Where, after a bank's charter had been forfeited, for its suspension of specie payment, it continued to exist de facto, and exercised all the privileges previously granted by the legislature, and the legislature afterwards, by subsequent legislation, declared that the corporation should exist, it was a waiver by the state of the previous forfeiture. State *v.* Bank (S. C.), 2 McMullan 439, 39 Am. Dec. 135.

58. The legislature may remit a forfeiture, and the exercise of that power by Act March 14, 1839, No. 22, relieved the banks from all penalties incurred by the nonpayment of specie. Atchafalava Bank *v.* Dawson, 13 La. 497.

59. Relief against forfeiture.—When the suspension of specie payments in 1860, by the banks of South Carolina, was legalized by her legislature, the legislature did no more, and could do no more than to relieve them from the penalty of the forfeitures of their charters. It could not relieve them from the obligation to pay their debts in specie, nor extend the time for such

§ 70. Proceedings to Enforce Dissolution[60]—§ 70 (1) In General.—Proceedings to dissolve banking corporations are usually regulated and prescribed by statute in the various jurisdictions.[61] But if the statute

payment. It could not do this, because any such law would impair the obligation of the creditor's contract. Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944.

The act of the legislature of 1852, which relieved the Citizens' Bank from the decree of forfeiture of its charter, while it restored the "rights and privileges" of the corporation, is not to be understood as having restored those of the individual corporators, so as to entitle the original stockholders to a credit at the hands of the bank, as at present organized, of $33 per share, as a loan payable in installments, according to the original charter. Pollock *v.* Citizens' Bank, 12 La. Ann. 228.

60. Proceedings against persons engaged in unauthorized banking, see ante, "In General," § 8. Proceedings on insolvency, see post, "Making, Receipt, and Entry of Deposit for Collection," § 158; "Rights and Liabilities as to Proceeds," § 164.

61. See statutes in the various jurisdictions.

California.—Bank Commissioners' Act March 30, 1878, § 11, as amended by St. 1887, p. 90, provides that if the commissioners find that any bank has violated its charter, or is conducting business in an unsafe manner, and refuses to discontinue its illegal practices, the attorney general may bring suit to prohibit further business, and to wind up its affairs. Section 21 provides for the repeal of all inconsistent acts. Held, that the insolvent Act of 1880, providing for an adjudication of insolvency on the petition of creditors, is superseded by the bank commissioners' act so far as banking corporations are concerned. People *v.* Superior Court, 100 Cal. 105, 34 Pac. 492.

A contention that the sole object of the bank commissioners' act is visitation and a report to the attorney general by the commissioners, and that there is no suggestion therein for the sequestration of assets, is untenable; § 11 of such act further providing that if the court shall consider it unsafe for the corporation to continue to transact business, and that it is insolvent, an injunction shall be issued, and thereupon such proceedings shall be taken against the corporation "as may be decided upon by its creditors"; and §§ 18, 19 authorizing the commissioners to maintain actions in the name of the people, under the court's direction. People *v.* Superior Court, 100 Cal. 105, 34 Pac. 492.

The remedies provided by the bank commissioners' act and the insolvent act are not cumulative, nor the powers conferred by the bank commissioners' act auxiliary to those conferred by the insolvent act; the object of the bank commissioners' act being to provide an entirely different scheme for winding up the business of a banking corporation. People *v.* Superior Court, 100 Cal. 105, 34 Pac. 492.

Louisiana.—Acts 1842, Nos. 98, 157, intend all contests as to the liabilities of banks in liquidation to be cumulated before the court putting them in liquidation. The former act (§ 24) assimilates the proceedings, except where otherwise provided, to those of the voluntary surrender, and thereby establishes a concurso in a modified form. Dorville *v.* Citizens' Bank (La.), 9 Rob. 362.

Mississippi.—By the fifth section of the Act of 1843, prescribing the mode of proceeding against incorporated banks for a violation of their corporate franchises, etc., it is enacted that the provisions of the act shall not extend to the Commercial and Railroad Bank of Vicksburg, so as to affect the railroad and its operation. Held, that this bank was not, by this provision, exempted entirely from the operation of the act. The provision only limited the extent of the judgment of forfeiture against the bank in the event one should be rendered. State *v.* Commercial, etc., Bank (Miss.), 12 Smedes & M. 276.

The third section of the act, "relating to informations in the nature of quo warranto, and for other purposes," passed March 12, 1845 (2 Curw. 1153), providing for proceedings by the assignee of dissolved corporations; the first section of the act of March 10, 1843 (2 Curw. 951), providing that suits should not abate by the dissolution of any corporation; and the provision of the act of March 21, 1850, "in relation to judicial proceedings in favor of and against dissolved corporations," that suits might be prosecuted by banking or other corporations at any time after dissolution—had all the same object. Stetson *v.* City Bank, 2 O. St. 167.

They were intended to preserve the rights of and furnish an effectual rem-

provides no method of procedure, the procedure should follow that specified for ordinary actions.[62]

§ 70 (2) Nature or Character of Proceeding.—It is well settled, however, that in order to forfeit the charter of a bank a direct proceeding for the purpose,[63] usually an information in the nature of a quo warranto,[64]

edy to persons entitled by assignment or otherwise to rights in action which had accrued to corporations, during their continuance (and which must therefore be prosecuted in the name of the corporation), against the operation of the common-law rule, which forfeited all such rights on the unconditional dissolution of the corporation. Stetson *v.* City Bank, 2 O. St. 167.

While many of the provisions of these statutes are necessarily confined to domestic corporations, those which relate to the prosecution of suits must, by a just and sound construction of the acts in question, be extended to assignees holding such claims as those mentioned by assignment from corporations beyond the limits of this state. Stetson *v.* City Bank, 2 O. St. 167.

"The Act of May 1, 1852 (3 Curw. 1876), 'to provide for the adjustment and settlement of the affairs of incorporated associations and companies,' was not inconsistent with and did not repeal the provisions of the former statutes allowing suits to be prosecuted in the name of a dissolved corporation, although the further facilities which it afforded for the same object were limited to domestic corporations." Stetson *v.* City Bank, 12 O. St. 577, approving and following Stetson *v.* City Bank, 2 O. St. 167.

62. As corporations might be organized under the act of June 15, 1852, of such a character as to fall within the class of "moneyed corporations," as intended by § 28 of the act to regulate the business of general banking (1 Rev. St. 1852, p. 159), is appears to follow that, so far as proceedings to dissolve corporations for banking purposes and the appointment and duties of a receiver are governed at all by special statute, the act establishing general provisions respecting corporations (1 Rev. St. 1852, p. 239) should maintain. Herron *v.* Vance, 17 Ind. 595. See Wright *v.* Rogers, 26 Ind. 218.

63. Forfeiture not enforceable in a collateral proceeding.—Forfeiture of a bank charter can not be taken advantage of in a collateral proceeding, but only in a proceeding instituted directly for that purpose. Bank *v.* Snelling, 35 Mo. 190; Miami Exporting Co. *v.* Clark, 13 O. 1; Bank *v.* Renick, 15 O. 322; Johnson *v.* Bentley, 16 O. 97; Bartholomew *v.* Bentley, 1 O. St. 37; Zinn *v.* Baxter, 65 O. St. 341, 62 N. E. 327.

The debtor of a bank can not absolve himself from payment by alleging that the bank has by mismanagement forfeited its charter, until the fact of forfeiture is established by direct proceedings against the bank. Such a forfeiture can only be enforced by the state in a direct proceeding for that purpose. Hughes *v.* Bank (Ky.), 5 Litt. 45; Farmers' Bank *v.* Garten, 34 Mo. 119.

Effect of reversal of judgment of forfeiture.—Where the affairs of a bank are, by statute, placed in the hands of trustees for settlement, after a judgment has been rendered on quo warranto against the bank declaring its charter forfeited, the subsequent reversal of that judgment does not affect a suit previously instituted by the trustees against a debtor of the bank, so as to protect the debtor against the rendition of judgment. Jemison *v.* Planters', etc., Bank, 23 Ala. 168.

64. Information in nature of quo warranto.—Saltmarsh *v.* Planters', etc., Bank, 14 Ala. 668; People *v.* Ridgley, 21 Ill. 65; Miners' Bank *v.* Thomas (Iowa), 4 Green 336; Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168; Farmers' Bank *v.* Garten, 34 Mo. 119.

Nature of proceeding.—An information in the nature of a quo warranto is a civil, and not a criminal, proceeding. Commercial Bank *v.* State (Miss.), 4 Smedes & M. 439.

Grounds for quo warranto.—Persons appointed, under Acts 1847, to wind up the affairs of a state bank, are not officers, within the meaning of Scates' Comp. 224, providing that, in case any person usurps or unlawfully holds any office or franchise, it shall be lawful for the attorney general to exhibit an information in the nature of a quo warranto. People *v.* Ridgley, 21 Ill. 65.

Persons appointed under the Act of 1847 to wind up the affairs of a state bank do not enjoy a franchise, within the meaning of Scates' Comp. 224, pro-

in the name of the state[65] must be instituted in the proper forum.[66]

viding for the filing of an information in the nature of a quo warranto to oust a person who unlawfully holds or executes any office or franchise. People *v.* Ridgley, 21 Ill. 65.

Hearing in quo warranto proceedings.—The court has full power and jurisdiction, upon a writ of quo warranto, to hear and determine all questions touching the forfeiture of the bank's franchises. Miami Exporting Co. *v.* Clark, 13 O. 1.

Quashal of quo warranto.—If a proceeding in the nature of a quo warranto has been improvidently issued against a bank, it will be dismissed or quashed on motion. State *v.* Commercial, etc., Bank (Miss.), 12 Smedes & M. 276.

Injunction as ancillary to quo warranto.—After the attorney general had filed an information in the nature of a quo warranto in the supreme court to annul the charter of a bank, he filed a bill in chancery to restrain the bank from doing business. Held, that the bank's continuing its operations while insolvent, or buying up its own notes at a discount, will not authorize an injunction from chancery to restrain its operations, as the questions of forfeiture are to be determined in the quo warranto proceedings. Attorney General *v.* Bank (N. Y.), 1 Hopk. Ch. 354.

In order to justify the issuing of an injunction, under the statute, to restrain a bank and its officers from exercising its franchises, positive testimony of the insolvency of the bank, or that it has violated some provision of law, is requisite; and an affidavit of belief to that effect is not sufficient. Attorney General *v.* Bank (N. Y.), 1 Hopk. Ch. 596

Scire Facias.—In South Carolina forfeiture of a bank charter for suspension of specie payments may be enforced by scire facias in the common pleas. State *v.* Bank (S. C.), 1 Speers 433.

Schedule annexed to petition.—The provision of Code Civ. Proc., § 2421, that the schedule annexed to a petition for voluntary dissolution of a corporation shall show, as far as petitioners "know or have the means of knowing," the name and residence of each creditor, or, if either of these is unknown, a statement to that effect, is complied with where the schedule to such a petition by the directors of a bank, whose property is in the possession of the superintendent of banks, states that it contains the required matter so far as known, and that there are "a number of other depositors whose names are unknown to petitioners," and gives the aggregate claims of all depositors. In re Murray Hill Bank, 9 App. Div. 546, 41 N. Y. S. 914.

65. Parties to quo warranto proceeding.—Huntington *v.* Crescent City Bank, 18 La. Ann. 350.

"The state * * * only, by the attorney general, can institute proceeding to have the franchises of a corporation declared forfeited for failure to comply with the provisions of the charter. State *v.* White's Creek Turnpike, etc., Co., 3 Tenn. Ch. 163; State *v.* McConnell, 71 Tenn. (3 Lea) 332; State *v.* Scott, 32 Tenn. (2 Swan) 332; Code, 3409, et seq.; Merriman *v.* Magiveny, 59 Tenn. (12 Heisk.) 494." State *v.* Butler, 83 Tenn. (15 Lea) 104.

Third parties can not enforce the forfeiture of a charter. The state grants it and alone can take it away, but other parties in dealing with such corporations may inquire into their powers and obligations. State *v.* Butler, 83 Tenn. (15 Lea) 104.

"By our law, a (banking) corporation is not dissolved by the nonuse, or assignment to others, in whole or in part, of its powers, franchises and privileges, unless all the corporate property has been appropriated to the payment of its debts; and, in such cases, says the Code (§ 3431), 'any creditor, for himself and other creditors, whether he has recovered a judgment or not, or any stockholder, for himself and other stockholders, may file a bill, under the provision of this chapter, to attach the corporate property, and have such property applied to the payment of the corporation debts, and any surplus divided

66. "By the common law the forfeiture of a charter can only be enforced in a court of law, in a proceeding by scire facias, or on an information in the nature of a writ of quo warranto, yet in this state there can be no doubt that, under the act of 1856, ch. 55, a court of chancery is invested with the jurisdiction to inquire into and determine the fact of a violation of the charter by the corporation, in the respects indicated in the 12th section of the act incorporating the Bank of East Tennessee." Johnson *v.* Churchwell, 138 Tenn. (1 Head) 146.

§ 70 (3) Necessity of Proceeding.—Until a bank charter has been judicially forfeited, the institution may continue to exercise its banking functions, because it is well settled that the powers of a corporation do not cease by the mere act of violating its charter.[67] But in a few juris-

among the stockholders.'" Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471.

Consent of attorney general required.—Under Act March 18, 1858, providing for the establishment of a general free banking system within the state, § 20 authorizing the forfeiture of a bank charter on the application of the attorney general, a judgment of forfeiture obtained not only without the attorney general's consent, but contrary to his express agreement will be set aside. Riggin & Co. *v.* Union Bank, 18 La. Ann. 677.

Bank commissioners.—It is not necessary that all the bank commissioners should unite in a proceeding against a bank for a violation of its charter. Bank Comm'rs *v.* Bank (N. Y.), 6 Paige 497.

Private relator.—A writ of quo warranto to dissolve a banking corporation can not be maintained in the supreme court upon the suggestion of a mere private relator; but in questions involving merely the administration of corporate functions or duties affecting only individual rights, such as the election of officers, or admission of corporate officers or members, the writ, under the Act of 1836, may issue at the suit of the attorney general, "or of any person or persons desiring to prosecute the same." Murphy *v.* Farmers' Bank, 20 Pa. 415.

Suit to dissolve by stockholder.—Notwithstanding it may be true the right to dissolve a banking corporation is reposed solely in the state, yet a court of equity may, at the instance of a stockholder of such a corporation, entertain a proceeding against it and its officers and compel it to account for a fraudulent conversion of its funds, and such court may, if necessary for the preservation of the res, appoint a receiver. Chandler Mortg. Co. *v.* Loring, 113 Ill. App. 423.

Priority of proceedings.—The provisions of the banking law (Laws 1892, c. 689) relative to the taking possession of the property of an insolvent banking corporation by the superintendent of banks, and the institution of proceedings by the attorney general for its dissolution, being a special act, applying only to banking and similar corporations, and of later date than the general provisions of the Code of Civil Procedure relating to the voluntary dissolution of corporations (§§ 2419-2432), a proceeding instituted by the attorney general under the former statute for the dissolution of such a corporation, after the seizure of its property by the superintendent of banks, takes priority over a proceeding instituted by the directors under the latter statute, though the directors' proceeding was begun before that of the attorney general. Judgment, 43 N. Y. S. 836, 14 App. Div. 318, affirmed. In re Murray Hill Bank, 153 N. Y. 199, 47 N. E. 298.

67. Necessity of forfeiture proceedings.—Atchafalaya Bank *v.* Dawson, 13 La. 497; Union Bank *v.* Macdonald, 15 La. 25; Bank *v.* Green, 20 La. Ann. 214; People *v.* Bank, 12 Mich. 527; Montgomery *v.* Merrill, 18 Mich. 338; Finnell *v.* Burt, 2 Handy 202, 12 O. Dec. 403; State *v.* Butler, 83 Tenn. (15 Lea) 104.

A decree of a court where a bank is located, finding the latter insolvent, appointing a receiver, and restraining the bank from further transacting any business, is not a declaration of a forfeiture. City Ins. Co. *v.* Commercial Bank, 68 Ill. 348.

The failure of a bank to redeem its notes is a question for the state to inquire into, and the bank possesses the power to make loans until its charter shall have been declared forfeited. Maury *v.* Ingraham, 28 Miss. 171.

Bank may dispense with judicial proceeding.—The object of the Act of February 12, 1843, "for the final settlement of the affairs of the Planters' and Merchants' Bank of Mobile," was to obtain a dissolution of the bank's charter agreeably to law; and although it provides for the institution of judicial proceedings against the bank, to obtain a judgment of forfeiture of its charter, and declares, "that, if no cause of forfeiture shall be found, this act shall have no force or validity," yet the bank might dispense with the judicial proceeding by surrendering its charter and accepting the provisions of the act, and it was competent for the state, with the assent of the bank, to resume its franchises at any time. Savage *v.* Walshe, 26 Ala. 619.

Effect of order of foreign court.—The order of a Kentucky court, made

dictions, because of peculiar statutory provisions, a bank ceases to exist upon a noncompliance with or violation of the banking laws, so as to render a judgment of forfeiture unnecessary.[68]

§ 70 (4) Jurisdiction and Venue.—Dissolution proceedings by a creditor of a corporation to wind it up can not be instituted in a court of equity.[69]

§ 70 (5) Parties.—In some jurisdictions creditors and stockholders may institute dissolution proceedings against a bank.[70]

under the law of the state, appointing commissioners to take possession, for the benefit of its creditors, of the assets of a banking institution there, does not operate as a dissolution of the bank's corporate powers, so that the bank's interest in property of any description in Ohio could not be reached by legal remedies directed against that property by its creditors. Finnell *v.* Burt, 2 Handy 202, 12 O. Dec. 403.

68. Wilson *v.* Tesson, 12 Ind. 285.

Under the act to prevent illegal banking, a violation thereof may be pleaded in bar of any suit brought by a corporation, and it is not necessary that the franchise should have been forfeited, upon direct proceedings for that purpose. North Missouri R. Co. *v.* Winkler, 33 Mo. 354.

69. Jurisdiction of forfeiture proceedings.—Discontinuance of business, reputed insolvency, suffering its circulating notes to be returned to the comptroller for redemption, and nonpayment of rent for the premises occupied by the association, and the issuing of post notes to circulate as money, are not sufficient grounds for a proceeding in this court to dissolve the association at the instance of a simple contract creditor. Parmly *v.* Tenth Ward Bank (N. Y.), 3 Edw. Ch. 395.

But in Michigan under the Act of June 21, 1837, the court of chancery has jurisdiction over banking corporations to restrain them by injunction from exercising their corporate powers, to appoint a receiver to take charge of their assets, and to decree their dissolution, when the corporation is insolvent, when it refuses to pay its debts, or when it has violated any provision of its charter, or of any law binding on it. Attorney General *v.* Oakland County Bank (Mich.), Walk. Ch. 90.

Court of common pleas of New York.—In 1894 (Const., art. 6, § 12) the superior city courts, of which the common pleas of the city and county of New York was one, continued with the jurisdiction then possessed, and such further civil and criminal jurisdiction as might be conferred by law. Code Civ. Proc., § 263, subd. 2, provided that the superior city courts should have jurisdiction of actions for causes specifically enumerated, as well as for any other cause of action arising within the city, or where defendant is a resident of that city, or where the summons is personally served on him therein. Held, that the court of common pleas of New York had jurisdiction to entertain an action to dissolve a state bank incorporated under Laws 1882, c. 409, where New York City was its principal place of business, and the summons was served there, and the cause of action arose therein. Hagmayer *v.* Alten, 36 Misc. Rep. 59, 72 N. Y. S. 623.

70. Who may institute forfeiture proceedings.—In an action by a stockholder of a bank, praying the dissolution of the corporation, the vacation of an assignment made by the president and cashier, alleged to have been made without the knowledge of the stockholders, and with intent to defraud them, removal of the assignee, and appointment of a receiver, the bank, the president, and the cashier and assignee are all proper parties defendant. Mitchell *v.* Bank, 7 Minn. 252 (Gil. 192).

Rev. St., c. 148, § 25 (2 Taylor's St., p. 1734), provides, with reference to proceedings against corporations, for failure to pay debts or for charter violations, that if an application for an injunction and the appointment of a receiver be made by a creditor of any corporation whose stockholders are liable for the payment of the debt, in any event or contingency, they "or any of them may be made parties to the action, either at the commencement thereof, or in any subsequent

§ 70 (6) Multifariousness.—A single suit to wind up a banking corporation is sufficient, and the statutory liability of stockholders, and the liability of directors and officers and stockholders of the corporation for the payment of the indebtedness of the corporation in any event or contingency and the liability of the directors, managers, trustees and other officers of the corporation to make good any money or property squandered or lost through their fraud or negligence, are all germane to the subject of the action; therefore, may all be properly brought in as parts of the one controversy.[71]

§ 70 (7) Pleading.—The general rules of pleading in civil cases are applicable to proceedings upon an information in the nature of a quo warranto, except so far as these rules have been modified by statute. The information is a pleading which must be answered or demurred to, but the allegations of the information may be in very general terms; no great particularity is required.[72] On the other hand, the defendant's answer to the

stage of the proceedings, whenever it shall become necessary to enforce such liability." Section 26 provides that, if any creditor desires to make stockholders parties to the action "after a judgment therein against the corporation," he may do so by filing a complaint against them founded on such judgment. Held, that § 26 is but an extension of the remedy to such creditors as may choose to proceed to judgment before resorting to the equitable proceedings, and is not an implied denial of the action expressly authorized by § 25; and hence a creditor of a bank may, without having obtained a judgment at law against it, maintain an action against the bank and its stockholders jointly, to restrain the further exercise of corporate franchises to procure the appointment of a receiver, the distribution of assets, and, if necessary, enforce the stockholders' individual liability. Cleveland *v.* Marine Bank, 17 Wis. 545.

The forfeiture of charter for a failure to pay one of its notes in specie, given by the fourth section of the Act of 18th February, 1836, incorporating the Bank of the United States, is a penalty to enforce a private claim, and can not be pursued by a party who, on a second application, has received the amount of his note, with 12 per cent interest, in specie, and who has delivered it up to the bank, he not being the "holder or proprietor," within the meaning of the law. Kuhn *v.* Bank (Pa.), 2 Ashm. 170.

71. Rev. St. 1878, § 3218, provides that, when a banking corporation shall become insolvent, the court may restrain it from transacting business; § 3219 provides that the injunction may issue at the commencement of any action by any creditor or stockholder; and § 3227 provides that when an action shall be commenced under any of the provisions of the chapter against a corporation, its officers or stockholders, the court may, on application of either party, restrain all proceedings by any other creditor. Held, that but one winding-up suit is proper, and in an action by a creditor to close the business of an insolvent bank the statutory liability of stockholders, the liability of directors, officers, and stockholders for the indebtedness of the bank, and the liability of the directors or other officers to make good any money squandered through their fraud or negligence, may be enforced; the several liabilities not being different causes of action. Gager *v.* Marsden, 101 Wis. 598, 77 N. W. 922.

72. **Pleadings in quo warranto proceedings.**—Commercial Bank *v.* State (Miss.), 6 Smedes & M. 599, 45 Am. Dec. 280; People *v.* Hudson Bank (N. Y.), 6 Cow. 217.

For exacting excessive rate of discount.—Where a bank is prohibited by its charter from making loans above a certain rate of discount, and also in dealing in anything but bills of exchange, gold or silver bullion, etc. (not including promissory notes), a count in an information, charging the bank with "dealing in promissory notes," without charging the taking of unlawful discounts, is bad on special

charge of forfeiture must set forth particularly his matters of excuse or defense.[73]

§ 70 (8) Judgment.—Under the New York practice, a final judgment entered in an action brought by the attorney general to wind up the affairs of an insolvent bank, which dissolves the corporation and adjudges that it is insolvent and that its capital stock has been impaired, relates back to the date when the temporary receiver was appointed and took possession of the assets of the corporation.[74]

demurrer. Commonwealth *v.* Commercial Bank, 28 Pa. 383.

The bank being expressly authorized to deal in bills of exchange, a count in a quo warranto information charging the discounting of bills of exchange, at rate of discount exceeding that allowed by the charter, is bad on special demurrer, as, being drawn upon a distant place, the discount may have been regulated by consideration of exchange as well as time. Commonwealth *v.* Commercial Bank, 28 Pa. 383.

A count charging the bank with "dealing in promissory notes by purchasing same at rates of discount greatly exceeding" the allowed rate is good on special demurrer. Commonwealth *v.* Commercial Bank, 28 Pa. 383.

Counts charging, respectively, that defendant, on a day named, "and at divers other days before and since, discounted promissory notes and made loans, at rates of discount exceeding" the rate allowed, are good on special demurrer, without setting out the special notes, their parties, dates, or amounts, or the particular loans referred to, as the offense charged is the diversion of the business from its proper course. Commonwealth *v.* Commercial Bank, 28 Pa. 383.

Where the charter of a bank declared that the "rate of discount at which loans may be made shall not exceed one-half of one per centum for thirty days," a count, charging it with "discounting promissory notes at rates of discount exceeding one-half of one per centum for thirty days," is good on special demurrer, without averring that such discounts were made upon loans of money. Commonwealth *v.* Commercial Bank, 28 Pa. 383.

A count charging such a discount of a bill of exchange payable at Philadelphia is good, as this is a mere discount of a domiciliary bill, for which only the rate fixed by law could be charged. Commonwealth *v.* Commercial Bank, 28 Pa. 383.

A count charging that, "for many months past, the defendant has been in the constant practice of discounting promissory notes at exorbitant and usurious rates of interest, far exceeding the rate of one-half of one per centum for thirty days," is good on special demurrer. Commonwealth *v.* Commercial Bank, 28 Pa. 383.

Service of petition.—The officers of a bank are without authority to waive the service of a petition praying a forfeiture of its charter, or to waive the delay within which third persons may intervene to protect their interest, or of filing an answer which virtually confesses the forfeiture of the charter, and admits the necessity of the immediate liquidation of the bank. State *v.* Citizens' Sav. Bank, 31 La. Ann. 836.

73. In a proceeding against a bank to forfeit its charter because of its suspension of specie payments, the answer of the bank stated that it paid all its notes and liabilities, except certain checks which it had drawn on another bank, for payment of which provision had been made with that bank, but it failed to pay them, and they were returned; that, on being returned, the bank was unable to pay them at the time, but in two years afterwards, and before the commencement of any proceeding against it, it resumed specie payment on these checks and all other liabilities, whenever payment was demanded at its counter, and was then paying specie. Held, that this was not a sufficient answer to the charge of forfeiture, and no excuse for the suspension. Commercial Bank *v.* State (Miss.), 6 Smedes & M. 599.

74. Judgment in forfeiture proceedings.—People *v.* Merchants' Trust Co., 187 N. Y. 293, 79 N. E. 1004, citing People *v.* American Loan, etc., Co., 172 N. Y. 371, 65 N. E. 200; People *v.* Commercial Alliance Life Ins. Co., 154 N. Y. 95, 47 N. E. 968; Attorney General *v.* Life, etc., Ass'n, 150 N. Y. 94, 45 N. E. 8; In re Equitable, etc., Life Ass'n, 131 N. Y. 354, 30 N. E. 114.

§ 70 (9) Abatement and Vacation of Proceedings.—Abatement of Proceedings.—A proceeding for a voluntary dissolution of a banking corporation, instituted by its directors, abates upon the entry of a judgment dissolving such corporation in an action brought by the attorney general.[75]

Setting Aside.—A stockholder of a bank can not have the dissolution proceedings set aside on account of defects therein.[76]

§ 70 (10) Costs.—The costs of a proceeding to wind up the affairs of a bank should be borne ratably by all the creditors.[77]

§ 70 (11) New Trials.—Where an issue of fact is involved in dissolution proceedings against a bank, a new trial may be had as in other cases.[78]

§ 71. Receivers, Trustees or Commissioners in Proceedings for Dissolution—§ 71 (1) Selection, Appointment and Removal.—Where a banking corporation goes into liquidation, a receiver is the officer usually

75. In re Murray Hill Bank, 153 N. Y. 199, 47 N. E. 298, affirming 14 App. Div. 318, 43 N. Y. S. 836.

Another suit pending.—The pendency of a proceeding by directors of an insolvent bank to dissolve it does not bar an action by the attorney general for the same relief. People *v.* Murray Hill Bank, 10 App. Div. 328, 41 N. Y. S. 804, 26 Civ. Proc. R. 1, 75 N. Y. St. Rep. 1203.

76. A bank was dissolved and a receiver appointed, who assigned a judgment in favor of the bank, under authority of court. The assignee attempted to enforce the judgment against the proceeds of the share of the debtor in realty which had been sold in partition proceedings. A stockholder of the bank intervened, and attacked the assignment of the judgment, setting forth defects in the dissolution proceedings. Held, that he could not afterwards move to have the dissolution proceedings set aside on account of said defects. Order In re Grand Cent. Bank, 27 Misc. Rep. 116, 57 N. Y. S. 418, affirmed. In re Voluntary Dissolution, 42 App. Div. 157, 58 N. Y. S. 1022; Treacy *v.* Ellis, 45 App. Div. 492, 61 N. Y. S. 600.

77. Costs in dissolution proceedings.—Under the statute forbidding an insolvent corporation giving a preference, and providing that any of its creditors may institute proceedings for winding up its affairs, and on such application the court shall take charge of all its assets and distribute them equally among the creditors, an action, though in the name of a single creditor, for appointment of a receiver and to wind up the affairs of an insolvent bank, is for the benefit of all its creditors, so that the fees of the attorneys bringing the action should be borne by all the creditors in proportion to the amounts received by them. Bradshaw *v.* Bank, 76 Ark. 501, 89 S. W. 316.

Counsel fees.—For services rendered in the prosecution of a bill by creditors to wind up the affairs of a bank, counsel are entitled to be paid out of the aggregate recovery, all the petitioning creditors contributing pro rata; but counsel, only representing petitioning creditors, must be paid by their clients out of the funds recovered for them. Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

78. New trials in proceedings to enforce dissolution.—St. 1903, p. 368, c. 266, § 10, authorizes the dissolution of a bank at the suit of the attorney general, where the bank is insolvent, or its directors are transacting its business in an unsafe manner and by unsafe practices. Held that, while such section provided for the summary winding up of the affairs of a bank under such circumstances, suit brought by the attorney general was not necessarily of a summary character in its proceedings, so that, where an issue of fact was raised therein as to the insolvency of the bank, and as to alleged improper acts of its directors, a motion for a new trial was authorized after decree of dissolution. People *v.* Bank, 152 Cal. 261, 92 Pac. 481.

designated to wind up its affairs.[79] But in some jurisdictions the statutes authorize the appointment of other officers, such as trustees, with, however, much the same powers.[80] This trustee is sometimes appointed upon petition or application by the stockholders.[81]

In New York, a superintendent of banks is authorized to take charge of any institution that has violated its charter or any state law, or is conducting its business in an unsafe or unauthorized manner. This officer acts by virtue of his authority as such superintendent under the statute, and not as a result of any proceeding in court, but his general administration of the trust is subject to the supervision and control of the state supreme court in most respects.[82]

79. See post, "Assets and Receivers on Insolvency," § 77.

80. **Appointment of trustees.**—The governor has no authority, by virtue of his office, to appoint trustees under the act of 1847 to wind up the affairs of a state bank. People *v.* Ridgley, 21 Ill. 65.

Persons appointed to wind up the affairs of a state bank are not public officers, but merely trustees. People *v.* Ridgley, 21 Ill. 65; and hence are not subject to legislative control. Commercial Bank *v.* Chambers (Miss.), 8 Smedes & M. 9.

Removal of trustees.—Since persons appointed, under Act 1847, to close up the affairs of a state bank, are merely trustees, the proper method of proceeding to remove them is by bill in chancery, and not by quo warranto. People *v.* Ridgley, 21 Ill. 65.

Liquidators in Louisiana.—Where a charter gives the right to shareholders to control liquidation of a bank, the officers, including the board of directors, are without authority to surrender such right, and a request by the shareholders, made to the court, to confirm their action in appointing liquidators, is not a renunciation of their right to select liquidators, but is an affirmance of it. Dreifus *v.* Colonial, etc., Trust Co., 123 La. 61, 48 So. 649.

Election of liquidators.—Louisiana Rev. St., § 687, provides that stockholders at a general meeting convened therefor may dissolve the corporation with assent of three-fourths of the stock represented thereat. Articles of incorporation of a bank provided "said association may be dissolved with the assent of two-thirds of the capital stock represented at a general meeting of the stockholders convened for that purpose." Held, that the election of liquidators by all the stockholders present at a meeting is not invalid, because the election was not supported by three-fourths of the entire stock. Dreifus *v.* Colonial, etc., Trust Co., 123 La. 61, 48 So. 649.

81. A bank, being insolvent by action of its stockholders, under Banking Law (Laws 1895, p. 92, c. 8), § 35, passed with all its assets into the control of the State Banking Board, which turned over the property, under the law, to a trustee on the application of the stockholders. Thereafter the bank brought suit on a note, and defendant pleaded that the bank was not the real party in interest, but that the trustee was the proper party plaintiff. Held, that where the answer fails to allege that the parties, who are described as stockholders and on whose petition the assets were turned over to the trustee, were all, or even a majority, of the stockholders, as required by Laws 1895, pp. 91, 92, c. 8, §§ 34, 35, to authorize such appointment of a trustee, it was insufficient to show a legal appointment of such trustee, and vesting in him the right to sue and recover assets. Omaha Sav. Bank *v.* Rosewater, 1 Neb. 723, 96 N. W. 68.

Where the assets of an insolvent bank were, on petition of its stockholders, turned over to the trustee in accordance with the banking law, if such act was illegal, because a sufficient number of stockholders had not petitioned therefor, as required by the statute, any acquiescence in the proceedings or ratification thereof by the stockholders must be shown in the record. Omaha Sav. Bank *v.* Rosewater, 1 Neb. 723, 96 N. W. 68.

82. Under New York Banking Law (Consol. Laws 1909, c. 2), §§ 19, 190, authorizing control of certain banks by the superintendent of banks under specified circumstances, a superintendent taking charge of a banking institution does so by virtue of statu-

§ 71 (2) Title, Right and Authority.—While the legal title to the bank's assets is in the trustee,[83] yet a bank commissioner under the statutes in some states can not supersede the officers of the bank in control of its property.[84] The powers of bank commissioners and trustees are limited to such acts alone as pertain to closing the pecuniary matters of the bank, to do what the officers of the bank could do before its charter was repealed. In short, they are merely administrators to settle up the estate.[85] A majority of such commissioners are authorized to act.[86] Thus trustees

tory authority as superintendent, and not as a result of any proceeding in court, though his administration is, in certain respects, subject to the action of the state supreme court. In re Bologh, 185 Fed. 825.

83. The charter of a bank was forfeited by legal proceedings, and the plaintiff was appointed a trustee to sue for and collect the debts due the bank. Afterwards, in pursuance of a law subsequently passed, the circuit court directed the trustee to sell the assets of the bank to the highest bidder. Held that, the legal title to all the property of the bank being vested in the trustee by operation of law and the proceeding of the court consequent on the forfeiture of the charter, such title was not terminated by the order to sell. Bingaman *v.* Robertson, 25 Miss. 390.

84. Powers of California bank commissioner.—Act March 30, 1878, § 11, as amended by Acts 1886-87, p. 90, authorizing the bank commissioners to obtain an injunction to restrain the doing of business by a bank which is insolvent or can not safely do business, requires the business of such bank to be settled within four years after it is declared insolvent, unless a majority of the commissioners consent to its longer continuance in liquidation. The act also provides that banks in liquidation shall make semiannual reports of their condition to the bank commissioners, and that the commissioners shall examine their condition, and "shall have a general supervisory control" of them, and shall designate the number of officers and employees necessary to close up the business and fix their salaries. Held, that the act does not authorize the commissioners to supersede the officers of the bank in the control of the bank's property during its progress towards final liquidation. Long *v.* Superior Court, 102 Cal. 449, 36 Pac. 807.

85 Authority over directors.—Under the law creating the bank commissioners and defining their powers, requiring the commissioners to examine the condition of every banking corporation in liquidation in the same manner as in case of solvent banks, and providing that subject to the right of removal and appointment the directors of banking corporations in liquidation shall manage the affairs thereof under the direction of the bank commissioners, etc., the business of closing up the affairs of a banking corporation in liquidation is vested in the directors of the corporation, and the bank commissioners have authority over the directors and the affairs of the corporation only for the purpose of safeguarding the depositors and stockholders against an extravagant or fraudulent administration. Bank *v.* Brown, 8 Cal. App. 566, 97 Pac. 533.

Number and salaries of employees.—St. 1895, p. 177, c. 167, § 12, giving the bank commissioners power to limit the number and salaries of employees of banking corporations in liquidation, amends St. 1887, p. 92, c. 80, giving the commissioners power "to designate the number of officers and employees necessary to close up the business * * * and to fix the salaries of the same;" and under it the commissioners are empowered to fix the maximum number of employees of banking corporations in liquidation, and to fix their maximum salaries, and, where the commissioners have fixed such limitation, the directors of the corporation must fix the number of employees and their salaries within such limit. Bank *v.* Brown, 8 Cal. App. 566, 97 Pac. 433.

86. Act March 24, 1903, § 10, St. 1903, p. 368, c. 266, as amended by Act March 20, 1905, St. 1905, p. 304, c. 296, provides that upon the failure of a bank to conform to the requirements of the bank commissioners, or if the commissioners unanimously decide that it is unsafe for the bank to continue business, they shall take its property, whereupon the attorney general shall commence suit to enjoin the transaction of business by such bank,

may compromise debts due the bank,[87] with the approval of the court,[88] or perform any other acts that will contribute to an advantageous closing of its affairs.[89] The trustees of an insolvent bank may execute a warrant

the act also providing that there shall be four bank commissioners. Held that the fact that there were only three bank commissioners serving when they decided that a continuance of defendant's bank was unsafe did not prevent a "unanimous" decision under the act, as they could exercise the powers conferred by law so long as there was in office a majority of the number provided by statute. People *v.* Bank, 154 Cal. 194, 97 Pac. 306.

87. Trustees may make compromises.—Neither one of several nor all the assignees in conjunction appointed to wind up the affairs of the Bank of Illinois is or are authorized to make a compromise with any debtor of the bank, by which the security of the bank or the trust fund will be diminished, unless some advantage will thereby accrue to the creditors of the bank. Thomas *v.* Sloo, 15 Ill. 66.

Under the powers conferred by the acts of the 13th February, 1843, for the final settlement of the affairs of the Planters' & Merchants' Bank of Mobile, and of the 24th January, 1845, amendatory thereof, the trustees appointed by virtue of the latter act may lawfully enter into a contract with a third person, without the consent of the debtor, to secure the payment of a doubtful debt due to the bank, and transfer the debt for that purpose to such third person. Saltmarsh *v.* Planters', etc., Bank, 17 Ala. 761.

Act 1845 authorizes the appointment of trustees to settle the affairs of the Planters' & Merchants' Bank, whose charter had been declared forfeited, and gave them power to compromise bad or doubtful debts, and to use all the remedies which the bank might have used, while in existence, for the collection and securing of its claims. Held, that the trustees were authorized to take individual notes to secure a balance due from another bank that had suspended specie payment, as such debt must be considered bad or doubtful. Jemison *v.* Planters', etc., Bank, 23 Ala. 168.

Act Feb. 13, 1843, for the final settlement of affairs of the Planters' & Merchants' Bank after declaring its charter forfeited, and providing for the exhibition of an information in the nature of a quo warranto and the appointment of commissioners, provides that it shall be lawful for said commissioners to submit to arbitration contested claims, "to compound any doubtful or bad debt," etc. Pamph. Acts 1845, p. 46, provides that the trustee may use the corporate name of said bank in the collection of debts due it, and may use all the modes and powers given to the bank for the collection of its debts, in the same manner as if the charter had never been forfeited. Held, that these provisions do not authorize discounting or purchasing bills except in payment or as security for a debt that is bad or doubtful. Saltmarsh *v.* Planters', etc., Bank, 14 Ala. 668.

88. The proceedings of a trustee appointed to settle up the affairs of a bank, and authorized to make such compromises as he may deem most advantageous, are subject to the revision and control of a court of equity, and may be rejected or confirmed. Morris *v.* Thomas, 17 Ill. 112.

89. Powers incidental to main power.—Under the Act of 1850, relative to the final settlement of the affairs of the Planters' & Merchants' Bank of Mobile, etc., and providing that, within thirty days after, etc., the trustees of said bank shall sell for cash all remaining property, claims, etc., belonging to said bank, and realize the same for the purpose of final settlement, the trustees, by necessary implication, had the power to transfer negotiable securities so as to pass the legal title by their assignment, and enable the purchaser to sue in his own name. Savage *v.* Walshe, 26 Ala. 619.

Discounting notes.—As the trustees of the Planters' & Merchants' Bank of Mobile had authority, on the final settlement of the affairs of the bank, to take a note in settlement of a debt due to the bank, the fact that a note taken by the trustees after the surrender of the bank's charter was made "negotiable and payable at said bank" does not raise a legal presumption that it was unlawfully discounted by the trustees, instead of being taken in settlement of a debt due, so as to defeat an action brought thereon by one who purchased the note at the trustees' sale of the bank's assets. Savage *v.* Walshe, 26 Ala. 619.

Sale of collateral securities by trustee.—The trustee of a bank in liquida-

to confess judgment given to the bank before its insolvency.[90] But trustees have no power to contract away the assets of the bank to carry on quo warranto proceedings against its officers,[91] nor sue for and recover debts due the bank, after its liabilities are paid off.[92] Commissioners appointed in another state have no extraterritorial powers.[93]

Duties.—The duty of a trustee of a banking corporation forbids the concealment of any fact from the note holders and creditors which affects the value of their notes or debts, and requires them to disclose every fact that the creditor is concerned to know. It requires prompt distribution of cash assets, prompt notice to creditors to file claims, and a full recognition of the fact that they are equally the agents of the creditors to protect and to assist them, and of the corporation to husband and economically administer its resources.[94]

tion has the same right as any pawnee or pledgee to sell collateral security transferred to the bank, upon giving to the debtor notice of the time and place of the sale. But if it appears that he had actual knowledge of the fact a reasonable time before the sale was to take place, this is sufficient without a formal notice. Alexandria, etc., R. Co. *v.* Burke, 63 Va. (22 Gratt.) 254. See, also, Howe, etc., Co. *v.* Ould, 69 Va. (28 Gratt.) 1.

Transfer of assets.—St. 1895, p. 172, c. 167, creates a bank commission, and § 11 (page 175) requires the commissioners to control a bank in liquidation until the court shall order the commissioners to surrender the property in their possession to the corporation for liquidation, and that the directors or trustees shall be permitted to manage the bank's affairs during liquidation. The corporation is also required to report its affairs to the commissioners, and with amounts realized for property sold since any previous report. Held, that the officers of a bank in process of liquidation had power, with the knowledge and acquiescence of the bank commissioners, to make an absolute assignment of pledged securities to the pledgee, in a final settlement of the bank's transactions with such pledgee. Merced Bank *v.* Price (Cal.), 98 Pac. 383.

Revival of judgment.—The trustee of a bank whose charter has been forfeited may, in his own name, revive a judgment upon which a claim of the bank is founded, and the claim will be regarded as that of the trustee of the bank. Robertson *v.* Agricultural Bank, 28 Miss. 237.

90. Warrant of attorney to confess judgment.—Trustees authorized to close the affairs of a bank after its charter has expired may use a warrant of attorney to enter judgment given to the bank. Martin *v.* Belmont Bank, 13 O. 250.

91. The trustees of the Miners' Bank of Dubuque, appointed under the act repealing the bank charter, could only settle the affairs of the bank, and were not authorized to employ and pay, from the assets of the bank, an attorney to conduct a quo warranto suit against the bank officers. Miners' Bank *v.* Thomas (Iowa), 4 Greene 336.

92. Powers of trustee appointed on judgment of dissolution against bank under the act of the twentieth of July, 1843, are terminated when he has paid off and discharged the whole of the debts of the bank, and he can not sue for and recover the debts which were due to it, and which were still outstanding and unpaid. Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168.

93. Rights of foreign commissioners.—The order of a Kentucky court, made under the law of the state appointing commissioners to take possession, for the benefit of creditors, of the assets of a banking institution there, does not operate so as to divest any title or interest of that institution in property of any description in Ohio, and prevent legal remedies directed against that property to satisfy a debt. To give such commissioners a priority, they must establish their claim under the laws of this state. Finnell *v.* Burt, 2 Handy 202, 12 O. Dec. 403.

94. Trustee must act in good faith.—Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

Liabilities.—Such trustees are liable as well for acts of nonfeasance as misfeasance.[95]

§ 71 (3) Salary or Compensation.—Right to Compensation.—The trustees of a banking corporation in process of liquidation are entitled to reasonable compensation for services performed.[96]

Amount of Compensation.—In the absence of any amount of compensation having been fixed for commissioners appointed to effect the liquidation of an insolvent bank by the statute governing the subject, it is the duty of the judge of the court before whom the proceedings are taken to fix same according to his best judgment and discretion, and his finding in the premises will not be reversed unless it clearly appears that his award is excessive or erroneous.[97] Where the directors of a banking corporation in liquidation fail purposely or negligently to fix the salary of its secretary and manager, though the bank commissioners have fixed the maximum salary to be paid him, he can only recover on a quantum meruit.[98]

§ 71 (4) Suits by and against—§ 71 (4a) Suits by.—The trustee may bring suit to collect claims due the bank until a sufficient fund has been realized to pay its debts.[99] But it has been held that commissioners

95. Liabilities of trustees.—Where the managing trustees of a bank in liquidation have funds, the distribution of which is prevented by litigation, and responsible banks in the community in which they reside pay interest on deposits, and such funds were bearing interest when the trustees obtained custody of the same, and they withdrew the moneys from the banks and deposited them in a bank in which a trustee was a stockholder, without interest, such trustee is personally liable for the customary rate of interest paid for deposits of like character. Gund *v.* Ballard, 80 Neb. 385, 114 N. W. 420.

96. Compensation of trustees.—That managing trustees of a bank in process of liquidation have not been active in defending actions by one of their number against the bank on an individual claim will not defeat their right to a reasonable compensation for services in settling the other affairs of the bank. Gund *v.* Ballard, 80 Neb. 385, 114 N. W. 420.

97. Amount of compensation.—State *v.* Bank, 49 La. Ann. 1060, 22 So. 207.

Under St. April 6, 1843, § 2, the commissioners for the liquidation of banks were entitled to compensation at the rate fixed by that section until superseded by the appointment of a liquidator under St. May 4, 1847. The salaries allowed by St. 1843 were not limited to the period of four years, mentioned in St. March 14, 1842, § 25. In re Merchants' Bank, 3 La. Ann. 382.

Arrears of salary which are due a liquidating bank commissioner under the Louisiana Act of March 14, 1842, are extinguished by a judgment of equal amount, held against him by the bank. Conrey *v.* Copland, 4 La. Ann. 307.

98. In an action by a banking corporation for money collected and retained by an officer, the answer admitted receiving the money in the capacity as officer, and alleged that the officer retained the same in part payment of his compensation for services as secretary and manager during the liquidation of the corporation, and set forth an express agreement to pay him a specified sum per month as his salary without alleging between whom the agreement was made. Held, that the allegation of an agreement to pay him a salary referred to the action of the bank commissioners fixing the limit of the salary and the answer failed to show a valid agreement fixing his salary. Bank *v.* Brown, 8 Cal. App. 566, 97 Pac. 533.

99. Suits by trustee to collect assets.—The trustee of a dissolved bank appointed under Act 1843, with power to collect sufficient assets of the bank to pay its debts, has no longer power,

can not enforce the liability of bank directors.[1]

Manner of Instituting Suit.—The trustees of an insolvent bank should sue in their collective and not in their individual names.[2] But an action by a sole trustee should be in his own name, without in any way using the name of the bank.[3]

§ 71(4b) Suits against.—Commissioners may be sued for any cause, though arising under the administration of former boards of directors.[4]

§ 71 (4c) Revivor of Actions.—Suits by bank commissioners do not abate upon the abolition of their office.[5]

§ 71 (5) Termination of Trust.—After the trustee executes his trust, his rights terminate.[6]

after a sufficient amount has been collected, to sue on claims due the bank. Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168.

The charter of a bank was, by legal proceeding, declared forfeited, and the plaintiff was appointed a trustee to sue for and collect the debts due the bank. Afterwards, in pursuance of a law subsequently passed, the circuit court directed the trustee to sell the assets of the bank to the highest bidder. Held, that the right of the trustee to sue for and collect a note due the bank was not devested by the order of sale. Bingaman *v.* Robertson, 25 Miss. 390.

Where, before an assignment to trustees on the dissolution of a bank, as provided for by the Laws of 1843, the bank had transferred without indorsement a note payable to a third person, the trustees appointed could not bring an action on such note in their own name for the use of the holder of such note. Bacon *v.* Cohea (Miss.), 12 Smedes & M. 516.

The trustees of the rights and property of a bank, on its dissolution, can not maintain an action, as such trustees, on a note, against a person who drew or indorsed it, as an officer and in behalf of the bank. McLaren *v.* Pennington (N. Y.), 1 Paige 102.

1. Suits by trustee to enforce liability of directors.—Commissioners appointed to liquidate a free bank, whose charter was judicially forfeited, have no right of action against directors charged with violating Rev. St., §§ 300, 301, regulating loans, etc. The directors' liability for the debts is not an asset susceptible of collection by the commissioners, but accrues to the creditors ut singuli. Lacombe *v.* Milliken, 36 La. Ann. 367.

2. Manner of bringing suit.—Martin *v.* Belmont Bank, 13 O. 230.

3. Action by sole trustee.—In an action brought in the name of the "Bank of Tennessee for the use of R. Ewing, trustee and receiver," on a note executed to S. Watson, trustee of said bank, the defense was, that the bank as a corporation had ceased to exist when the action was brought. Held, that the bank was not the real plaintiff, or even a necessary nominal plaintiff, and the defense was not available. Kyle *v.* Ewing, 73 Tenn. (5 Lea) 580.

Suit by surviving trustee.—A suit on a note assigned to the trustees of the Real-Estate Bank by that bank is perfectly brought in the name of the surviving trustees, after the death of any of them. Conway *v.* Roane, 10 Ark. 242.

4. Suits against bank commissioners.—Gaillard *v.* Citizens' Bank (La.), 11 Rob. 168.

5. Abatement of suits against bank commissioners.—After the dissolution of a banking corporation by a decree in a suit by the bank commissioner, and after the appointment of a receiver, and a reference to a master to settle the claims of creditors, who had come in under the decree requiring all the creditors of the bank to come in and prove their claims, the office of bank commissioner was abolished by statute, but no provision was made for the continuance of suits previously commenced by such officer. Held, that the court might proceed in the suit, without a formal revivor, upon the mere entry of an order that the master proceed in the reference. In re City Bank (N. Y.), 10 Paige 378.

6. Termination of trust.—Under the Act of July 26, 1843, a payment of the bank's debts, or collection from the

§ 71 (6) Accounting.—If a trustee of a bank should receive the money of the bank, use it as his own, or in any way interfere with it, so that, in consequence of his wrongful act, it was lost to the bank, the bank would have an action in equity to compel him to account.[7]

§ 72. Effect of Dissolution—§ 72 (1) In General.[8]—The statutes providing for the winding up and dissolution of banking corporations usually specify the effect thereof.[9] But it may be stated generally that upon dissolution the right of the bank to enter upon new business is suspended, except such as is necessary and appropriate in settling the affairs of the concern.[10] And the legal duty resting on going concerns to report

assets of sufficient money for that purpose by the trustee, was a full execution of his trust, whereby he became functus officio. Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168.

7. Accounting by trustees.—Higgins *v.* Tefft, 4 App. Div. 62, 38 N. Y. S. 716, 74 N. Y. St. Rep. 100.

8. Effect of appointment of receiver, see post, "Negligence or Default of Agents or Correspondents," § 170.

9. General effect of dissolution of banks.—Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

Rule in Mississippi.—A judgment of forfeiture, under the statute of 1843, prescribing the mode of proceeding against banks for a violation of their franchises, has none of the common-law consequences of a judgment of forfeiture, but only such effect as is given it by the statute itself, it being competent for the legislature to waive the penalties of the forfeiture in whole or in part, and to determine all the consequences of such judgment. Nevitt *v.* Bank (Miss.), 6 Smedes & M. 513.

A judgment of forfeiture rendered in a proceeding to forfeit the charter of a bank (Sess. Acts, p. 55), and an appointment of trustees thereunder to take charge of and collect the assets of the bank, operate as an assignment of the effects of the bank to the trustees for the benefit of creditors. Nevitt *v.* Bank (Miss.), 6 Smedes & M. 513.

10. No new business allowable after dissolution.—Saltmarsh *v.* Planters', etc., Bank, 14 Ala. 668; Smith *v.* Frye, Fed. Cas. No. 13,049, 5 Cranch C. C. 515.

By death.—On the dissolution of a banking association by the death of a member, the survivor has the right to take possession of the copartnership assets and settle up the affairs of the joint concern; and it may be stated, as a settled proposition, that the power of a partner to make a contract for the firm ceases upon the dissolution of the firm, and the surviving partners or expartners can enter into no contract which will bind the estate of the deceased partner, except such as is appropriate and necessary in settling the affairs of the concern. Dissolution operates as a revocation of all authority for making new contracts; as dissolution finds the engagements of the company, they must remain until liquidated and paid. First Nat. Bank *v.* Payne & Co., 85 Va. 890, 9 S. E. 153, 3 L. R. A. 284.

Where a bank became insolvent and went into liquidation, its power to bind its stockholders ceased except with reference to transactions implied in the duty of liquidation. Covell *v.* Fowler, 144 Fed. 535.

Right to contract.—A contract made by a bank officer after the bank had ceased to exist, for failure to comply with the provisions of Act of 1855, is not binding on the stockholders. Wilson *v.* Tesson, 12 Ind. 285.

Under St. 1819, c. 43, providing that corporations shall continue bodies corporate for the term of three years after the expiration of their charters, for the purpose of settling their business, but not for the purpose of continuing business, a bank is authorized, immediately before the expiration of the term of three years after its charter has expired, to indorse a note to trustees appointed to wind up its affairs. Folger *v.* Chase (Mass.), 18 Pick. 63.

Necessary officers may be appointed.—Where, on the surrender of the charter of a bank, and its acceptance by the legislature, the bank is continued in its corporate capacity for a limited time, for the purpose of closing its affairs, the directors may legally appoint a cashier, under the general

their financial condition is also suspended.[11] But the dissolution of a banking corporation does not prevent a court of equity from collecting and administering its assets.[12]

On Right to Sue and Be Sued.—In the absence of statute a banking corporation, after its charter has been forfeited, can not sue in the corporate name.[13] But by statute in most jurisdictions, even after dissolution, a bank is continued in its corporate capacity for a limited time and may sue and be sued, plead and be impleaded, as a corporation.[14] Nor will a

banking law. Cooper *v.* Curtis, 30 Me. 488.

Issuing and circulating securities.—St. 1812, c. 57, which prohibited banks, after the expiration of their charters, from issuing or putting into circulation any securities for money, did not extend to the assignment of a note for the purpose of paying a debt owed by the bank before the charter expired; no new obligation being contracted by the bank. Hallowell, etc., Bank *v.* Hamlin, 14 Mass. 178.

11. On duty to report financial condition.—Under Sess. Laws 1897, p. 111, c. 47, § 30, providing that a bank may be voluntarily liquidated by paying its depositors in full, and that, on filing a verified statement with the bank commissioner setting forth that its liabilities have been paid and the surrender of its certificate of authority to transact a banking business, it shall cease to be subject to the provisions of that act, and may continue to transact a loan and discount business under its charter, where a bank has paid its depositors and surrendered its certificate of authority, it is no longer subject to the requirement of that act that reports of its financial condition be made to the bank commissioner. Wilson *v.* First State Bank, 77 Kan. 589, 95 Pac. 404.

12. Kyle *v.* Ewing, 73 Tenn. (5 Lea) 580.

13. Effect of dissolution on right to sue and be sued.—A banking company, whose charter was adjudged forfeited, and which had been placed in the hands of receivers under the Act of February 13, 1842, could not prosecute a suit after such dissolution. Under this act, the corporate name of the company could be used only by the receivers appointed under the act. Miami Exporting Co. *v.* Gano, 13 O. 269.

The dissolution of a corporation by act of the legislature deprives it of its corporate existence, so that a legal judgment can not be rendered against it. Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649; Rankin *v.* Sherwood, 33 Me. 509.

Where, after the repeal of the charter of a bank, property had been ordered to be taken and distributed among creditors by receiver, suit on a debt due by the bank can not be brought against it in its name, and a judgment in such suit is a nullity, the statute giving corporations three years in which to wind up their affairs not being applicable. Whitman *v.* Cox, 26 Me. 335.

After the charter of a bank has been repealed, and a receiver appointed, a stockholder has no authority to defend an action brought against the corporation. Merrill *v.* Shaw, 38 Me. 267.

Suit by assignee of judgment.—The assignee of a judgment rendered in favor of a bank filed a bill to revive and enforce the same against the judgment debtor. After the assignment, a judgment of forfeiture was pronounced against the bank. Held that, as the assignee can not proceed at law in the name of the bank by reason of the forfeiture, a court of equity will entertain jurisdiction, and enforce such judgment. Marsh *v.* Mandeville, 28 Miss. 122.

14. Pomeroy *v.* State Bank, 1 Wall. 23, 17 L. Ed. 500; Smith *v.* Frye, Fed. Cas. No. 13,049, 5 Cranch C. C. 515; Huntsville Bank *v.* McGehee (Ala.), 1 Stew. & P. 306; Underhill *v.* State Bank, 6 Ark. 135; Cunningham *v.* Clark, 24 Ind. 7; Conwell *v.* Pattison, 28 Ind. 509; American Bank *v.* Cooper, 54 Me. 438; Folger *v.* Chase (Mass.), 18 Pick. 63; Pub. St. New Hamp. 1901, Ch. 148, §§ 18, 19; Kalb *v.* American Nat. Bank, 21 O. C. C. 1, 11 O. C. D. 437; Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339, 4 Am. L. Rec. 705; Commonwealth *v.* Huntingdon Bank (Pa.), 2 Pen. & W. 438; Kyle *v.* Ewing, 73 Tenn. (5 Lea) 580, construing, § 1493 of the Code; Shappard *v.* Cage, 19 Tex. Civ. App. 206, 46 S. W. 839, affirmed in 93 Tex. 656, no op.; Donnally *v.* Hearndon, 41 W. Va. 519.

suit brought against the corporation prior to the expiration of its charter

23 S. E. 646; W. Va. Code, p. 511, ch. 53, § 59.

When the condition arrives which drives an incorporated company into liquidation, when it must marshal and collect its assets, and pay its debts, and wind up its business and adjust its affairs, its power to assert and defend its rights is most strong because the necessity is then most imperative. The last sign of vitality of an incorporated company is the power to maintain and defend an action; and the nature and purpose of the action is the test of whether or not the company has sufficient life to maintain it. Kalb *v.* American Nat. Bank, 21 O. C. C. 1, 11 O. C. D. 437.

A banking corporation may prosecute its suit to final judgment for the purpose of closing up its affairs, though it goes into voluntary liquidation pending the litigation. Commercial Loan, etc., Co. *v.* Mallers, 242 Ill. 50, 89 N. E. 661.

Where a solvent bank goes into voluntary liquidation under Act March 14, 1842, No. 98, though its banking franchises be surrendered, the body corporate exists, and the commissioner in collecting its debts may sue in the corporate name. Commercial Bank *v.* Villavasco, 6 La. Ann. 542.

A bank, just before the expiration of its corporate existence, by its cashier, indorsed and assigned to a trustee, for the stockholders, all unpaid paper belonging to the bank. Held, that the assignment was valid, and that the trustee might sue, after the expiration of the bank charter, on paper so indorsed to him. Cooper *v.* Curtis, 30 Me. 488.

The period for which a bank was chartered not having expired, no forfeiture having been suffered, and no judgment of dissolution having been rendered against it, it continued to exist as a banking corporation, authorized to sue on a note due it, notwithstanding it had gone into voluntary liquidation, paid off its depositors, surrendered to the banking commissioner its certificate of authority to transact business, and ceased to transact any business, except to collect debts owing it and to distribute the proceeds among its stockholders by way of closing up its affairs. Wilson *v.* First State Bank, 77 Kan. 589, 95 Pac. 404.

The Act of March 3, 1855 (1 Gav. & H. St. 124), did not operate to dissolve a free bank organized under the Act of May 28, 1852, because its provisions were not complied with. But such bank, under § 48 of the first-mentioned act, continued until March 1, 1857, for the purpose of winding up, or accepting such act, and had three years from the latter date to sue and be sued, to settle, dispose of, and convey its property, and divide the capital stock, but not to continue the business for which it was established. Cunningham *v.* Clark, 24 Ind. 7; Conwell *v.* Pattison, 28 Ind. 509.

Under the bank commissioners' act, as amended in 1895, providing a scheme of liquidation for insolvent banks by which the assets are created a trust in the hands of the directors for the benefit of creditors, and the corporation enjoined from the transaction of any business except that of trustee for the purpose of liquidation, an ordinary action for the collection of a debt can not be maintained against an insolvent bank in process of liquidation under the act. Argues *v.* Union Sav. Bank, 133 Cal. 139, 65 Pac. 307.

Right to sue on collaterals.—Where a note and mortgage, payable to a bank as a corporation, was pledged by the bank, it was entitled to sue thereon in its corporate name, though it was in course of liquidation. Merced Bank *v.* Price (Cal.), 98 Pac. 383.

Rights of foreign corporations.—2 Rev. St. Can., c. 129, § 15, provides that a company shall cease to carry on its business from the time of the winding-up order, except in so far as is required for the beneficial winding up thereof, and that the corporate state and all the corporate powers of the company shall continue until the affairs of the company are wound up. St. Can. 53 Vict., c. 31, § 91, provides that on the forfeiture of the charter of a bank it shall only remain in force for the purpose of enabling the directors or other lawful authority to wind up its business. Held, that an insolvent Canadian bank has the capacity to maintain an action, after the appointment of liquidators, for the recovery of a debt. Ham *v.* Banque Ville Marie, 22 R. I. 248, 47 Atl. 364.

Attachment after dissolution.—The forfeiture by a bank of its charter, and the appointment of a receiver to distribute the assets among its creditors in the state of its location, does not prevent a creditor from bringing

abate on its expiration,[15] though as a general principle, the dissolution of a corporation by the expiration of its charter pendente lite is an abatement of the suit.[16] Furthermore, it is the especial duty of its officers to see that all such suits are maintained and defended.[17]

§ 72 (2) On the Relation of Officers to the Bank.—The powers and duties of the officers of an insolvent bank cease when it makes an assignment for the benefit of creditors. After its dissolution said officers are neither the agents nor trustees of the bank, and they may lawfully

an attachment suit against the bank in another state. City Ins. Co. *v.* Commercial Bank, 68 Ill. 348.

A banking corporation may sue out execution on its judgment for the purpose of closing up its affairs, though more than two years have intervened between its voluntary dissolution and the date of the judgment; the limitation in Hurd's Rev. St. 1908, c. 32, § 10, continuing corporations for two years for the purpose of collecting debts, being applicable to "corporations organized under" that law, and not to banking corporations which are within the general public policy of the state, allowing a corporation to do such acts as may be necessary to collect its debts and settle up its affairs after dissolution. Commercial Loan, etc., Co. *v.* Mallers, 242 Ill. 50, 89 N. E. 661.

On rights of federal courts.—Judicial proceedings on petition of the bank commissioners, under Pub. St. N. H. 1901, c. 162, for winding up a banking corporation, in which an assignee is appointed in whom the title to all its property vests, do not operate to dissolve the corporation at once so as to preclude the rendition of a judgment against it by a federal court. Judgment, Anglo-American Land, etc., Co. *v.* Cheshire Provident Ins., 124 Fed. 464, affirmed. Cheshire Provident Inst. *v.* Anglo-American Land, etc., Co., 66 C. C. A. 122, 132 Fed. 968.

Effect of appearance.—"It is by no means certain that the bank had no capacity to sustain a suit, notwithstanding the expiration of its charter and the transfer of its property to trustees. But, however this may be, where those very trustees, in whom plaintiff claims that the title was vested, and from whom he derives title by deed, appeared to this suit and moved to dissolve the attachment, and the bank appeared by attorney and defended the suit, both must then be bound by these proceedings, and neither can deny a jurisdiction to which they voluntarily submitted." McGoon *v.* Scales (U. S.), 9 Wall. 23, 19 L. Ed. 545.

15. Abatement of actions against banks.—Pomeroy *v.* State Bank (U. S.), 1 Wall. 23, 17 L. Ed. 500.

Banking associations organized under the Act of 1838 are corporations; and therefore a suit begun by such bank is not abated by the appointment of a receiver, within the Act of April, 1832, which provides that dissolution of a corporation shall not abate any suit brought by it, and that such suit may be continued by the receiver. Talmage *v.* Pell (N. Y.), 9 Paige 410.

But the expiration by limitation of the charter of the United States banks abated all pending suits in the name of the president, directors, and company of that bank, though by the charter its notes were still receivable in all payments to the United States. Bank *v.* McLaughlin, Fed. Cas. No. 928, 2 Cranch C. C. 20.

16. The rule that at law no action can be maintained by or against a corporation after it has ceased to exist, in the absence of statute, still applies in some jurisdictions. Kyle *v.* Ewing, 73 Tenn. (5 Lea) 580.

The expiration of the charter of the State Bank during the pendency of a bill in chancery for the collection of a debt due the bank did not affect the right to the debt which was previously vested in the superintendent and board of common-school commissioners of the state. Ingraham *v.* Terry, 30 Tenn. (11 Humph.) 572.

17. When an incorporated company goes into liquidation, it becomes the special function of its president, for the purpose of winding up its affairs, to see that actions to that end are maintained and defended; and he may do this without specific authority of the board of directors. Kalb *v.* American Nat. Bank, 21 O. C. C. 1, 11 O. C. D. 437.

buy up outstanding claims against it, if in so doing they act fairly and with an honest intent.[18]

§ 72 (3) On Rights of Creditors—§ 72 (3a) In General.—The elementary books and the numerous cases decided are uniform in their language in regard to the consequences resulting from the dissolution of a banking corporation at common law. They hold that upon the death of a corporation, all its real estate remaining unsold reverts back to the original grantor and his heirs. The debts due to and from the corporation are all extinguished. Neither the stockholders, nor the directors, nor trustees of the corporation, can recover those debts, or be chargeable with them in their natural character. All the personal estate of the corporation vests in the crown, with use in the people of the state, as succeeding, in this respect, to the rights and prerogatives of the king.[19]

The principal alterations made by statute in the common-law rule are that, by judgment of forfeiture its debtors are not released from their debts, and it is usually provided that a trustee shall be appointed with power to sue for and collect debts due to the dissolved bank and to sell and dispose of all of the property belonging to it, and that the debts when collected and the proceeds of sale of the property shall be applied by the trustee to the payment of its debts.[20] In other words, the assets of a bank-

18. Hill *v.* Frazier, 22 Pa. 320, distinguished. Craig's Appeal, 92 Pa. 396.

19. Effect of dissolution at common law on rights of creditors.—Co. Lit. 13 b; 1 Bla. Com. 484; 2 Kent's Com. 309; Angell & Ames on Corp. 513; Robertson *v.* Coulter (U. S.), 16 How. 106, 14 L. Ed. 864; Smith *v.* Frye, Fed. Cas. No. 13,049, 5 Cranch C. C. 515; United States *v.* Alexander, Fed. Cas. No. 14,428, 4 Cranch C. C. 311; Mayor, etc., of Colchester *v.* Seaber, 3 Burr. (Eng.) 1868; Commercial Bank *v.* Lockwood (Del.), 2 Har. 8; State Bank *v.* State, 1 Blackf. 267, 12 Am. Dec. 234; Conwell *v.* Pattison, 28 Ind. 509; Commercial Bank *v.* Chambers (Miss.), 8 Smedes & M. 9; Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168; Bank *v.* Duncan, 56 Miss. 166; Fox *v.* Horah, 36 N. C. 358, 36 Am. Dec. 48.

Since all debts due to a bank are extinguished by the expiration of its charter, it is held that when a note has been given to the cashier as trustee for the bank, although the legal title is in him, equity will restrain its enforcement after the bank has ceased to exist. Fox *v.* Horah, 36 N. C. 358, 36 Am. Dec. 48.

Foreign banking corporations.—Where a bank in a foreign state has forfeited its charter under the laws of such state, the obligation of its contracts still survives, and its property, not in the hands of a bona fide purchaser, may be subjected to the payment of its debts by suit commenced by attachment, there being nothing in the comity existing between states rendering it improper on the ground that by the local laws its effects are in the hands of a receiver. City Ins. Co. *v.* Commercial Bank, 68 Ill. 348.

20. McGoon *v.* Scales (U. S.), 9 Wall. 23, 19 L. Ed. 545; Kipp *v.* Miller, 47 Colo. 598, 108 Pac. 164; Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168; Donnally *v.* Hearndon, 41 W. Va. 519, 23 S. E. 646.

On judgment of forfeiture against bank, all assets, consisting of credits or debts due to it, chattels, and real estate, become a trust fund for the sole purpose of paying the debts due by the bank at the time of its dissolution. Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168.

Debts due the late Bank of the United States were not extinguished by the expiration of its charter; and a note given after such expiration to one of its agents, in his own name, in renewal of a note previously due, is valid. Smith *v.* Frye, Fed. Cas. No. 13,049, 5 Cranch C. C. 515.

An Act of 1843 provided that after judgment of forfeiture against a bank

ing corporation, after its dissolution, are regarded as a trust fund, for the payment of the bank's debts.[21] And, if the legislature has failed to provide an adequate remedy for the enforcement of that right, a court of equity will supply the deficiency.[22]

§ 72 (3b) Rule in Equity.—But the rule in equity independent of statute is that upon the dissolution of a bank by the expiration of its charter or otherwise, its property will be impounded and appropriated first to the payment of its debts, and then for the benefit of the stockholders.[23]

§ 72 (3c) Pre-Existing Liability for Taxes.—The liability of a bank for taxes assessed against its capital stock, being fixed and primary before its dissolution, may be enforced afterwards by distraint and levy when due, upon property in the hands of trustees for the benefit of stockholders and creditors.[24]

§ 72 (4) On Rights of Stockholders.—In most, if not all of the states, in which the legislature has deemed it expedient to repeal or modify the principles of the common law which apply on the dissolution of a banking corporation produced by a judgment of forfeiture, express provision has been made by which the stockholders may take the surplus after the payment of debts.[25] The dissolution of a banking corporation not only does not suspend the property rights of the stockholders, or hinder the

its debts should not be extinguished, but that trustees should be appointed to collect them, and apply their proceeds to the payment of the debts of the bank. Held, that the legislature did not thereby make an appropriation in favor of creditors, but that, wholly independent of the legislative provision, the trustees should thus apply the proceeds, the creditors having a right to such application, growing out of the relation of debtor and creditor preserved by the act. Commercial Bank *v.* Chambers (Miss.), 8 Smedes & M. 9.

The Act of 1843, saving rights of creditors of a bank after dissolution, did not apply to banks dissolved by limitation of time, but only to those against which any judgment of forfeiture should be rendered. Bank *v.* Duncan, 56 Miss. 166.

Subjection of land lying in another state.—And the proceedings of a creditor of the bank to subject such real estate lying in Wisconsin to the payment of its debts, had in the courts of Wisconsin, must be governed by the laws of that state made for such cases. McGoon *v.* Scales (U. S.), 9 Wall. 23, 19 L. Ed. 545.

The state of Wisconsin had a right to pass laws to subject such lands to the payment of the debts of the bank, though the corporation had ceased to exist as such by the laws of Illinois, the only limitations on the right of the legislature to prescribe the mode of doing this, being the constitution of the state and of the United States. McGoon *v.* Scales (U. S.), 9 Wall. 23, 19 L. Ed. 545.

Under the Indiana statute, where no application is made to the circuit court for the appointment of a receiver and an extension of the time for collecting the debts due an insolvent bank, such debts are, at the expiration of three years, totally extinguished. Conwell *v.* Pattison, 28 Ind. 509.

21. Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168.

22. Commercial Bank *v.* Chambers (Miss.), 8 Smedes & M. 9.

23. Effect of dissolution in equity.—O'Connor *v.* Memphis, 74 Tenn. (6 Lea) 730; Connecticut Mut. Life Ins. Co. *v.* Dunscomb, 108 Tenn. 724, 69 S. W. 345, 58 L. R. A. 694, 91 Am. St. Rep. 769.

24. Bramel *v.* Manring, 18 Wash. 421, 51 Pac. 1050.

25. Effect of dissolution on rights of stockholders.—Connecticut Mut. Life Ins. Co. *v.* Dunscomb, 108 Tenn. 724, 69 S. W. 345, 58 L. R. A. 694, 91 Am. St. Rep. 769.

preservation thereof by a court of chancery, but furnishes additional ground therefor.[26] But in Mississippi, the rule is otherwise.[27] In that state the statute, as to the dissolution of a banking corporation, leaves stockholders in just the position they had at common law.[28]

The stockholders may also interfere to prevent waste of the assets by the receiver.[29] And the assets must be prorated and paid out in proportion as the subscriptions of stock have been paid.[30]

§ 72 (5) On Liability of Stockholders.—Where a bank corporation continues to transact business after the expiration of its charter for the purpose of winding up its affairs, it is a de facto corporation and stockholders can not maintain that they become thereafter liable only as partners.[31]

§ 72 (6) On Right to Make Collections.—After a bank has suspended, it thereby ceases to have the general power and authority which it previously had to collect paper which, before its suspension, had been deposited with it for this purpose, so as to make it a general creditor of the depositor, but this subsequent collection must be held by it as agent in trust for the owner.[32]

23. Property rights and equity jurisdiction.—The tendency of the decisions and judgments of the court of chancery in Great Britain, and of the courts of this country, is to concede the existence of a distinct and positive right of property in the individuals composing the corporation, in its capital and business, which is subject in the main to the management and control of the corporation itself; but that cases may arise where the corporators may assert not only their own rights, but the rights of the corporate body. And no reason can be given why the dissolution of a banking corporation, whether by judicial sentence or otherwise, whose capital was contributed by shareholders, for a lawful and perhaps laudable enterprise, with the consent of the legislature, should suspend the operation of these principles, or hinder the effective interference of the court of chancery for the preservation of individual rights of property in such a case. The withdrawal of the charter—that is, the right to use the corporate name for the purposes of suits before the ordinary tribunals—is such a substantial impediment to the prosecution of the rights of the parties interested, whether creditors or debtors, as would authorize equitable interposition in their behalf, within the doctrine of chancery precedents. Bacon *v.* Robertson (U. S.), 18 How. 480, 15 L. Ed. 499.

27. Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168.

Debts due a bank are not kept alive for benefit of stockholders, under the statute passed the twentieth of July, 1843, and they have no right to the surplus; their rights are left as they were at the common law; this act was for the benefit of the creditors of the corporation merely. Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168.

28. Coulter *v.* Robertson, 24 Miss. 278, 57 Am. Dec. 168.

29. The statute of 1842 (Cobb's St. 118, 119), providing for the winding up of defaulting banks, did not deprive stockholders of the right to interfere and prevent waste by the receivers. Robinson *v.* Lane, 19 Ga. 337.

30. Cook, Stock & Stockholders, § 641. Connecticut Mut. Life Ins. Co. *v.* Dunscomb, 108 Tenn. 724, 69 S. W. 345, 58 L. R. A. 694, 91 Am. St. Rep. 769.

31. Elson *v.* Wright, 134 Iowa 634, 112 N. W. 105.

32. Effect of dissolution on right to make collection.—Jockusch *v.* Towsey, 51 Tex. 129; German American Bank *v.* Third Nat. Bank, 2 Tex. Law Jour. 150.

§ 73. Insolvency and Its Effect in General[33]—§ 73 (1) What Constitutes Solvency or Insolvency.[34]—Where the question of insolvency is in issue in a state court, it is proper for the court to follow the definition of "insolvency" contained in the national bankruptcy act.[35] The terms solvency and insolvency, however, are usually defined as follows: A bank is solvent so long as it possesses sufficient assets to pay, within a reasonable time, all its liabilities through its own agencies.[36] But a bank is insolvent when the capital stock and all its assets are insufficient to meet its liabilities.[37] And where a suspension of specie payment is the alleged

33. Conclusiveness of receiver's appointment on question of insolvency, see post, "Appointment and Removal of Receiver," § 77 (1).

34. On criminal prosecution for receiving deposits when insolvent, see ante, "Criminal Responsibility," § 60. Proof of insolvency, see post, "What Constitutes Collection," § 163.

35. What constitutes insolvency under bankrupt act.—Owen *v.* American Nat. Bank, 36 Tex. Civ. App. 490, 81 S. W. 988.

Closing doors for few days.—"It is provided by the bankrupt law, that if a banker stops or suspends fraudulently for a period of fourteen days, he is deemed to have committed an act of bankruptcy; but if the suspension be not fraudulent it is not an act of bankruptcy. Brightly Bankrupt Law, p. 80, and notes." Moseby *v.* Williamson, 52 Tenn. (5 Heisk.) 278.

36. Definition of solvency.—Dodge *v.* Mastin (C. C.), 17 Fed. 660, 5 McCrary 404.

The closing of a bank and calling on the superintendent of banks to take charge of its assets may very properly be deemed acts of insolvency, but are not conclusive, and where it is shown that this course was unnecessary, that the bank was able to pay its debts, and have a large surplus, these acts resulting from fright or overcaution, in view of the financial situation existing, or from ignorance of solvency, lose their probative force. People *v.* Oriental Bank, 124 App. Div. 741, 109 N. Y. S. 509.

37. Definition of insolvency.—Dodge *v.* Mastin (C. C.), 17 Fed. 660, 5 McCrary 404; Youmans *v.* State, 7 Ga. App. 101, 66 S. E. 383; Fremont County *v.* Fremont County Bank, 145 Iowa 8, 123 N. W. 782; Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471.

"Insolvency," in its legal sense, as applied to banks and trust companies, exists whenever such an institution, from any cause, is unable to pay its debts in the ordinary course of business. Bell *v.* Tradesmen's Trust Co. (Pa.), 85 Atl. 363.

A bank is insolvent when, from the uncertainty of being able to realize on its assets, in a reasonable time, a sufficient amount to meet its liabilities, it becomes necessary for the control of its affairs to pass out of its hands. Livingstain *v.* Columbian, etc., Trust Co., 81 S. C. 244, 62 S. E. 249, 22 L. R. A., N. S., 445, quoting 3 Encyc. Law (2nd ed.) 847.

Though a banking corporation, at the time it suspended, had enough funds on hand to meet the demands made against it on that day, in the ordinary course of business, it was then insolvent, if its property was insufficient to pay all its debts. Higgins *v.* Worthington, 12 App. Div. 361, 42 N. Y. S. 737.

But a bank will not be considered as insolvent merely because it has gone voluntarily, or been forced, into liquidation. It is only when the whole amount of a bank's capital stock, together with assets, is insufficient to meet liabilities, that it can be said to be insolvent. Exchange & Banking Co. *v.* Mudge (La.), 6 Rob. 387.

Nor is a bank insolvent if it has property more than sufficient to pay all demands, though it has suspended specie payment. Livingston *v.* Bank (N. Y.), 5 Abb. Prac. 338, 26 Barb. 304.

Ability to pay in cash.—A bank ceased business in 1862 because of the Civil War, and continued its existence simply to close its business. In 1865, after publishing a resolution of its directors that it would make settlements by set-off, it continued to liquidate its business in this way until June, 1872, when it was forced into bankruptcy before completing its settlements. Held, that the question of its insolvency as against persons with whom it had effected settlements within four months prior to the bankruptcy proceedings, which are fraudu-

ground of insolvency, it is to be considered insolvent as of the time when payment was first suspended.[38]

lent and void under Rev. St. U. S., § 5128, should be determined by whether or not its assets were sufficient to meet its liabilities simply, and not by its ability to pay all its claims in cash on presentment. Harmanson v. Bain, Fed. Cas. No. 6,072, 1 Hughes 188.

Insolvency of borrower.—If an action by a depositor against a banker for negligence in loaning the depositor's money in 1896 to a borrower who became bankrupt in 1899, the defendant requested an instruction that the fact that the borrower was insolvent when the bankruptcy proceedings were begun was not evidence that he was not a safe, responsible, and conservative borrower in 1896. It appeared that the borrower was in failing circumstances at and after the loan, and the bankruptcy was the culmination of this condition of affairs. Held, that the instruction was properly refused Judgment (1902) 105 Ill. App. 52, affirmed. Watson v. Fagner, 208 Ill. 136, 70 N. E. 23.

Construction of words "not clearly solvent."—A bank which has suspended specie payments is "not clearly solvent," within the New York Act of April 5, 1849, providing that a creditor, in ten days after refusal of payment, may apply for an order under which, upon a hearing, if the judge determine that the bank is "not clearly solvent," he shall make a further order declaring it insolvent, restraining any further exercise of its corporate or legal rights, etc. In re Empire City Bank (N. Y.), 10 How. Prac. 498.

A bank is "not clearly solvent" where it refuses to pay its undisputed debts for more than twenty days after demand. In re Empire City Bank (N. Y.), 10 How. Prac. 498.

A bank is "not clearly solvent," within the act of April 5, 1849, where it has suffered judgments against it to be recovered, and executions upon them to be issued, and to remain and to be returned unsatisfied, either in whole or in part. In re Empire City Bank (N. Y.), 10 How. Prac. 498.

A bank is "not clearly solvent," within the Act of April 5, 1849, where it allows an injunction against its business to be issued, and when, on a compromise with the creditors, such injunction was withdrawn or dissolved, or supposed to be, it immediately executed (without security) to three individuals—two of them, if not all, debtors to it, and selected by directors occupying the same position—an absolute assignment of all its property and effects to the nominal amount of $500,000, to pay its creditors. In re Empire City Bank (N. Y.), 10 How. Prac. 498.

A bank is "not clearly solvent," within the act of April 5, 1849, where, prior to suspending specie payments, it borrowed money in large amounts at the rate, in some instances, of 5 per cent per month. In re Empire City Bank (N. Y.), 10 How. Prac. 498.

If a bank is so circumstanced as to depend on the individual resources and exertions of its directors and stockholders, and is compelled to rely on their private funds to meet its engagements, and only claims to be able to pay at a future day, it can not be said to be solvent. Ferry v. Bank (N. Y.), 15 How. Prac. 445.

But if the inability of a bank to meet its undertakings arises solely from an unexpected crisis, and it exhibits resources abundantly sufficient to enable it to meet its engagements and discharge its liabilities in the ordinary and usual method of conducting that business, it should not be pronounced insolvent, with a view to its dissolution. Ferry v. Bank (N. Y.), 15 How. Prac. 445.

Receiving deposits with knowledge of "insolvency."—Under § 5718 (M. & V.), Code, making the managing officers of a banking corporation individually liable to depositors for money received on deposit, when they knew, or had good reason to believe, the bank insolvent, a bank is treated as insolvent when it becomes unable to meet its liabilities as they become due in the ordinary course of its business. It is not insolvent, within the meaning of this statute, so long as it is meeting its liabilities as they become due, and there is a reasonable expectation on the part of its officers familiar with its business affairs of continuing to do so. Whether the officers acted in good faith and upon a reasonable expectation of continuing the business must be determined from the consideration of all the attendant circumstances. Minton v. Stahlman, 96 Tenn. 98, 34 S. W. 222.

38. Suspension of specie payment.—Where a bank in South Carolina

§ 73 (2) Evidence of Insolvency.—Evidence that is competent and relevant, according to the well-established general rules of evidence, whether direct,[39] or presumptive,[40] may be admitted to prove the fact of solvency or insolvency. But such fact must be shown by a preponderance of evidence.[41]

§ 73 (3) Effect of Insolvency—§ 73 (3a) In General.[42]—By the insolvency of a bank the corporation is rendered incapable of pursuing the objects for which it was created without defrauding the public and its existing creditors. Its officers or agents should cease to use its franchises after the insolvency is ascertained, but their responsibility as to assets does

suspended specie payments in November, 1860, and never after resumed, paying out its own bills for the last time in August, 1861, and after that date paying its debts only in Confederate money, held, that the bank failed at the time of the suspensions, in November, 1860. Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944.

39. W., who owned a private bank, drew a draft on such bank in July. In October he assigned, and in November the plaintiffs, as his assignees, made a statement of his liabilities. Held that this, with testimony that there were no losses between July and November, and no extraordinary shrinkage in assets or increase of liabilities between the dates named, was competent on the question of W.'s insolvency in July. Kling *v.* Irving Nat. Bank, 21 App. Div. 373, 47 N. Y. S. 528, order affirmed in 160 N. Y. 698, 55 N. E. 1096.

40. Presumption of insolvency.—The jury might infer that a banking corporation was insolvent when it suspended, where the suspension was followed in a few days by the appointment of a receiver, and subsequently by a judgment of dissolution on the ground of insolvency. Higgins *v.* Worthington, 12 App. Div. 361, 42 N. Y. S. 737.

The alleged acts of insolvency of a bank consisted in payments made upon the checks of its depositors at a time when it was insolvent. Some of the payments were made between the time it closed its doors and the date of an assignment for the benefit of creditors. Held that, although the presumption was that such payments were made by the firm with knowledge of its insolvency, or in contemplation of it, such presumption was overcome where the members testified that they believed the firm to be solvent up to the time of assignment; that they used their individual means to pay depositors; and that, after the bank had closed its doors, they tried to borrow money to continue the business. McAfee *v.* Bland, 11 Ky. L. Rep. 1, 11 S. W. 439.

41. Sufficiency of evidence to show insolvency.—The fact that circumstances have made it a bank's duty to abstain from receiving further deposits and making further payments; that it has suspended in justice to its depositors, creditors, and stockholders; and that it is, for the present, unable to meet its cash liabilities—establishes legal insolvency. State *v.* Mechanics', etc., Bank, 35 La. Ann. 562.

Evidence showed that an examination of the affairs of a bank was made on August 2d, when the specie then on hand amounted to $9,754.92. Another examination was made on the 11th of the same month, when it then had only $138.89, and there was no corresponding decrease in its liabilities; that about $44,000 of all the bank's issues were then in the hands of agents without securities; and that of the assets there were $5,000 in uncurrent notes and about $25,000 in post notes, which were issued on August 4th, without being indorsed by the bank commissioner, as required by law. Held, that the bank was insolvent, and that such facts were sufficient for the appointment of a receiver to close up its business. Bank Comm'rs *v.* Bank (Mich.), 1 Har. 106.

Evidence held to support a finding that a bank was solvent on January 4, 1905, when a check was drawn on it by a retiring county treasurer in favor of his successor, and three days later, when the successor deposited the check with the bank and until after the adoption on May 3d by the board of supervisors of a resolution designating the bank as a depository of county funds. Fremont County *v.* Fremont County Bank, 145 Iowa 8, 123 N. W. 782.

42. As ground for forfeiture of charter, see post, "Set-Off by Depositor," § 135.

not cease. They continue to use them as before; not for themselves, or for the use and benefit of the stockholders, but for the creditors of the corporation. After the insolvency of the corporation, although the legal ownership of the assets may continue as before, the beneficial interest of the stockholders no longer exists, as a state of insolvency presupposes that the capital and assets are insufficient to meet the liabilities.[43] But the mere insolvency of a banking corporation will not work a dissolution,[44] nor convert its effects into a trust fund for its creditors.[45] And money on deposit in a bank, subject to check, becomes due without demand when the bank becomes insolvent.[46]

A stock assessment levied before the insolvency of the bank but not collected can not be enforced by the bank commissioners.[47]

§ 73 (3b) Transacting Business after Knowledge of Insolvency.[48] —By statute in many jurisdictions the officers of a bank are forbidden to receive deposits or create any debts, after knowledge that it is insolvent and in failing circumstances, and the plaintiff is only bound to prove to the satisfaction of the jury that the bank was insolvent. Upon this showing, the officers of the bank, to escape liability, must prove that they did not have the knowledge the law imputes to them, and thus overcome the law, which says they did know. The burden of proof of the want of knowledge of insolvency is on the officer sued.[49] The rule seems to be well settled, that

43. General effect of insolvency.—Williams *v.* Patrons, 23 Mo. App. 132; Roan *v.* Winn, 93 Mo. 503, 4 S. W. 736; Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471.

The general authority of private bankers' cashier to transact business for them ceased with their insolvency, and hence he could not validly deliver a note for them. Casale *v.* Guion, 116 N. Y. S. 294.

44. Insolvency does not work dissolution.—The mere insolvency of a corporation will not work a dissolution, nor will the assignment of all of its property, nor the appointment of a receiver, extinguish the franchises with which the company has been invested, where there have been no proceedings for forfeiture inaugurated by the state, nor a surrender by act of the stockholders. Coburn *v.* Boston, etc., Mfg. Co., 76 Mass. (10 Gray) 243; Bickerhof *v.* Brown, 7 Johns. Ch., 217; State *v.* Butler, 86 Tenn. 614, 8 S. W. 586.

The existence of the corporation, with the powers conferred by its charter, continued, notwithstanding the insolvency of the bank and its consequent suspension of business, and the legal rights of individual shareholders could not be taken from them by the majority, however large, and the attempt of such a majority was beyond the power of the corporation. Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556; Island City Sav. Bank *v.* Sachtleben, 67 Tex. 420, 3 S. W. 733.

45. Catlin *v.* Eagle Bank, 6 Conn. 233.

46. Thompson *v.* Union Trust Co., 130 Mich. 508, 90 N. W. 294, 97 Am. St. Rep. 494.

47. A stock assessment levied, but not collected, and not yet due, when the adjudication of insolvency was made under the bank commissioners' act, was set aside by the adjudication; and the levy can not be enforced, as a call for the payment of unpaid subscriptions, by the bank commissioners, since the commissioners had no such authority, nor could the directors act as trustees under the statute before such adjudication was made. Bank *v.* Johnson, 133 Cal. 185, 65 Pac. 383.

48. Criminal Responsibility, see ante, "Criminal Responsibility," § 60.

49. Transacting business after knowledge of insolvency.—St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390; Dodge *v.* Mas-

after a bank has suspended, it ought not to receive payments upon business paper previously deposited with it for collection, in such a manner that the money so received by it will pass into its general assets, and the owner of

tin (C. C.), 17 Fed. 660, 5 McCrary 404, (construing Missouri Constitution); Minton *v.* Stahlman, 96 Tenn. 98, 34 S. W. 222.

Where one intrusts his money to a bank as a general deposit, makes no inquiry as to its solvency, and is not induced to make the deposit as the result of any statement made by the officers of the bank, such depositor is in no better position than any other person who deals with an insolvent under the impression that he is solvent. McGregor *v.* Battle, 128 Ga. 577, 58 S. E. 28.

Right to recover funds deposited pending insolvency.—Where it appears that a bank has been insolvent for a long time before the assignment, to the knowledge of the directors and officers of the bank, it was a fraud on the part of such officers to continue to do business, and persons having intrusted money to the bank may recover it back if it can be identified. But where the money can not be identified, but was mingled with the funds of the bank, they must take their chances with the other creditors of the bank, unless the money came into the hands of the bank impressed with a special trust, in which case the assignee will have to refund it out of any money of the bank in his hands. In re Assignment, 2 N. P. 170, 4 O. Dec. 108; Jones *v.* Kilbreth, 49 O. St. 401, 31 N. E. 346; Mad River Nat. Bank *v.* Melhorn, 8 O. C. C. 191, 4 O. C. D. 401; In re Assignment, 1 N. P. 358, 2 O. Dec. 304.

Right to recover check given for worthless draft.—A few hours before the Fidelity National Bank closed its doors, and at a time when its officers knew that it was hopelessly insolvent, and that no deposit made could be withdrawn, G., acting as agent of W., was allowed by said officers to deposit W.'s check on another bank to G.'s account in the Fidelity National Bank, and receive in exchange therefor a draft of the Fidelity National Bank on a New York Bank, where it had no funds. It was held that W., as against the receiver of the Fidelity National Bank, was entitled to rescind the contract of deposit of the check for fraud, and on the tender of the dishonored draft was entitled to a delivery up of the check. Held, further, that W. was entitled in equity to enjoin suit against himself by the receiver in a jurisdiction where G.'s assignee in insolvency, who held the dishonored draft and refused to deliver the same to W. or the receiver, could not be made a party. Warner *v.* Armstrong, 21 Wkly. L. Bull, 124, 10 O. Dec. 426, affirmed in 49 O. St. 376, 31 N. E. 877.

Effect of fraud by bank inducing depositor to let fund remain on deposit.—Where a depositor, who presented his check for the payment of the balance of his deposit, was induced through the fraudulent misrepresentations of the bank as to its solvency to let his money remain on deposit in said bank, such deposit does not become a trust fund in the hands of the bank as trustee, but the relation of debtor and creditor still exist. Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533; Venner *v.* Cox (Tenn.), 35 S. W. 769; Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921.

Discounting paper.—Act Feb. 13, 1843, for the final settlement of the affairs of a certain bank, after declaring its charter forfeited for failure to pay its debts, and providing for the exhibition of an information in the nature of a quo warranto by the solicitor of the circuit court on the requisition of the governor, and the appointment of commissioners to take charge of its effects, with power to sue, etc., provides that it shall be lawful for said commissioners to submit to arbitration contested claims, either those against or held by the bank, and "to compound any doubtful or bad debt," etc. Pamph. Acts 1845, p. 46, provides that the trustees may use the corporate name of said bank in the collection of debts due it, and may use all the modes and powers given to the bank by its original charter, or any subsequent act of the legislature, for the collection of its debts, in the same manner as if the charter had never been forfeited. Held that, though the statute authorizes the bank to exert all the powers conferred by the charter for the purpose of collecting its debts, it has no power to discount or purchase a bill of exchange as a business transaction; and an averment, therefore, in a plea in an action on a bill due the

the paper be placed in the position of one of its creditors, entitled only to take his dividends; and proceeds received after the bank becomes insolvent, will be held in trust, and may be recovered in full.[50]

On Right to Secure Future Advances.—A banking corporation may execute a mortgage to secure an antecedent indebtedness of the bank even at a time when it is insolvent, provided it is not in the hands of a receiver.[51]

On Right of Directors to Withdraw Deposits.—It seems that a director of an insolvent banking corporation, with full knowledge that the corporation is insolvent and must close its doors, can not withdraw his deposits from the bank.[52]

§ 73 (3c) On the Venue of Suits against Bank.—Another effect of insolvency is to confine suits against the bank to the court in which the insolvency proceedings have been instituted.[53]

§ 73 (4) Rights of Correspondent Bank.—A correspondent bank, indebted to an insolvent bank on open account, is entitled to apply the

bank, that such bill was acquired by the bank by discounting it, is sufficient prima facie to show that the transaction was unauthorized. Saltmarsh *v.* Planters', etc., Bank, 14 Ala. 668.

50. Jones *v.* Kilbreth, 49 O. St. 401, 31 N. E. 346, citing Morse Bk., § 248a.

Right to recover interest.—Where a bank known by its officers to be insolvent collected money for a customer and mingled the same with its own funds which, to an amount larger than the sum received, passed to the bank's receiver in insolvency, the customer, though unable to trace the identical money into the receiver's hands, was entitled to recover from the receiver an amount equal to that collected but without interest, the general creditors of the bank not being responsible for the receiver's error of judgment in refusing to pay the claim on demand. Butler *v.* Western German Bank, 86 C. C. A. 306, 159 Fed. 116.

51. Mortgage to creditor to secure advances.—Creditors and stockholders of a bank in the hands of a receiver made an agreement for the resumption of business by it. To obtain funds to make a part payment to the creditors, a loan was obtained from one of the creditors, and a mortgage given to him to secure his pre-existing claim. Held that, on an issue of the validity of the mortgage as against the other creditors, the question of the bank's insolvency at the time of its execution was immaterial, since the receiver had been discharged with their consent. Bank *v.* Puget Sound Loan, etc., Co., 20 Wash. 636, 56 Pac. 395.

52. In an obiter dictum in Lamb *v.* Laughlin, 25 W. Va. 300, the court after an exhaustive review of many cases, laid down the rule that the directors of an insolvent banking corporation sustained a fiduciary relation to the creditors, and therefore, when the directors and depositors know the bank is hopelessly insolvent, they may not make a rush for their deposits and delay the closing of the doors of the bank until they have made themselves safe.

In Lamb *v.* Laughlin, 25 W. Va. 300, a director of a banking corporation, knowing the institution to be insolvent, availed himself of his superior knowledge as director and withdrew all the deposits of the firm of which he was a member. The court, without deciding the point, was of the opinion that such assets constituted a trust fund for the creditors of the bank and ought to have been permitted to remain in the bank for the creditors generally; and that the defendant being a director and trustee for the creditors should be compelled to make good the amount himself.

53. Venue of suits against bank after dissolution.—A bank in liquidation, under Act 1842, No. 98, § 8, can not be sued before any other court than that before which it is liquidated. New Orleans Imp. Co. *v.* Citizens' Bank (La.), 10 Rob. 14.

amount thereof on an indebtedness due to the correspondent bank from the insolvent bank.[54]

§ 73 (5) Insolvency of Foreign Banks.—The insolvency and dissolution of a foreign bank has no extraterritorial operation so as to affect the rights of domestic creditors.[55]

§ 74. Transfers and Preferences Affected by Insolvency[56]—§ 74 (1) In General.—A banking corporation in failing circumstances may assign its property to trustees for the benefit of preferred creditors, or of all the creditors equally, unless restrained by some express provision in its act of incorporation.[57] But by statute in most jurisdictions banks are now forbidden to make conveyances when insolvent or in contemplation of insolvency, with a view to prefer one creditor to another, and such transaction is void and may be set aside by the receiver,[58] unless the conveyance was

54. **Rights of correspondent bank.**—The S. bank, having a sufficient deposit in the B. bank for that purpose, directed the B. bank to remit a sum of money to the N. bank to cover an overdraft in the S. bank's deposit account. The B. bank sent a draft on the M. bank to the N. bank, and the draft was credited on the deposit account of the S. bank. The S. bank having failed after the transmission of the draft, the B. bank, being fearful that collateral security, held by it for a loan to the S. bank, would prove insufficient, requested the N. bank to return the draft, with which request the N. bank complied, but immediately sent its agent to the B. bank, and secured a redelivery of the draft on the giving of an indemnity bond. Held, that the duty of the S. bank to maintain the credit side of its deposit account in the N. bank was a sufficient consideration for its direction to the B. bank, and, that the bank having no authority to recall the draft, the surrender of the draft by the N. bank did not affect its rights as against the S. bank, and therefore the receiver of the S. bank was not entitled to credit for that part of the fund represented by the draft as was necessary to satisfy the overdraft in the N. bank. Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289.

55. **Insolvency of foreign banks.**—The appointment of commissioners under the law of Louisiana, to administer the assets of the M. bank, a Louisiana institution, in liquidation, does not defeat the rights acquired by plaintiff under attachment in this state. Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367, 38 Am. Rep. 518, affirming 21 Hun 166.

A creditor of an insolvent foreign bank may sue and obtain judgment against it for the amount of his claim and enforce the same against any property in the state which would have belonged to it had it not gone into liquidation. State Bank *v.* Corwith, 6 Wis. 551.

56. Preferential assignments for benefit of creditors, see post, "Collateral Security," § 179.

57. **Preferences allowable in absence of statute.**—State *v.* Bank (Md.), 6 Gill & J. 205, 26 Am. Dec. 561.

An incorporated bank, not being a person capable of taking the benefit of the insolvent laws of the state of Maryland, is not within, or affected by, Acts 1812, c. 77, § 1, and Acts 1816, c. 221, § 6, which provide that deeds, etc., made to a creditor or security "with a view or under expectation of becoming an insolvent debtor," and with intent thereby to give undue preference to such creditor, shall be void. State *v.* Bank (Md.), 6 Gill & J. 205, 26 Am. Dec. 561.

58. **Preferences by banks generally forbidden by statute.**—Robinson *v.* Aird, 43 Fla. 30, 29 So. 633; Hill *v.* Western, etc., R. Co., 86 Ga. 284, 12 S. E. 635; Clarke *v.* Ingram, 107 Ga. 565, 33 S. E. 802; Booth *v.* Atlanta Clearing-House Ass'n, 132 Ga. 100, 63 S. E. 907; Roan *v.* Winn, 93 Mo. 503, 4 S. W. 736; Gillet *v.* Moody, 3 N. Y. 479; Leavitt *v.* Blatchford, 17 N. Y. 521; Robinson *v.* Bank, 21 N. Y. 406; Leavitt *v.* Tylee (N. Y.), 1 Sandf. Ch. 207.

Construction of term "effects."—The term "effects" as used in the statute of 1833 prohibiting insolvent banks

to a bona fide purchaser without notice of the insolvency.[59] And any advantages given to directors or officers of the bank are particularly obnoxious

from making preferences is construed to include a transfer of money and promissory notes or other securities. Hill *v.* Western, etc., R. Co., 86 Ga. 284, 12 S. E. 635.

Transfer of collaterals.—Where a bank, by the assignment and transfer to plaintiff of a note in suit, was simply performing that which it had agreed and obligated itself to do in order to induce plaintiff in the first instance to loan it the money, and the promise or agreement to assign the notes as collateral was made before plaintiff had actually become a creditor of the bank, the action of the latter in assigning and transferring the collaterals to plaintiff in no sense resulted in an unlawful preference within Burns' Rev. St. 1894, § 2934 (Horner's Rev. St. 1897, § 2697), though the bank was insolvent at the time the collaterals were assigned. Harris *v.* Randolph County Bank, 157 Ind. 120, 60 N. E. 1025.

Pledge of collaterals.—A bank, after insolvency, borrowed money from plaintiff with which to resume business, and pledged collaterals to secure the loan. On its maturity the bank was again in an insolvent condition, and, in order to secure an extension of the loan, paid a small portion, and pledged further collaterals, to secure it, at which time plaintiff had knowledge, or at least constructive notice, that the bank was insolvent. Held, that such pledge was a preference to plaintiff by an insolvent corporation, and void as in fraud of creditors. Burrell *v.* Bennett, 20 Wash. 644, 56 Pac. 375.

Payment of depositor's check.—Payment by a bank known by its managing officers and agents to be insolvent, but continuing in business, of the check of a depositor wholly ignorant of its financial condition, is not within the meaning of the provision of 1 Rev. St. 603, § 4, declaring it unlawful for any incorporated company to make any transfer or assignment in contemplation of its insolvency. Dutcher *v.* Importers', etc., Nat. Bank, 59 N. Y. 5.

Effect of conveyance.—When the statute declares void an assignment of evidence of debt by an insolvent bank, the assignee of such bank of a note and mortgage acquires no title, and can not sue thereon. Brighton *v.* White, 128 Ind. 320, 27 N. E. 620.

Sufficiency of answer setting up conveyance.—In a suit on a note and mortgage executed to a bank, and by it assigned to plaintiff, an answer alleging that the assignor is "a bank of deposit and discount organized under the laws of the state of Indiana," and that it assigned the mortgage after it and plaintiff knew it to be insolvent, is not demurrable as failing to show that the bank is within the provisions of Rev. St., § 2697, declaring that assignments and transfers of evidences of indebtedness by such banks when insolvent, with a view to prefer a creditor, shall be void, since the presumption is that it was organized under that statute—the only general statute of the state relating to banks. Brighton *v.* White, 128 Ind. 320, 27 N. E. 620.

Acts 1882, c. 409, §§ 186, 187, declare that no conveyance of the effects of a bank exceeding in value $1,000, except in the ordinary course of business, shall be valid unless previously authorized by resolution of the directors, and that no conveyance or transfer given in contemplation of insolvency shall be valid. A bank cashier, knowing that the bank was insolvent and was to suspend business the next day, gave a depositor drafts belonging to the bank amounting in the aggregate to more than $1,000. Held, in an action by the bank's receiver against the transferee, that defendant might show that he had brought suit on the draft, and that a valid defense had been interposed. Atkinson *v.* Rochester Printing Co., 43 Hun 167, 5 N. Y. St. Rep. 470.

Setting aside conveyance.—Code, § 4429, provides that all conveyances, etc., made by any bank in contemplation of insolvency, or after insolvency, shall, unless made to an innocent purchaser for a valuable consideration, and without knowledge or notice of the condition of the bank, be fraudulent and void; and that the officers of the bank making or consenting to such a conveyance shall be guilty of a misdemeanor. Held, that an action to set aside such a conveyance will lie, without first prosecuting the officers of the bank consenting to the fraudulent conveyance. Hill *v.* Western, etc., R. Co., 86 Ga. 284, 12 S. E. 635.

59. Rights of bona fide purchasers.—A conveyance by an insolvent bank, not made for the benefit of all its

to this statutory prohibition. All such moneys and securities must be promptly refunded or surrendered.[60] But to bring a case within the pro-

creditors and stockholders, to one who, at the time of receiving the instrument, was chargeable with notice of the bank's insolvency, though he had no actual knowledge, is void, under Civ. Code, § 1979, providing that all conveyances by a bank in contemplation of insolvency, or after insolvency, except for the benefit of all creditors and stockholders, shall be void, unless made to an innocent purchaser for value, without notice or knowledge of the condition of the bank. Clarke *v.* Ingram, 107 Ga. 565, 33 S. E. 802.

Under the proviso in Act April 15, 1846, § 2, a transfer of notes or property by a bank prior to suspension for a valuable consideration to a bona fide purchaser without knowledge or notice of the insolvency, is valid. Kinsela *v.* Cataract City Bank, 18 N. J. Eq. 158.

An associate who took no part in the transactions of the bank, after he had signed the certificate for organization required by the sixteenth section of the banking Act of February 27, 1850, can not be charged, as a director or manager, with implied notice of the bank's insolvency; and therefore a bona fide assignment to him for a valuable consideration is valid, in the absence of actual knowledge of insolvency. Kinsela *v.* Cataract City Bank, 18 N. J. Eq. 158.

But in New York, the invalidity of a transfer by an insolvent bank does not depend upon the knowledge of the transferee, but upon the fact of insolvency. Dutcher *v.* Importers', etc., Nat. Bank, 59 N. Y. 5.

Knowledge as matter of law.—Where a bank had been insolvent for several years, and it is shown without contradiction that at the time payments were made to its president and directors, or the way thereafter, it became hopelessly insolvent, such payments, when attacked as unlawful preferences, can not be defended on the ground that such president and directors had no knowledge of the insolvency, since such knowledge is imputed to them by law. James Clark *v.* Colton, 91 Md. 195, 49 L. R. A. 698, 46 Atl. 386.

Bona fide purchasers.—A depositor or other bona fide creditor who draws his check upon an insolvent bank or one contemplating insolvency, or who receives effects therefrom without notice of or reason to suspect its insolvent condition, is considered a bona fide purchaser under the statute of 1833 prohibiting preferences. Hill *v.* Western, etc., R. Co., 86 Ga. 284, 12 S. E. 635.

"Under our statute, Civil Code, p. 1979, 'it would seem that if the depositor, although paid not in the usual course of business, was ignorant of the insolvency and of the intent of the bank to prefer him, he would be protected and not required to refund. However, it would seem, under some circumstances, that payment out of the usual course of business would be a circumstance to be given great weight in determining whether there was notice; as a payment made with a view of giving a preference to a particular creditor is rarely, if ever, made in the usual course of business.'" McGregor *v.* Battle, 128 Ga. 577, 58 S. E. 28.

60. Preferences to directors.—A director of and depositor in a bank, knowing that it probably was insolvent, obtained from the cashier bank securities equal to the amount of the deposit. Held, that he must surrender them for the benefit of depositors and creditors generally. Lamb *v.* Cecil, 28 W. Va. 653.

An arrangement between the cashier of an insolvent bank and one of its creditors having knowledge of its insolvency, whereby a check is to be paid, not in the ordinary course of business, but is to be held by the cashier until the deposits are sufficient to pay it, whereupon the money is laid aside for the creditor, is fraudulent, and the creditor will be compelled by a court of equity to refund the money. Lamb *v.* Cecil, 25 W. Va. 288.

A bank which had been insolvent for several years paid its president's check for a large amount, and retired its note, without demand, on which its officers were indorsers, and the day thereafter was hopelessly insolvent on account of such payments. Its dissolution was decreed, and receivers were appointed under the insolvent law, § 22 of which prohibits preferences made either in actual or contemplated insolvency. Held that, though the bank was a going concern at the time of the payments, they were unlawful preferences, and acts of insolvency, and such payments when the officers must have known its condition were a fraud on other creditors for whom the officers

visions of these statutes, there must be not only an act or a contemplation of insolvency and a payment resulting in a preference, but the payment must be made with a view to create the preference.[61]

In a few jurisdictions, however, such preferences are upheld on the ground that the mere insolvency of a bank, incorporated with the usual powers of such an institution, does not convert its effects into a trust fund for its creditors.[62]

In New York a transfer in excess of a certain amount is expressly forbidden unless authorized by the board of directors.[63]

held its property in trust, and recoverable by such receivers. James Clark Co. *v.* Colton, 91 Md. 195, 49 L. R. A. 698, 46 A. 386.

The president of a corporation, who was also a director of a bank, obtained knowledge, as director, that the bank was insolvent and would close the next day. He thereupon executed a check for the corporation's deposit in the bank, and caused it to be collected through the clearing house from the insolvent's funds which he knew were in the possession of the bank through which the insolvent cleared. Held, that the transaction was an attempt by the bank to transfer its assets "by" one of its officers with intent to prefer a creditor, prohibited by Stock Corporation Law, § 48, and hence that the receivers of the bank were entitled to recover the amount of the check from the corporation. O'Brien *v.* East River Bridge Co., 36 App. Div. 17, 55 N. Y. S. 206.

61. Stone *v.* Jenison, 111 Mich. 592, 70 N. W. 149, 36 L. R. A. 675.

Transfers to clearing house.—Where a bank executed its notes to a clearing house association in return for clearing house certificates and deposited collateral to secure payment, no such preference was created as is inhibited by Civ. Code, 1895, § 1979, making any transfer in contemplation of insolvency, except for benefit of creditors, fraudulent and void, unless made to an innocent purchaser for value without notice of the condition of the bank. Booth *v.* Atlanta Clearing House Ass'n, 132 Ga. 100, 63 S. E. 907.

The fact that a clearing house association knew that a bank had guaranteed the whole amount of clearing house certificates issued, and that the amount of its guaranty exceeded all of its resources, was not in itself sufficient to charge it with actual knowledge of insolvency, for such liability would at most be contingent, and, unless such contingent liability of the bank as guarantor was likely to become absolute, it could not be considered a liability in determining solvency or insolvency. Booth *v.* Atlanta Clearing House Ass'n, 132 Ga. 100, 63 S. E. 907.

62. Preferences upheld in some states.—Catlin *v.* Eagle Bank, 6 Conn. 233.

The fact that the board of directors of a bank had resolved to go into liquidation does not render invalid an agreement afterwards made by which it preferred a certain creditor. Merced Bank *v.* Ivett, 127 Cal. 134, 59 Pac. 393.

63. New York rule.—The General Banking Act (Laws 1882, c. 409), § 186, provides that no transfer of its effects to an amount exceeding $1,000 by any corporation contemplated by the act shall be made unless authorized by a previous resolution of its board of directors. Section 187 provides that no transfer, etc., made in contemplation of insolvency, with the intention of preferring any particular creditor, shall be valid. Two days after the receiver of an insolvent bank was appointed, the cashier, unauthorized by resolution of the directors, transferred securities of the bank to secure certain creditors. Held, that such transfer was void, and it is immaterial that arrangements therefor had been made several days before the receiver was appointed. Bradner *v.* Woodruff, 52 Hun 214, 5 N. Y. S. 207, 23 N. Y. St. Rep. 365.

Where the cashier of an insolvent bank transfers to a depositor securities of the bank exceeding in value $1,000 in payment of the deposit, the transaction not being in the usual course of business, and for a valuable consideration, the transfer is illegal, without regard to defendant's intent or knowledge that the bank was insolvent. Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178, affirming 43 Hun 167.

Duty of Transferee.—A transferee of the assets of a bank at the time insolvent will be required to deliver them up to the receiver.[64]

Knowledge of Insolvency.—And with regard to the question whether the transferee had knowledge of the bank's insolvency the rule is that whatever is sufficient to put a person on inquiry is notice. Rumors of insolvency may be sufficient when brought home to the party to be charged, and personal knowledge of the insolvency of the bank is not required.[65]

Unincorporated Banks.—An unincorporated bank is not a de facto corporation, and its president, who is its sole owner, may transfer any of its property to secure a bona fide creditor.[66]

64. **Duty of depositor to refund.**—The defendant was a depositor in a savings bank, and purchased of the bank, through its president, a bond and mortgage, the defendant paying for said bond and mortgage partly in cash and partly by being debited on the books of the bank with the amount of his deposit. At the time of the purchase and transfer the bank was insolvent, but the purchaser had no knowledge of the insolvency. Held, that the defendant should assign the bond and mortgage to the receiver of the bank on having returned to him the amount of his cash payment, with interest, and being reinstated as a creditor upon the books of the bank in the amount of his deposit. French *v.* O'Brien (N. Y.), 52 How. Prac. 394.

Duty of stockholder to refund.—Where stockholders in a bank sold their stock to an officer thereof at a time when the bank was insolvent and they anticipated its suspension, and the funds used to pay for the stock belonged to the bank, and were withdrawn to prevent such funds being appropriated to the payment of creditors, the amount so paid for the stock was recoverable by the receiver of the bank for the benefit of creditors, Kirby's Dig., § 861, providing that, if the capital stock of any corporation be refunded to the stockholders before the payment of the corporation's debts, the stockholders shall be liable to the amount so refunded, and § 6348, providing that a receiver for a corporation shall have the right to collect debts, preserve the assets for the benefit of creditors, and that he may sue in his own name for such purpose. Corn *v.* Skillern, 75 Ark. 148, 87 S. W. 142.

65. If a bank was actually insolvent at the time it conveyed land to a director and stockholder in exchange for stock, and the grantor had knowledge of such insolvency, the deeds must give way to the claims of a creditor when a court of equity is asked by him to avoid them. Roan *v.* Winn, 93 Mo. 503, 4 S. W. 736.

Sufficiency of evidence.—About two hours before the making of a deed of assignment for the benefit of creditors by an insolvent bank, the cashier gave orders for the transfer of moneys belonging to the bank to defendant bank. This was done without any understanding with defendant. About an hour afterwards and before the assignment, the cashier transferred to defendant's president in person certain notes, and the latter was then informed of the proposed assignment. The cashier testified that he considered the bank solvent at this time, and the consideration of these transfers was indebtedness of the insolvent bank to defendant, but the cashier could not give the exact amount of the debt, nor remember whether any balance was struck. Held, that the evidence was sufficient to take the case to the jury on the question of whether such transfers to defendant were within the inhibition of Code, § 4429, providing that all conveyances of effects made by any bank in contemplation of insolvency, or after insolvency, except for the benefit of all the creditors, shall, unless made to an innocent purchaser for a valuable consideration, and without notice of the condition of the bank, be void. Hill *v.* Western, etc., R. Co., 86 Ga. 284, 12 S. E. 635.

66. Longfellow *v.* Barnard, 58 Neb. 612, 79 N. W. 255, 76 Am. St. Rep. 117, affirmed on rehearing in 59 Neb. 455, 81 N. W. 307.

When a bank is unincorporated, and is owned exclusively by a private individual, although the business is conducted by a president and cashier, the assets of the bank represent merely the portion of the owner's capital invested in banking, and he may lawfully dispose of them to pay or secure the

§ 74 (2) Right of Directors to Prefer Themselves.—In those jurisdictions in which directors of a bank are regarded as trustees, transactions whereby directors prefer themselves to other creditors will not be upheld.[67] But in others this trust relation is repudiated, and preferences may be made in their own favor provided they act in good faith.[68]

§ 74 (3) Payments to Depositors.—Where a bank, though insolvent, is still conducting its business and pays a check of a depositor in the usual course of business, and the depositor has no notice of the insolvency of the bank, the payment is good, and the depositor will be protected.[69] But if

just claims of any of his creditors. Longfellow *v.* Barnard, 58 Neb. 612, 76 Am. St. Rep. 117, affirmed on rehearing in 79 N. W. 255, 59 Neb. 455, 81 N. W. 307.

67. **Right of directors to prefer themselves.**—Lamb *v.* Laughlin, 25 W. Va. 300; Trustees *v.* Bosseiux, 3 Fed. 817.

The assets of an insolvent bank become a trust fund to be managed by the directors for the benefit of the creditors, and thereafter the directors can not, in equity, secure any advantage to themselves. Roan *v.* Winn, 93 Mo 503, 4 S. W. 736.

When the directors of a banking corporation ascertain that it is hopelessly insolvent, so that individually they are unwilling longer to aid it, their manifest duty is to close its doors at once; for continuing to do business then (as receiving deposits) is a fraud upon the public, and they should not receive any more deposits nor pay any more checks, but should proceed to execute their trust, either by making a general assignment for the benefit of creditors, or by paying pro rata the debts of the corporation. "Whether the board of directors could then under peculiar circumstances make preference of creditors, as was done in Burr *v.* McDonald, 44 Va. (3 Gratt.) 215, it is unnecessary to decide in this case. But the directors had no right occupying the fiduciary relation to the creditors generally, which they did, to keep the doors of the Wheeling Savings Institution open, until they could get out their deposits, and all the time from February 21, 1871, until the twenty-fifth of the said month, luring depositors to give credit to the insolvent concern, while some of them at least, including the defendant in this cause, were receiving their money from deposits thus improperly received. Before Laughlin received his money, the directors under the evidence in this cause should have closed the doors of the institution. Under these circumstances he had no right to draw his money and thus prefer himself to the other creditors, for whom he was acting as trustee. To do so was a gross breach of trust and was also fraud; and in my opinion the decree of the circuit court ought to be affirmed." Lamb *v.* Laughlin, 25 W. Va. 300.

68. Directors of a bank are bound to discharge their duties prudently, diligently, and faithfully, and apply the assets, in case of insolvency, for the benefit of creditors in preference to stockholders and other persons. But they are not technically trustees nor bound to apply the assets rateably among the general creditors. They may not only make preferences between creditors, but such preferences may be made in their own favor if they be creditors. But in such cases they must act with the utmost good faith. Planters' Bank *v.* Whittle, 78 Va. 737.

69. **Payments to depositors.**—McGregor *v.* Battle, 128 Ga. 577, 58 S. E. 28.

Money paid by a bank to a depositor in the usual course of business while the bank is a going concern, although in fact insolvent, is not impressed with a trust in favor of other creditors, where the depositor did not know the fact of insolvency, and was assured by the officers that the bank had money to pay all depositors, even though he was induced to withdraw the money by rumors of its embarrassment. Livingstain *v.* Columbian, etc., Trust Co., 81 S. C. 244, 62 S. E. 249, 22 L. R. A., N. S., 445.

Payments to a depositor during a run on a bank, and after the cashier has persuaded some persons not to withdraw their deposits, but when the bank has assets sufficient so that its officers hope and expect to continue business and be able to pay all the debts of the bank, are not made with

there is any attempt to prefer a depositor to other creditors of the bank he will be compelled to refund the payment, in accordance with the well-settled general rule which requires the assets of an insolvent corporation to be distributed ratably among all,[70] and it follows a fortiori that a court of equity will not aid him to enforce his unfair advantage.[71] Even a recovery in a separate suit against the common assets will not give the creditor a preference over the others in their final distribution.[72]

§ 74 (4) Who Is Entitled as a Preferred Creditor.—One who is induced by the officers of an insolvent bank through fraud and misrepresentation to furnish securities to the institution to tide it over its period of distress, is entitled to recover from the receiver as a preferred creditor.[73]

a view to prevent the application of the assets of the bank in the manner prescribed by statute, or with a view to the preference of that depositor over other creditors, within the meaning of 3 How. St., § 3208e6. Stone *v.* Jenison, 111 Mich. 592, 36 L. R. A. 675, 70 N. W. 149.

For three days there was a slight run on a bank, which suspended on the third day at 3 p. m. The cashier believed the bank had sufficient assets to pay all depositors could it avoid suspension, and in the forenoon of the third day paid defendant his deposit. He testified that in making payments he acted to protect the bank, and not with a view to making preferences. During the run, and before the payment to defendant, he had persuaded some depositors not to withdraw, in one instance giving as a reason for the request the closeness of the money market. Held, that a receiver of the bank could not recover the amount so paid defendant, on the ground that it was a payment after an act of insolvency, or in contemplation thereof, with a view to giving a preference (3 How. Ann. St., § 3208e6)—Grant, J., holding that there was no act of insolvency; Moore and Hooker, JJ., holding (Long, C. J., and Montgomery, J., dissenting) that there was no evidence that the payment was made with a view to create a preference. Stone *v.* Jenison, 111 Mich. 592, 36 L. R. A. 675, 70 N. W. 149.

70. Where the depositor of an insolvent bank is paid, not in the usual course of business and with knowledge that the bank is insolvent and of the intent to prefer him, the payment is not good, and such depositor is liable for the difference between the amount so received and his share of the assets of the bank. McGregor *v.* Battle, 128 Ga. 577, 58 S. E. 28.

A depositor whose account was overdrawn paid the balance to the bank's receiver. Afterwards the receiver discovered that such depositor, at the time the bank become insolvent, had a deposit, and that the cashier had fraudulently delivered to him certain bills of the bank, for the amount of which he drew a check, giving it a prior date, which check slightly overdrew his account. The receiver then brought action to recover these bills. Held, that the payment of the overdraft to the receiver was not a settlement which would relieve the depositor from liability to account for the unlawful preference. Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178.

71. An insolvent bank drew a draft to pay a depositor on a bank in which it had as a deposit the proceeds of a note secured by collateral; the note providing that, in case of insolvency of the maker bank, it should become due at once, and the note could be charged to the account of the bank and the collateral sold. On notice of the insolvency of the maker, the drawee bank so charged the note, but refused to pay the draft, and turned over the collateral to the receiver of the insolvent bank. Held, that the holder of the draft was not entitled to be subrogated to the rights of the drawee bank in the collateral as against general creditors of the drawer bank. Livingstain *v.* Columbian, etc., Trust Co., 77 S. C. 305, 57 S. E. 182, 122 Am. St. Rep. 568, 5 L. R. A., N. S., 442.

72. Leipold *v.* Maroney, 75 Tenn. (7 Lea) 128.

73. Who is entitled to claim as a preferred creditor.—A woman engaged to marry the cashier of an insolvent bank, who is told by him that the bank is in trouble and needs money or securities immediately, and is induced by

§ 74 (5) Transfers to Pledgees.—The officers of a bank in process of liquidation may, with the knowledge and acquiescence of the bank commissioners, make an absolute assignment of pledged securities to a pledgee, in a final settlement of the bank's transactions with such pledgee.[74]

§ 74 (6) Transfer after Appointment of Receiver.—A transfer of assets made after an order of court appointing a receiver is void.[75]

§ 74 (7) Purchase of Its Own Stock by a Bank.—If a banking corporation, at the time of purchasing its own shares of stock, is in an insolvent condition, the transaction can not be sustained as to creditors, and the selling stockholder who thus receives a portion of the capital holds the same subject to the superior equities of creditors.[76]

§ 75. Rights of Persons Making Deposits after Insolvency—§ 75 (1) In General.[77]—A bank should not continue business when it is known

him to furnish securities for a loan to the bank, but is not told that the bank's capital is gone, and more, as a result of defalcations by the cashier and others, is entitled to recover from the receiver, as a preferred creditor, the amount of the loan paid by her to save her securities. Hallett *v.* Fish, 120 Fed. 986.

Evidence in an action by one furnishing aid to an insolvent bank (being induced thereto by its cashier) to recover from the receiver, as a preferred creditor, considered, and held to show that the aid was furnished to the cashier in his official capacity, as representative of the bank, and not as an individual. Hallett *v.* Fish, 120 Fed. 986.

74. Preferential transfers to pledgees.—Merced Bank *v.* Price (Cal.), 98 Pac. 383.

Where a note and mortgage pledged by a bank were assigned to the pledgee while the bank was in liquidation, the mortgagor, even if a general creditor of the bank, could not attack the assignment in an action to foreclose the mortgage. Merced Bank *v.* Price (Cal), 98 Pac. 383.

In an action, by the pledgee from a bank of a note and mortgage, to foreclose the mortgage, evidence held to show that an absolute assignment of the pledge by the bank to the pledgee, made in settlement of the bank's debt to the pledgee, and while the bank was in liquidation under the bank commissioners, was not fraudulent as against the bank's creditors. Merced Bank *v.* Price (Cal.), 98 Pac. 383.

75. Validity of transfer after appointment of receiver.—A transfer of assets by an insolvent bank to one of its stockholders to secure him against a liability previously incurred by him on account of the bank, made after an order of the court appointing a receiver on motion, of which motion the president had received notice, is a fraud upon the court, and is therefore void, independent of the statute. Leavitt *v.* Tylee (N. Y.), 1 Sandf. Ch. 207.

76. Right of bank to purchase its own stock.—A solvent stockholder of an insolvent bank delivered to it his shares of stock in consideration that his note held by the bank, secured by his stock as collateral, be credited with an amount considered by him and the president of the bank as a fair valuation of the stock. At the time both the stockholder and the president thought the bank solvent, and the shares were held by the bank until it made an assignment for the benefit of the creditors within a month or two thereafter. Held, that the stockholder received the credit subject to the superior equity of creditors of the bank, and that the credit would be canceled at the instance of a receiver for the bank, and the stockholder decreed to hold the amount of such credit in trust for the creditors. Fitzpatrick *v.* McGregor, 133 Ga. 332, 65 S. E. 859. See ante, "Reduction of Capital Stock," § 38.

77. Receiving deposits after insolvency, civil liability of officers, see post, "Criminal Prosecutions," § 204.

Criminal liability, see post, "Penalties for Failure to Pay," § 210; "Liability of Stockholders or Officers," § 211. Right of deposit or to preference, see post, "Issue and Payment of Drafts," § 189; "Letters of Credit," § 191.

Imputation to bank of cashier's

to its officers to be insolvent, and more especially is this true as to depositors, because the relation between a bank and its customers is such that great confidence is asked and reposed. Accordingly it is held to be a fraud for the bank to receive deposits from an innocent depositor, ignorant of the bank's condition;[78] when it is known by its officers to be insolvent at the

knowledge of insolvency, see post, "In Respect to Deposits," § 116 (3).

Enforcement of liability of stockholders, see ante, "Actions and Proceedings to Enforce," § 49.

Of national banks, see post, "Assets and Receivers on Insolvency," § 287.

Criminal responsibility of officers, see ante, "Criminal Responsibility," § 60.

78. Receiving deposits by bank after knowledge of insolvency.—Peck *v.* First Nat. Bank, 43 Fed. 357; Wasson *v.* Hawkins, 59 Fed. 233; Philadelphia *v.* Aldrich, 98 Fed. 487; Richardson *v.* New Orleans Debenture Redemption Co., 42 C. C. A. 619, 102 Fed. 780, 52 L. R. A. 67; St. Louis, etc., Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390; American Trust, etc., Bank *v.* Gueder, etc., Mfg. Co., 150 Ill. 336, 37 N. E. 227; see Fisse *v.* Dietrich, 3 Mo. App. 584; Higgins *v.* Hayden, 53 Neb. 61, 73 N. W. 280; Perth Amboy Gaslight Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704; Anonymous, 67 N. Y. 598; Williams *v.* Van Norden Trust Co., 104 App. Div. 251, 93 N. Y. S. 821; Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; Grant *v.* Walsh, 145 N. Y. 502, 40 N. E. 209, 45 Am. St. Rep. 626; In re Assignment, 1 N. P. 358, 2 O. Dec. 304; Warner *v.* Armstrong, 21 Wkly. L. Bull. 124, 10 O. Dec. 426; see, also, Talcott *v.* Henderson, 31 O. St. 162, 27 Am. Rep. 501; Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968; Bruner *v.* First Nat. Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532; Friberg *v.* Cox, 97 Tenn. 550, 37 S. W. 283; Williams *v.* Cox, 99 Tenn. 403, 42 S. W. 3; Parker *v.* Crawford, 3 Tex. App. Civ. Cases, § 365; Hyland *v.* Roe, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873.

When a bank receives a deposit after it is hopelessly insolvent, the fraud avoids the implied contract between the parties by which the relation of debtor and creditor would ordinarily arise, and prevents the money deposited from becoming the property of the bank, and a trust is the equitable result. Richardson *v.* New Orleans Debenture Redemption Co., 42 C. C. A. 619, 102 Fed. 780, 52 L. R. A. 67.

It is a fraud on a depositor for a bank to permit a depositor, in reliance upon the supposed solvency of the bank, to make deposits after it has become irretrievably insolvent, and such insolvency is known to the bank or its agent, and, upon the discovery of the fraud, the depositor may rescind the contract, reclaim the check or draft, unless it has come into possession of a bona fide holder for value. National Citizens' Bank *v.* Howard (N. Y.), 3 How. Prac., N. S., 511.

Checks deposited for collection.—Checks and drafts delivered by a depositor to a bank for collection and deposit at a time when the bank was insolvent, and known to be so by its officers, and which had not been collected when the bank closed its doors, remain the property of the depositor, although they were indorsed to the bank without qualification, and on their subsequent collection by the receiver the proceeds may be recovered from him by the depositor. Richardson *v.* New Orleans Coffee Co., 43 C. C. A. 583, 102 Fed. 785.

Where a debtor tenders a bank a draft in excess of his debt, and requests that the balance be placed to his credit, which the bank does, without disclosing its insolvency, it acquires no title, since it could not receive the draft, or any part of it, as a loan, without making such disclosure. Spring Brook Chemical Co. *v.* Dunn, 39 App. Div. 130, 57 N. Y. S. 100.

Construction of Illinois statute.—Act June 4, 1879, which makes it embezzlement for any banker to receive on deposit, while insolvent, "any money, check, draft, bill of exchange, stocks, bonds, or other valuable thing which is transferable by delivery," applies to checks payable to the payee's order as well as to those payable to bearer. American Trust, etc., Bank *v.* Gueder, etc., Mfg. Co., 150 Ill. 336, 37 N. E. 227.

Necessity for false representations.—In an action by an indorsee of a draft deposited by defendants, the drawers, with a banker, the evidence showed that at the time of the deposit the banker was, and for a long time had been, to his knowledge, utterly in-

time they accepted the deposit;[79] and the depositor may rescind the con-

solvent. The defense alleged that the draft was obtained by the banker by fraudulent misrepresentations. Held, that the court properly refused to charge that defendants must show that the banker made false representations to them to procure the draft; that they were in fact deceived thereby; and that representations made to the world were not sufficient, and that they must have been made directly to defendants; that, if his failure was caused by the unexpected failure of another bank, upon which he depended for help, and he was ignorant of the latter's failure when he received the draft, the defense could not be sustained. Rochester Printing Co. *v.* Loomis, 45 Hun 93, 9 N. Y. St. Rep. 592.

Waiver of fraud.—Where a depositor in a bank which has become insolvent files his claim with the trustee in insolvency, it is an acceptance of the contract relation, waiving the right to rescind on the ground of fraud, in that the deposit was accepted by the bank with knowledge of its insolvency. Potts *v.* Schmucker, 84 Md. 535, 35 L. R. A. 392, 36 Atl. 592, 57 Am. St. Rep. 415.

79. The scienter in action to recover deposits after insolvency.—New York Breweries Co. *v.* Higgins, 79 Hun 250, 29 N. Y. S. 416; Stapleton *v.* Odell, 21 Misc. Rep. 94, 47 N. Y. S. 13; Williams *v.* Van Norden Trust Co., 104 App. Div. 251, 93 N. Y. S. 821.

Where plaintiff deposits money with the receiving teller of a bank, a few minutes before the bank closes its doors, to be credited to his account, and the teller, not knowing of the coming failure, after crediting the money in plaintiff's pass book, puts the money and deposit ticket one side, and before entry is made in the books of the bank, it closes its doors, and the money is, by order of the directors, placed apart, and in that condition delivered to the receiver, plaintiff can replevy it. Furber *v.* Stephens, 35 Fed. 17.

In Wasson *v.* Hawkins, 59 Fed. 233, the circuit court held that "where money and checks are unsuspectingly deposited in a bank, which is known by its managing officer to be hopelessly insolvent, a few minutes before the closing hour on the last day on which it does business, and the checks are subsequently collected by the bank's clerk, the whole of the deposit is charged with a trust, and an equal amount may be recovered from the receiver, who retains the specific money among the general mass of the bank's funds."

But the mere fact that a bank is insolvent when a check is deposited as cash does not alter the relation of debtor and creditor between the customer and the bank arising out of the deposit, and the customer is not therefore entitled to recover the proceeds of the check as his own money, it not appearing that the officer knew of the bank's insolvency. Williams *v.* Cox, 97 Tenn. 555, 37 S. W. 282; Showalter *v.* Cox, 97 Tenn. 547, 37 S. W. 286.

In Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9, a distinction was taken between the actual and the hopeless insolvency of a bank.

Where checks are deposited in bank in the usual course of business, and credit therefor is given in the depositor's pass book, the title to such checks vests in the bank, and the depositor can not recover them on the ground that the bank was insolvent at the time of the deposit without showing that the officers of the bank knew of its insolvency, and received the deposits fraudulently. People *v.* St. Nicholas Bank, 77 Hun 159, 28 N. Y. S. 407, 58 N. Y. St. Rep. 712; People *v.* St. Nicholas Bank, 77 Hun 611, 28 N. Y. S. 421, 59 N. Y. St. Rep. 881; In re Beers, 77 Hun 611, 28 N. Y. S. 422, 59 N. Y. St. Rep. 881.

Construction of Penal Code.—In view of Pen. Code, § 601, providing that one who receives a deposit for a bank, which he knows is insolvent, is guilty of a misdemeanor, proof merely of the insolvency of a bank when a deposit was made does not justify an inference that the officers and directors knew of such insolvency, so as to permit the depositor to recover back the deposit as for fraud of the bank. Stapleton *v.* Odell, 21 Misc. Rep. 94, 47 N. Y. S. 13.

Sufficiency of notice or knowledge of insolvency.—Some cases hold that to constitute fraud in receiving a deposit when insolvent, which will authorize a rescission by the depositor, and a recovery from a receiver subsequently appointed, the officers of the bank must have known or believed that it was insolvent when it was received; and such knowledge can not be presumed. The fact that the officers knew the bank to be embarrassed is not sufficient. Quin *v.* Earle, 95 Fed. 728; Baker *v.* Orme, 6 O. C. C.

tract of deposit and recover back the deposit or its proceeds,[80] or he may

N. S., 289, 298, 17-27 O. C. D. 465, affirmed in 74 O. St. 337.

But in other cases the rule is that the presumption that the managing officers and agents of an insolvent bank have notice of its condition arises from circumstances, especially when the president is familiar with the desperate condition of the bank, and undertakes to conduct its business. Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9.

On Tuesday the directors of a bank discovered that the cashier had embezzled the funds, but not to such an extent, as they then supposed, as to render the bank insolvent, and it continued business. On Wednesday, complainant, a dealer with the bank, deposited about $600 in cash and checks, which were credited in his bank book, and the checks duly forwarded for collection, and credited to the bank by its correspondent. On Thursday the bank suspended through insolvency. Held, that complainant's deposit was not entitled to preference in payment over those of other depositors. Terhune *v.* Bank, 34 N. J. Eq. 367.

Where the cashier of a bank failed to appear during business hours, and a shortage in the cash was discovered by the president, and the cashier, who for years had the perfect confidence of the bank, telephoned that the balance was in another compartment of the vault, the president was not chargeable with notice of the bank's insolvency, and hence was not guilty of fraud in subsequently receiving deposits. Perth Amboy Gaslight Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704.

Where a president of a bank heard that its cashier had made unauthorized drafts on another bank, and appropriated the proceeds, to an amount exceeding the capital and surplus of the bank, and proposed to a bank examiner to close the bank, but was advised by him to first verify his information, and while this was being done with all possible speed the bank remained open, for one hour, the president was not guilty of fraud in receiving deposits during that period. Perth Amboy Gaslight Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704.

Knowledge on the part of the cashier or other officer of the bank's insolvency is imputed to the bank. Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968, reviewing many cases. See post, "Notice to Officer or Agent,"

Liability of directors.—A part of the depositors of an insolvent banking corporation in the hands of a receiver may sue the directors for deceit in inducing complainants to make deposits when they knew the bank was insolvent. Blumer *v.* Ulmer (Miss.), 44 So. 161.

80. Remedies of depositor.—Richardson *v.* New Orleans Coffee Co., 43 C. C. A. 583, 102 Fed. 785; Baker *v.* Orme, 6 O. C. C., N. S., 289, 17-27 O. C. D. 465, affirmed in 74 O. St. 337; Parker *v.* Crawford, 3 Tex. App. Civ. Cases, § 365; Blake *v.* State Sav. Bank, 12 Wash. 619, 41 Pac. 909; Hyland *v.* Roe, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873.

A depositor, who has been permitted by an insolvent bank to deposit a draft with it immediately before the closing of the doors of the bank, may rescind the contract of deposit on the ground of fraud, and reclaim the property. Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9, followed in Importers', etc., Nat. Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319.

The officers of a bank, knowing the bank to be hopelessly insolvent, accepted a deposit, and the next day closed its doors. Held, that the amount of the deposit was recoverable against the receiver. Craigie *v.* Smith, 14 Abb. N. C. 409.

Actual receipt of funds necessary.—In an action by a depositor to recover from the assignee for the benefit of creditors of bankers a deposit alleged to have been received by the bankers on the eve of their insolvency, plaintiff can not recover without proof that the proceeds of the deposit actually came into the hands of the assignee. Williams *v.* Van Norden Trust Co., 104 App. Div. 251, 93 N. Y. S. 821.

Defenses.—Defendants, directors in a private corporation, when sued for money the plaintiff, a stockholder, had been induced to deposit with the company, then insolvent, by the representations of the defendants, they having accepted the deposits and applied them to the payment of a debt for which they were sureties, are estopped from setting up as a defense in a suit to charge them therefor, their want of authority to receive the deposits. Kinkler *v.* Jurica, 84 Tex. 116, 19 S. W. 359.

Plaintiff brought an action to recover money alleged to have been

maintain replevin for the money,[81] provided the deposit or its proceeds can be distinguished or identified, and before it has become commingled with the general funds of the bank,[82] and to this end he is entitled to a prefer-

fraudulently received by defendant, a banking house, while proceedings were pending to have them declared bankrupts, in which proceedings an injunction had been issued restraining them from doing any further business. The complaint alleged that defendants concealed these facts, and opened their banking house and did business as usual, with intent to defraud, and plaintiff, relying on the appearances, deposited the money with them, and received a draft on C., in whose hands they, as was alleged, had no funds, and the draft was not paid. The answer denied most of the allegations of the complaint, and admitted the receipt of the money and the giving of the draft, but alleged that when the draft was delivered defendants had funds in C.'s hands, and that the draft was not presented until a number of days afterwards. The answer also alleged that the transaction was in good faith, and that the reason why defendants kept their banking house open was that they expected to make a speedy arrangement with their creditors, and have the proceedings discontinued. Other facts were alleged, tending to disprove fraudulent intent. Held, that the answer constituted a defense to the action. Van Alstyne *v.* Crane (N. Y.), 4 Thomp. & C. 113.

Evidence.—Act June 4, 1879, making the failure of a banker within thirty days after receipt of a deposit prima facie evidence of an intent to defraud, applies as well in civil actions as in criminal prosecutions. American Trust, etc., Bank *v.* Gueder, etc., Mfg. Co., 150 Ill. 336, 37 N. E. 227.

When a bank is insolvent, and one of the managing partners, informed of its condition, continues to receive deposits after the other absconds, it is not necessary for a depositor, seeking to rescind a sale of paper to it, to show that the remaining partner was privy to the flight of the other. The fact that the managing partner must have known the condition of the bank, and that the sum credited to the depositor could not be paid in the course of business, sufficiently shows the fraud. First Nat. Bank *v.* Strauss, 66 Miss. 479, 6 So. 232, 14 Am. St. Rep. 579.

Amount of recovery.—Where money and checks are unsuspectingly deposited in a bank, which is known by its managing officer to be hopelessly insolvent a few minutes before closing hour on the last day on which it does business, and the checks are subsequently collected by the bank's clerk, the whole of the deposit is charged with a trust, and an equal amount may be recovered from the receiver, who retains the specific money among the general mass of the bank's funds. Wasson *v.* Hawkins, 59 Fed. 233.

Title of assignee.—A banker, knowing that he was insolvent, and intending to make an assignment for the benefit of his creditors in a day or two, unless he should meanwhile receive financial assistance, accepted a deposit, without informing the depositor of his insolvency, but kept the money in a separate parcel, marked with the depositor's name, intending to return it in case he made a general assignment. On the same day he made such assignment, and delivered the parcel to the assignee, with a request that he return it to the depositor if he could legally do so. Held, that the assignee took no title to the deposit. Chaffee *v.* Fort (N. Y.), 2 Lans. 81.

81. Replevin by depositor.—Bank *v.* Solicitors Loan, etc., Co., 188 Pa. St. 330, 41 Atl. 536, 68 Am. St. Rep. 872.

82. Deposit must be capable of identification in hands of receiver.—Illinois, etc., Sav. Bank *v.* First Nat. Bank, 15 Fed. 858, 21 Blatchf. 275; Philadelphia Nat. Bank *v.* Dowd, 38 Fed. 172; Somerville *v.* Beal, 49 Fed. 790; Case *v.* Beauregard, Fed. Cas. No. 2,487, 1 Woods 125; Peters *v.* Bain, 133 U. S. 670, 33 L. Ed. 696, 10 S. Ct. 354; Maury *v.* Mason (Ala.), 8 Port. 212; Goldsmith *v.* Stetson & Co., 30 Ala. 164; Parker *v.* Jones, 67 Ala. 234; McCall *v.* Rogers, 77 Ala. 349; St. Louis Brewing Ass'n *v.* Austin, 100 Ala. 313, 13 So. 908; Wilson *v.* Coburn, 35 Neb. 530, 53 N. W. 466; Higgins *v.* Hayden, 53 Neb. 61, 73 N. W. 280; In re North River Bank, 60 Hun 91, 14 N. Y. S. 261, 37 N. Y. St. Rep. 931; Baker *v.* Orme, 6 O. C. C., N. S., 289, 17-27 O. C. D. 465, affirmed in 74 O. St. 337, quoted from Quin *v.* Earle, 95 Fed. Rep. 728; In re Commercial Bank, 4 O. Dec. 108, 2 N. P. 170; Belding Bros. & Co. *v.* Frankland, 76 Tenn. (8 Lea) 67, 41 Am. Rep. 630; Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Sayles *v.* Cox, 95

Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940; Bruner *v.* First Nat. Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532; Friberg *v.* Cox, 97 Tenn. 550, 37 S. W. 283; Blake *v.* State Sav. Bank, 12 Wash. 619, 41 Pac. 909; Nonutuck Silk Co. *v.* Flanders, 87 Wis. 237, 58 N. W. 383; Burnham *v.* Barth, 89 Wis. 362, 62 N. W. 96; Thuemmler *v.* Barth, 89 Wis. 381, 62 N. W. 94; Stevens *v.* Williams, 91 Wis. 58, 64 N. W. 422; Dowie *v.* Humphrey, 91 Wis. 98, 64 N. W. 315.

In other words it is a general rule, as well in a court of equity as in a court of law, that in order to follow trust funds, and subject them to the operation of the trust, they must be identified. Cavin *v.* Gleason, 105 N. Y. 256, 11 N. E. 504.

And in the latter case of Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178, the court used this language: "The fact that the defendant became a creditor of the insolvent bank through the fraud of its officers, and the bank a trustee ex maleficio, gave the defendant no right to a preference over other creditors, unless it could trace and recover its property." Blake *v.* State Sav. Bank, 12 Wash. 619, 41 Pac. 909.

The fact that a bank is insolvent, within the knowledge of its officers, and receives the money of a depositor under circumstances which amount to a fraud upon him, is not of itself sufficient to entitle him to preference from the funds of the bank in the hands of an assignee; for although he may follow his money while he can trace and distinguish it, or the proceeds thereof, he can not do so after it has passed into the hands of the assignee mingled with the other funds of the bank. Wilson *v.* Coburn, 35 Neb. 530, 53 N. W. 466; Lanterman *v.* Travous, 174 Ill. 459, 51 N. E. 805.

To authorize recovery of a general deposit from a receiver on the ground that the bank was insolvent, and known to be so by its officers, when it was received, and that the fraud authorized a rescission of the contract by the depositor, the thing deposited, or its proceeds, must be capable of identification in the receiver's hands, or it must appear that the funds in his hands were increased by that amount. Quin *v.* Earle, 95 Fed. 728.

The fact that the bank had no right to receive defendant's deposits when known to be insolvent, and committed a fraud by so doing, thus becoming a trustee ex maleficio, gave defendant no right to a preference over other creditors, unless it could trace and recover its own property. Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178.

Where a depositor in a bank, known at the time by its officers to be insolvent, finding a mistake in the amount which he intended to deposit, told the teller to "put that money to one side" until he returned from his office, and the teller responded, "All right," but immediately mingled the deposit with the other funds of the bank, the deposit was impressed with a trust, and could be recovered in full, though not traceable directly into the hands of the assignee. In re Commercial Bank, 4 O. Dec. 108, 2 N. P. 170.

In other words, a party who deposits funds in a failing bank, which do not become mingled with other funds, but remain in a separate package, can recover the same from the assignee of the bank after it has made an assignment for the benefit of creditors. In re Assignment, 1 N. P. 358, 2 O. Dec. 304.

Where a depositor makes a deposit in an insolvent bank, and at the same time purchases from such bank a draft on another bank, and subsequently the bank receiving the deposit and issuing the draft makes an assignment, and the draft is returned unpaid, the depositor, if he be unable to identify the deposit, or to trace it into the hands of the trustees, can not recover it; the fact of the application of a part of the deposit to the purchase of a draft not being sufficient to give any special rights in the premises. In re Commercial Bank, 2 N. P. 170, 4 O. Dec. 108.

One who at various times deposited moneys with a bank, not knowing of its insolvency, and from time to time drew checks on the amount, can not, after the bank has been declared insolvent, recover from the receiver the amount remaining to his credit, as the fund was not impressed with a special trust in his favor, and could not be identified and traced into the hands of the receiver. Blake *v.* State Sav. Bank, 12 Wash. 619, 41 Pac. 909, explaining Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9.

Deposit with and without instructions.—There is an evident difference between a deposit of money without instructions and a paper, such as checks, drafts, etc., without such instructions. Accordingly, where a check drawn on another bank is deposited in an insolvent bank without any special instructions, and it is not placed to the customer's credit, and immediately thereafter the receiving bank fails, and

the check goes into the hands of the bank examiner and is afterwards collected, the proceeds are the property of the customer, and not of the bank. Showalter *v.* Cox, 97 Tenn. 547, 37 S. W. 286.

Special deposits.—If a deposit is delivered to the bank for a particular purpose, and not as a general deposit, it would be a trust fund in the first instance, and the title would not pass to the bank; but even then it could not be recovered without showing that it had gone into the hands of the receiver. Blake *v.* State Sav. Bank, 12 Wash. 619, 41 Pac. 909, citing with approval Cavin *v.* Gleason, 105 N. Y. 256, 11 N. E. 504.

Check deposited and credited as cash.—It is well settled where a check is deposited and credited on the customer's pass book as cash, the proceeds can not be followed and reclaimed unless the fund has been kept separate and may be identified. Williams *v.* Cox, 97 Tenn. 555, 37 S. W. 282; Friberg *v.* Cox, 97 Tenn. 550, 37 S. W. 283; Klepper *v.* Cox, 97 Tenn. 534, 37 S. W. 284, 34 L. R. A. 536, 56 Am. St. Rep. 823; Bruner *v.* First Nat. Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532.

Sufficiency of identification.—The general rule that where the money deposited is indistinguishably mingled with the other funds of the bank the depositor must be able to trace and identify his particular deposit before a trust can attach, is not very strictly applied. Accordingly, it has been held that even though there are no earmarks on the money, yet if the exact amount deposited is known, this is a sufficient identification. Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

And if it appears that the deposit was in cash and that the very money deposited was in the vaults of the bank at the time it closed its doors, and came necessarily into the hands of the assignee or receiver, the depositor may reclaim it, although he may not be able to identify the very coin or bills which composed the deposit. The reason for this is that the assets of the bank are actually increased by the amount of the deposit, and the very cash came to the hands of the receiver or assignee. Perth Amboy Gaslight Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704, opinion of Pitney, Vice Chancellor; Wasson *v.* Hawkins, 59 Fed. 233; Cavin *v.* Gleason, 105 N. Y. 256, 11 N. E. 504; Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178; Compare Frelinghuysen *v.* Nugent, 36 Fed. 229.

Where a bank receives a deposit on the day of its suspension, when it is known by its officers to be insolvent, and mingles the money with its own funds, which, to an amount larger than the deposit, pass into the hands of a receiver, it is not essential to the right of the depositor to recover his deposit from the receiver that he should be able to trace the identical money deposited into the receiver's hands, but it is sufficient that the amount which went into his hands was increased by the amount of the deposit. Richardson *v.* New Orleans Debenture Redemption Co., 42 C. C. A. 619, 102 Fed. 780, 52 L. R. A. 67.

In Massey *v.* Fisher, 62 Fed. 958, the circuit court for the Eastern District of Pennsylvania laid down the following rule: "The fact that the money was not marked and by a commingling with other funds of the bank, lost its identity, does not affect the right to recover in full, if it can be traced to the vaults of the bank, and it appears that a sum equivalent to it remained continuously therein until removed by the receiver." That court, in the opinion cites many supporting cases.

According to the better rule, the fact that the cash deposited during the day is mingled with the other funds on hand, is immaterial if the cash deposited swells the assets of the bank. And while in theory of law it is the duty of the depositor to trace his own money, he complies with this rule by showing that his money was mingled with the other cash on hand of the bank by the bank's officers and employees, and that the entire cash deposits for the day were less than the cash on hand when the bank closed its doors. Having shown this state of facts it will be presumed that the bank used its own cash during the last day it transacted business, and retained that which, under the law, it had no right to use. Willoughby *v.* Weinberger, 15 Okla. 226, 79 Pac. 777.

Identification of proceeds of check.—Where a check on a bank was deposited by the payee in a bank which transmitted it for collection to the bank on which it was drawn, and the following day the bank receiving the deposit suspended, owing to insolvency, and the drawee held the check, at the request of the payee, for some time, and eventually delivered it to the receiver of the insolvent bank, a contention that a petition by the payee, which stated the facts and prayed for an or-

ence over the general creditors.[83] In other words the deposit is impressed

der requiring the receiver to pay over the proceeds of the check, was insufficient, owing to there being no sufficient identification of the proceeds of the check, was without merit. Hyland *v.* Roe, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873.

The identical proceeds of a check or draft fraudulently received on deposit by an insolvent bank, are sufficiently traced by the depositor when it appears that they are included in a fund paid over to the receiver of the bank by a correspondent, as the proceeds of credits made after the bank failed, but notice thereof to the correspondent. Bruner *v.* First Nat. Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532.

Where bank's assets not increased.—Where one deposits in a bank the check of another depositor of the bank, and is given credit therefor, the assets of the bank are not thereby increased, and hence there can be no tracing and reclaiming of the deposit on the insolvency of the bank. Perth Amboy Gaslight Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704.

Burden of proof.—The burden is on one who transferred a draft to a bank prior to its failure, and who seeks to follow and reclaim the proceeds as against a receiver, to show that they were not received and mingled with the other funds of the bank before the failure; and, where they were placed to its credit by a correspondent on the same day the receiver was appointed, in the absence of further proof as to the exact time it will be presumed that the credit was given before the receiver was appointed. Klepper *v.* Cox, 97 Tenn. 534, 37 S. W. 284, 34 L. R. A. 536, 56 Am. St. Rep. 823.

83. Preference to depositors.—Perth Amboy Gaslight Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704; Baker *v.* Orme, 6 O. C. C., N. S., 289, 17-27 O. C. D. 465, affirmed in 74 O. St. 337; Willoughby *v.* Weinberger, 15 Okla. 226, 79 Pac. 777; Compare Cavin *v.* Gleason, 105 N. Y. 256, 11 N. E. 504.

A depositor is entitled to a preference where the deposit was made when the bank was hopelessly insolvent, which fact was concealed by the bank; and an equal amount may be recovered from the receiver, who has received the specific money among the general mass of the bank's funds. Lake Erie, etc., R. Co. *v.* Indianapolis Nat. Bank, 65 Fed. 690.

Where the relation of loaner and borrower exists between a bank and its depositor, he may reclaim his deposit, as against the general creditors of the bank, in case of insolvency, when its officers received the deposit knowing the insolvency at the time, and were guilty of actual fraud in receiving it, and he is able to trace his deposit to the assets which came into the hands of the receiver or assignee, though he need not identify the very coin or bills deposited. Perth Amboy Gaslight Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704.

Where funds were received on deposit a few minutes before closing time at a time when the bank was insolvent to the knowledge of the cashier in charge, and two days thereafter the bank passed into the hands of a receiver, the deposit having been fraudulently received, no title vested in the bank, and, on making timely demand upon the receiver, the depositor was entitled to recover the full amount of the deposit in preference to the claims of general creditors. Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968; Baker *v.* Orme, 27 O. C. C. 465.

Fraud in receiving a deposit of cash, or of a check treated as cash, after bank officials know that it is hopelessly insolvent, will not give the depositor a preferential claim against assets in the hands of the receiver of the bank, if the bank, before its failure, had commingled the cash with its general funds and had received credit for the check from a correspondent to whom it had been forwarded, although there was due from the correspondent more than the amount of the check which went into the hands of the receiver. Klepper *v.* Cox, 97 Tenn. 534, 37 S. W. 284, 34 L. R. A. 536, 56 Am. St. Rep. 823.

Where a bank, knowing its insolvency, receives a check, which it credits to the depositor as cash, and then sends to a correspondent, who, after the failure of said bank, but without notice thereof, credits the check to it as cash, and subsequently pays over the proceeds to the receiver, the depositor may recover such proceeds as a preferred claim. Bruner *v.* First Nat. Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532.

Deposits by county treasurer.—Where a county treasurer deposits in

with a trust in favor of the depositor.[84] A return of this deposit can not be attacked as a preference to creditors.[85]

The reason for the foregoing rule is that a deposit in a bank which is insolvent at the time does not vest title thereto in the bank and convert the depositor into a general creditor.[86]

§ 75 (2) Deposits for Collection.—A banker who receives money or drafts for collection with knowledge that the institution is hopelessly insolvent gets no title legal or equitable, and the funds or proceeds can always be claimed and recovered by the owner when they can be traced and identified, regardless of the form of indorsement.[87] But where a bank, knowing

an insolvent bank checks received for taxes which he has endorsed in blank, for which he accepts a certificate of deposit, but retains no memorandum of the checks deposited, he can not after the bank has gone into the hands of a receiver follow the checks or the money collected on them as a trust fund and claim a preference over other creditors for the amount so received from him by the bank. Towson *v.* Cole, 6 N. P., N. S., 388, 17 O. D. N. P. 282.

84. A petition seeking to charge a trust on property in the hands of the defendant, the receiver of an insolvent bank, may allege that the bank obtained the property as bailee, and at the same time charge that it was obtained by fraudulent concealment of insolvency, and relief may be granted on the latter ground, although the former be not proved. Higgins *v.* Hayden, 53 Neb. 61, 73 N. W. 280.

85. The delivery by a receiver of an insolvent bank to its owner of a draft deposited with the insolvent through the latter's fraud is not in the nature of paying a preferred creditor. Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9. This case is reviewed and explained in Blake *v.* State Sav. Bank, 12 Wash. 619, 41 Pac. 909.

86. Reason of rule.—Hyland *v.* Roe, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873.

87. Deposits for collection after notice of insolvency.—Richardson *v.* Denegre, 35 C. C. A. 452, 93 Fed. 572; Commercial Bank *v.* Armstrong, 148 U. S. 50, 37 L. Ed. 363, 13 S. Ct. 533.

Where a banker knew that he was hopelessly insolvent when he received for collection a check which he caused to be credited to him in a correspondent bank, his failure to apprise the owner of his condition made the acquisition of the check fraudulent, even if the latter knew he was to use it as a debt. Judgment, 63 N. Y. S. 670, 50 App. Div. 33, affirmed. Blair *v.* Hill, 165 N. Y. 672, 59 N. E. 1119.

On the day a bank closed its doors, and when it was known by its officers to be insolvent, complainant, a customer made a deposit of money, and also of certain checks and drafts for collection and credit, all of which were credited, at the time, to its account. During the day, it also purchased drafts from the bank, for which it gave checks about equal in amount to its entire deposit, but such drafts were returned unpaid, and were tendered back to the receiver. Held, that the purchase and sale of the drafts was a separate transaction, which, as it did not create any liability affecting the general creditors, and was in itself fraudulent on the part of the bank, did not affect complainant's right in equity to reclaim the deposits from the receiver. Richardson *v.* New Orleans Coffee Co., 43 C. C. A. 583, 102 Fed. 785.

Where defendant, a banker, under an agreement with plaintiffs to receive deposits, collect bills, pay their drafts on him when presented, use the money in his hands and pay interest on the same, received a draft from plaintiffs to be collected and collected the same and used the money, when he knew the day before the collection that he was insolvent, and suspended payment on the same day he made the collection, his failure did not annul the agreements, or make him a trustee for the funds collected. Bussing *v.* Thompson, 15 How. Prac. 97, 13 N. Y. Super. Ct. 696.

A regular customer of a bank sent to it a check with an unrestricted indorsement, and directed it to be placed to his credit. The check was received and credited, and the customer so advised. On the day of receipt the bank sent the check to its correspondent for collection, paid a check drawn by the

its insolvency, receives from a customer, as cash, a check on a foreign bank, and sends the paper to its correspondent, who, before the failure of the sending bank, credits the check to it as cash, and subsequently pays over the proceeds to the receiver, the right of the customer to reclaim the proceeds on account of the bank's fraud is lost.[88]

§ 75 (3) Special Deposits.—If the deposit be a special one the bank is merely a trustee or bailee, and the general funds into which it has passed are impressed with the trust.[89]

§ 75 (4) Rights of Payee of Draft.—The rights of the payee of a draft which was never really accepted as a deposit are the same, on the insolvency of the bank, as if it had never been presented.[90]

customer from a part of the proceeds of the credit, and closed its doors as insolvent. Held, that the check was not deposited for collection, but as cash, for immediate use. Williams *v.* Cox, 97 Tenn. 555, 37 S. W. 282.

The proceeds of a check received for collection by a bank when its officers knew that it was hopelessly insolvent, and which was not collected until after the bank had failed, belong to the customer, although the check was sent for collection with other checks to another bank, which retained from the entire amount collected an amount exceeding that of such check, for its indemnity, remitting the remainder, exceeding the amount of the check, to the receiver of the former bank, as it will be presumed in such case that the proceeds of such check were remitted. Williams *v.* Cox, 99 Tenn. 403, 42 S. W. 3.

However, where the bank has failed when the checks and drafts are credited, although done by a correspondent which does not yet know of the failure, this can not prejudice the rights of persons who deposited such paper in the insolvent bank to recover back their paper or its proceeds, when the deposit was received after the officers of the bank knew it to be insolvent. Bruner *v.* First Nat. Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532; Williams *v.* Cox, 99 Tenn. 403, 42 S. W. 3.

88. Where a bank accepts a check on another bank as cash, giving therefor a sum of money, a certificate of deposit, and the balance in a credit to the account of a third person, such transaction creates merely the relation of debtor and creditor between the bank and its customer, and the latter can not, on the insolvency of the bank, follow up the check, or its proceeds, as his property. Friberg *v.* Cox, 97 Tenn. 550, 37 S. W. 283.

Where a check drawn on another bank is deposited in an insolvent bank without any special instructions, and it is not placed to the customer's credit, and immediately thereafter the receiving bank fails, and the check goes into the hands of the bank examiner and is afterwards collected, the proceeds are the property of the customer, and not of the bank. Showalter *v.* Cox, 97 Tenn. 547, 37 S. W. 286.

89. Right of persons making special deposits after insolvency.—One deposited money in a bank under an agreement which made the deposit a special one. The deposit, without the knowledge of the depositor, went into the general funds of the bank, and it subsequently became insolvent. There was more than the amount of the deposit in the general fund at the time the receiver took charge. Held, that the depositor was entitled to follow the fund into the hands of the receiver, and charge the same with the trust. Shopert *v.* Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 515.

90. Rights of payee of draft.—A construction company drew a draft in favor of a subcontractor on a bank, which under an arrangement with a trust company was authorized to issue in payment of drafts for labor and materials exchange on the trust company which paid the same out of funds deposited by the holders of bonds issued to secure money to pay for the work. The subcontractor presented the draft to the bank for deposit and the amount thereof was entered on his passbook, but not actually passed to his credit; the bank being in a failing condition. It failed that night, and the next day the draft was returned to

§ 75 (5) Restoration of Consideration on Rescission.—A depositor in an insolvent bank who has received part of the deposit in money and the residue in a certificate of deposit, need not offer to return the amount actually received in order to obtain a rescission because of such insolvency, where he seeks to recover the balance only.[91]

§ 75 (6) Evidence.—The burden of proof is on the depositor to show affirmatively that the bank was insolvent when it received its deposit and that the officers then knew it.[92]

§ 76. Remedies and Proceedings on Insolvency[93]**—§ 76 (1) Right of Action.**—The fact that a bank is in process of liquidation does not protect it from suits by its creditors or depositors, in the absence of a judicial declaration of insolvency.[94]

§ 76 (2) Modes of Procedure—§ 76 (2a) In General.—The statutes in the various jurisdictions usually prescribe the mode of procedure for winding up the affairs of an insolvent bank,[95] and if these remedies did not exist at common law, are exclusive of all others.[96]

the payee. Held that, the draft not having been accepted as a deposit, the payee was equally entitled with the holders of similar drafts to share in the fund held by the trust company. McBride *v.* American R., etc., Co. (Tex. Civ. App.), 127 S. W. 229.

91. Restoration of consideration by depositor on rescission.—Hyland *v.* Roe, 111 Wis. 361, 87 N. W. 252, 87 Am. St. Rep. 873.

92. Burden of proof.—Furber *v.* Dane, 204 Mass. 412, 90 N. E. 859.

93. Proceedings to enforce liability of officers in insolvency, see post, "Taxation," § 205; "From Funds Deposited as Security," § 209.

94. Right of action against bank in liquidation.—That the bank commissioners have directed a bank to liquidate, and wind up its affairs, and that this is being done entirely by its own officers, who are collecting its assets, and disbursing money to depositors, does not deprive its creditors of their right to commence actions against it. Lanz *v.* Fresno, etc., Sav. Bank, 125 Cal. 456, 58 Pac. 63.

95. Statutory proceedings to wind up insolvent banks.—The mere fact that a bank, incorporated by special act, is not authorized to issue notes as currency, does not withdraw it from the operation of the general banking act of April 16, 1850, prescribing the procedure for winding up the affairs of an insolvent bank. In re Shackamaxon Bank (Pa.), 43 Leg. Int. 138.

Act March 24, 1903, § 10, St. 1903, p. 368, c. 266, as amended by Act March 20, 1905, St. 1905, p. 304, c. 296, authorizing the bank commissioners to require banks to discontinue unsafe practices and upon their failure to do so, or if it appear unsafe to allow any bank to continue business, to seize the effects of the bank and notify the attorney general, who shall commence suit to dissolve the corporation, etc., was intended to supersede the general insolvency act so far as it applied to banking corporations. People *v.* Bank, 154 Cal. 194, 97 Pac. 306.

Order to show cause.—A vice president of a bank, who is likewise a director, is a proper person to serve with an order to show cause why the bank should not be declared insolvent and a receiver appointed. People *v.* Central City Bank (N. Y.), 53 Barb. 412, 35 How. Prac. 428.

96. Exclusiveness of statutory remedies.—A suit under Rev. St., §§ 3218-3226, by a creditor of an insolvent bank, on behalf of all the creditors, to close up the bank's business and enforce against its officers and stockholders the liabilities created by statute, is exclusive of all actions on behalf of the creditors, and all are compelled to seek their remedy therein. Hurlbut *v.* Kelly, 62 Wis. 590, 22 N. W. 852.

An action commenced by a creditor and stockholder against an insolvent bank, alone, for the appointment of a receiver and the settlement of its af-

§ 76 (2b) Injunction.—By statute in some jurisdictions a court of equity, upon the application of either a creditor or stockholder, may restrain by injunction an insolvent bank from the further exercise of any of the privileges or franchises granted by its charter and appoint a receiver to take charge of the property and effects of the corporation. But before any such injunction will issue, the insolvency of the bank must be clearly made out.[97] The issuance of the writ is, however, discretionary with the

fairs (Rev. St. 1878, §§ 3218, 3219), in which the complaint does not allege that it is brought on behalf of all creditors, but prays that they may be brought in and made parties, is the exclusive action, in which not only the assets of the bank are to be administered, but the liabilities of the officers and stockholders are to be ascertained and enforced, since the complaint is capable of being amended so as to justify that relief on motion of any creditor who has proved his claim. Gager *v.* Bank, 101 Wis. 593, 77 N. W. 920.

97. Injunction against insolvent banks.—Barnum *v.* Bank (Mich.), 1 Har. 116; Oakley *v.* Paterson Bank, 2 N. J. Eq. 173; Hurlbut *v.* Kelley, 62 Wis. 590, 22 N. W. 852.

Where suit is brought by a creditor, in behalf of himself and other creditors of an insolvent banking corporation, to close up its business, and charge the directors, trustees, or other officers or stockholders, on account of their liability created by law, an injunction should issue to restrain further action by the bank, and a receiver be appointed. Hurlbut *v.* Kelly, 62 Wis. 590, 22 N. W. 852.

Construction of New Jersey statute.—Act February 1, 1838, restricting the circulation and discounts of the Paterson Bank for the time being, did not exempt that bank from operation of Act February 16, 1829, authorizing the chancellor, on insolvency of any corporation, to restrain the corporation from further exercising its charter powers on application of a creditor or stockholder and to appoint receivers. Oakley *v.* Paterson Bank, 2 N. J. Eq. 173.

Notice.—Except where the application is made by the bank commissioner showing fraud, insolvency, or violation of charter, notice should be given of an application for injunction, and a case made that would warrant the court to wind up the affairs of the bank. Barnum *v.* Bank (Mich.), 1 Har. 116.

Act April 5, 1849, concerning the proceedings against insolvent banks, provides that, upon the hearing of the parties on such short notice as the judge shall appoint, he shall determine whether such corporation and association be clearly solvent or otherwise, and that he may require the officer thereof to exhibit any and all of his books, papers, accounts, assets, and effects, and be examined on oath touching the same. Held that, where it is adjudged that a bank is insolvent, the act requires rapid and summary measures for the payment of billholders, depositors, and other bank creditors, and that all idea of increasing the assets for the benefit of the stockholders to the injury, by delay or otherwise of the billholders and depositors, is repudiated by the act. In re Knickerbocker Bank (N. Y.), 10 How. Prac. 341.

Ex parte hearing.—Under the bank commissioners' act (St. 1877, p. 744), as amended by St. 1886-87, p. 90, authorizing the attorney general, upon receiving a report from the bank commissioners that it is unsafe for a certain bank to continue business, to bring an action to enjoin it from doing any further business, and authorizing the court, if, after a hearing, it deems it necessary, to issue the injunction, and to direct the commissioners to take such proceedings against it as may be decided upon by its creditors, the court has no power, on an ex parte hearing, to enjoin the bank from doing business, and appoint a receiver therefor. Murray *v.* American Surety Co., 17 C. C. A. 138, 70 Fed. 341; People's Home Sav. Bank *v.* Superior Court, 103 Cal. 27, 36 Pac. 1015.

Necessity for bond.—Plaintiff, a stockholder in defendant bank, brought an action against the bank under 2 Rev. St., p. 461, regulating "proceedings against corporations in equity," and with the consent of defendant, represented by counsel, an order was made by the supreme court, at general term, enjoining defendant from the exercise of its corporate functions, and appointing a receiver of its property. Held, that the provision of the statute

court,[98] but a prima facie case of insolvency is usually sufficient.[99] And even though the bank be solvent, yet if the proceedings were instituted against the bank for refusal to pay a debt from it, the injunction may be continued until the debt is paid,[1] unless the bank has a good defense on the merits to such demand.[2]

The bill for the injunction must set forth the necessity for its issuance,[3]

regulating the giving of a bond on the injunction was waived by consenting to the injunction without requiring a bond. Ferry *v.* Bank (N. Y.), 15 How. Prac. 445.

Plaintiff, a stockholder in a bank, brought an action against the bank, under 2 Rev. St., p. 461, regulating "proceedings against corporations in equity," and, with the consent of defendant, represented by counsel, an order was made by the supreme court, at general term, enjoining defendant from the exercise of the corporate functions, and appointing a receiver of its property. Afterwards the defendant, on statements claiming that it was solvent, asked the court that such order be discharged, and that leave be granted it to resume, etc., on the ground, among others, that the injunction was irregular, having been granted without the giving of a bond or undertaking. Held, that the question whether a bond was necessary was not properly before the court, as the dissolution of the injunction would not restore defendant to its property or corporate rights without a discharge of the receivership, and so would afford no substantial relief to the parties. Ferry *v.* Bank (N. Y.), 15 How. Prac. 445.

Under the California statute the injunction of the trial court is, in effect, an order throwing the bank into liquidation, and until the bank goes into liquidation under such order it is not protected from the suits of creditors. Until such time it is acting largely independent of the courts and of the bank commissioners. Lanz *v.* Fresno, etc., Sav. Bank, 125 Cal. 456, 58 Pac. 63.

98. Act January 21, 1837, providing that an injunction may be issued when any banking institution shall refuse to pay its debts, is not imperative, but leaves it to the sound discretion of the court on a proper case being made. Barnum *v.* Bank (Mich.), 1 Har. 116.

99. Upon a proceeding by the attorney general, under the statute, for the dissolution of a banking corporation, it is only necessary for him to make out a prima facie case of insolvency, to justify the issuing of an injunction to restrain the bank from disposing of its effects. Bank *v.* Attorney General (N. Y.), 3 Wend. 588.

1. Laws 1849, c. 226, § 8, provides that, in proceedings against a bank to have it declared insolvent upon a refusal to pay a debt due from it, if the judge on the hearing determine that the association is clearly solvent, he shall, notwithstanding, continue the temporary injunction, if one has been granted, until the demand of the applicant has been fully paid, unless it shall have appeared that it has a good defense on the merits to such demand. Held, that the fact that the demand was for the payment of a sum of money held by the bank, but claimed also by third persons, showed a good defense to the claim, within the meaning of the statute, and that the title to the fund could not be tried in proceedings against the bank. In re Mechanics' Bank (N. Y.), 5 Abb. Prac. 374.

2. Proceedings under Laws 1849, c. 226, § 7, providing that, after ten days from the refusal of a bank to pay a debt due from it, an application may be made declaring it insolvent, etc., must be dismissed, wherever the existence of a good defense to the demand of the creditor of the bank is made to appear. In re Mechanics' Bank (N. Y.), 5 Abb. Prac. 374.

3. Form and contents of bill for injunction.—Under Act Jan. 21, 1837, providing that an injunction may be issued when any banking institution shall refuse to pay its debts, where a bill alleged merely a demand and refusal by the bank to pay its notes, and contained no allegations of any impending mischief, danger, or hazard of the rights of the complainants, an injunction was properly refused. Barnum *v.* Bank (Mich.), 1 Har. 116.

Act March 24, 1903, § 10, St. 1903, p. 368, c. 266, as amended by Act March 20, 1905, St. 1905, p. 304, c. 296, provides that if the bank commissioners find that a bank is doing business in an unsafe manner, they shall direct the discontinuance of such unsafe practices and if the bank fails to obey, or if the commissioners unanimously

and it can not be discontinued by one of the creditors, because it is in behalf of all.[4]

§ 76 (2c) Summary Remedies.—A statute allowing summary remedies against an insolvent bank to wind it up is strictly construed and will not be extended beyond its plain terms.[5]

§ 76 (2d) Creditors' Suits.—Where a bank has become insolvent and ceased to do business, one or more of the creditors, stockholders and depositors, may bring a creditors' suit for themselves and all others against the bank and its president for a settlement of its affairs and a distribution of its assets, for which purpose the court will appoint a receiver.[6] Other

decide it is unsafe for the bank to continue business, they shall take control of its effects and notify the attorney general who shall commence suit to dissolve it. In a suit by the attorney general the complaint alleged that the commissioners unanimously found that the bank was insolvent and unable to pay its obligations, and further alleged the fact of insolvency. Held, that, though there was no averment in the language of the statute that it was unsafe for the bank to continue business, the act contemplated that it was unsafe for an insolvent bank to continue business, and an allegation of insolvency was equivalent to an allegation that it was unsafe for it to continue business. People *v.* Bank, 154 Cal. 194, 97 Pac. 306.

4. **Discontinuance.**—A suit in equity to obtain an injunction against the officers of an insolvent bank, and to place its assets in the hands of receiver, though brought by one creditor, is a proceeding in behalf of all of the creditors, and can not, therefore, be discontinued by the plaintiff. Atlas Bank *v.* Nahant Bank (Mass.), 23 Pick. 480.

5. **Summary proceedings against banks.**—Laws 1882, c. 409, subc. 6, § 125, renders stockholders individually liable for the debts of banks "issuing bank notes or any kind of paper credits to circulate as money." Section 134 gives stockholders in such a bank, on showing its insolvency, a summary remedy, by which they may enjoin it from continuing business, and obtain the appointment of a receiver. A stockholder in a bank which had not issued any notes or credits for twenty-four years applied for the appointment of a receiver under said § 134, and shortly thereafter the attorney general also instituted proceedings under Code Civ. Proc., §§ 1785, 1788, to dissolve the bank, and to have a temporary receiver appointed. Held that, as there was serious doubt whether the summary remedy given stockholders by Laws 1882, c. 409, § 134, applied to banks which did not issue notes or credits, the stockholder's application would be denied, and that of the attorney general granted. Tefft *v.* North River Bank, 26 Abb. N. C. 189, 14 N. Y. S. 8.

The fact that the bank, in common with all other banking institutions organized under the state law, has power to issue bank bills to circulate as money, does not render it amenable to the summary remedy given the stockholders by the above section 134, where it is conceded that it has in fact issued no such bills for twenty-four years. Tefft *v.* North River Bank, 26 Abb. N. C. 189, 14 N. Y. S. 8.

6. **Creditors' suits against insolvent banks.**—Finney *v.* Bennett, 68 Va. (27 Gratt.) 365.

Under Gen. St. 1894, §§ 5900-5903, a creditor of a corporation having banking powers may, without having obtained a judgment at law against it, maintain an action, in behalf of himself and all other creditors who may choose to become parties thereto, against the corporation, to obtain the relief provided by said sections. American Sav., etc., Ass'n *v.* Farmers', etc., State Bank, 65 Minn. 139, 67 N. W. 800.

The bank of P. was ruined by the late war; and no officers of the bank have been elected nor has there been a meeting of the board since April, 1865, and it has done no business since, and in fact it had been abandoned and ceased to exist. In April, 1866, H. and M. suing as well for themselves as for all the other stockholders, creditors and depositors, etc., filed their bill against the bank and the president, for

creditors may, however, come into the proceeding by intervention.[7]

§ 76 (3) Parties.—Every one interested in the final closing up of the business of the bank is a proper party to a creditor's suit for that purpose and must be joined with the other creditors in the suit.[8] But after commissioners have been appointed to wind up the affairs of a bank, stockholders are no longer necessary parties to a suit affecting their holdings.[9] Where

a settlement of its affairs and a distribution of its assets. The court appointed a receiver in the case, and in June, 1866, there was a decree for an account. Held, it is a proper case for a creditor's suit. Finney *v.* Bennett, 68 Va. (27 Gratt.) 365.

7. **Intervention in suits against insolvent banks.**—Where creditors of an insolvent banking corporation, in accordance with the terms of, and in response to, an order of the court, made and published under the provisions of § 5911, have filed their claims in the shape of an intervener's complaint, made under oath, they become parties to the proceeding or action, and no formal order of court making them parties is required. Palmer *v.* Bank, 65 Minn. 90, 67 N. W. 893.

When a creditor has been allowed, upon application, and by order of the court, to intervene and file a complaint, and to bring stockholders into an action instituted under the provisions of §§ 5900, 5901, relating to insolvent banking corporations, and they have been brought in, there is but one action or proceeding pending; and as the insolvent corporation is already a defendant therein, it need not be named as a defendant in said complaint, nor again be served with a summons. Palmer *v.* Bank, 65 Minn. 90, 67 N. W. 893.

8. **Parties to suits and proceedings against insolvent banks.**—Under Rev. St., §§ 3218-3226, allowing a creditor to bring an action in behalf of all the creditors to close up an insolvent bank's business, and enforce against its officials and stockholders liabilities created by statute, or growing out of unlawful declaration of dividends, the creditor instituting the suit need not have been a creditor at the time unlawful dividends were declared. Hurlbut *v.* Kelly, 62 Wis. 590, 22 N. W. 852.

Stockholders.—Where a creditor of an insolvent banking corporation institutes an action against it under the provisions of Gen. St. 1894, c. 76, §§ 5900, 5901, and secures the appointment of a receiver, but fails to take any steps towards bringing the stockholders of the insolvent into the action, any other creditor may, upon an ex parte application to the court, showing the necessity of enforcing the statutory liability of such stockholders, obtain an order allowing him, in his own behalf, and in behalf of all other creditors, to intervene and file a complaint making the stockholders parties defendant, and to bring them into the action for the purpose of ascertaining and determining their statutory liability in the same proceeding. Palmer *v.* Bank, 65 Minn. 90, 67 N. W. 893.

Amendment to bring in parties.—Where a creditor of an insolvent banking corporation institutes an action against it under Gen. St. 1894, c. 76, §§ 5900, 5901, and secures the appointment of a receiver, but fails to take steps towards bringing the stockholders into the action, and another creditor is permitted to file a complaint which brings the stockholders in, the original plaintiff can not then be allowed to amend his complaint to the same end. Palmer *v.* Bank, 65 Minn. 90, 67 N. W. 893.

Harmless error.—In the interlocutory decree made upon default in a proceeding instituted by a creditor of an insolvent banking corporation under Gen. St. 1894, c. 76, §§ 5900, 5901, the receiver appointed therein was directed to proceed by suit against the stockholders of the bank to ascertain and determine their statutory liability. Thereafter, by a cross bill, the stockholders of the company were made parties to the action. Held, that the error in the interlocutory decree was thereby rendered harmless. Palmer *v.* Bank, 65 Minn. 90, 67 N. W. 893.

9. Where a bank has forfeited its charter, and commissioners appointed to wind up its affairs, in a bill in equity against them by a creditor of a stockholder to subject the latter's stock to payment of the debt, the stockholders are not necessary parties, their interest being fully represented by the commissioners. Dana *v.* Brown (Ky.), 1 J. J. Marsh. 304.

a forthcoming bond is given by a bank to secure a return of its assets pending a receivership, any creditor may sue on the bond without joining the others.[10]

Relators.—By statute in some states an injunction against the transaction of any further business by an insolvent bank is brought on the relation of the attorney general.[11]

§ 76 (4) Evidence.[12]—Insolvency of a bank to justify the issuance of an injunction may be shown by presumptive evidence,[13] by general reputation[14] or by the fact of its refusal to pay.[15] But the mere fact that a bank has suspended specie payment is not proof of its insolvency.[16]

The sufficiency of evidence to prove insolvency depends largely on the facts in each case.[17]

10. Where, pending an application for the appointment of a receiver, a bond conditioned for the payment of all claims against the bank is given to procure the return of the assets of the bank, under provisions of Comp. St. 1901, c. 8, § 35, a creditor can maintain an action on such bond, though there are also other unpaid creditors of the bank not parties to the action. Rawson *v.* Taylor, 69 Neb. 473, 95 N. W. 1033.

11. **Relators.**—People *v.* Bank, 154 Cal. 194, 97 Pac. 306.

The state is a proper party plaintiff to the action which Act March 26, 1907 (St. 1907, p. 232, c. 119), § 10, provides the attorney general shall bring to prohibit doing of business by a banking corporation reported unsafe by the bank examiner and commissioners. Sparks *v.* State Bank, etc., Co. (Nev.), 103 Pac. 406, 407, rehearing denied in 105 Pac. 567.

12. What constitutes insolvency, see post, "Action by Depositors or Others for Deposits," § 154.

13. **Presumption of insolvency.**—In a proceeding against a bank by the attorney general under the "Act to prevent fraudulent bankruptcies by incorporated companies, and to facilitate proceedings against them," if in the bill filed by way of information facts are stated, verified by affidavit expressing belief in the truth of those facts, and they are of such a character as to raise a fair presumption that the bank proceeded against is insolvent, and are not contradicted or explained by the bank, on a motion for the appointment of a receiver after due notice, the fact of insolvency will be considered as proved within the meaning of the act. Bank *v.* Attorney General (N. Y.), 3 Wend. 588.

14. **General reputation.**—In a proceeding against a bank by the attorney general under the "Act to prevent fraudulent bankruptcies," etc., the oath of the attorney general, with the affidavit of the comptroller, that the bank was generally reputed to be insolvent, and to have suspended payment for ten days, and of their belief to the same effect, were held to be sufficient evidence of insolvency to authorize an injunction; the suspension not being denied by the bank, and the insolvency having been presented to the court by the affidavits of creditors in a separate proceeding. Bank *v.* Attorney General (N. Y.), 3 Wend. 588.

15. **Refusal to pay evidence of insolvency.**—Laws 1849, c. 226, § 7, provides that, after ten days from the time of refusal of a bank to pay a debt due from it, an application can be made for an order declaring it insolvent. Held, that the fact of refusal to pay, continued after the ten days, is not conclusive evidence of insolvency, but only shifts the burden of proof from the applicant to the bank. In re Mechanics' Bank (N. Y.), 5 Abb. Prac. 374.

16. **Suspension of specie payment.**—Where a suspension of specie payment by banks is general, and nearly universal, the mere fact that a bank has suspended its circulation is not proof of its insolvency. Livingston *v.* Bank (N. Y.), 5 Abb. Prac. 338, 26 Barb. 304.

17. **Sufficiency of evidence of insolvency.**—Evidence held to sustain a finding that a bank was insolvent within the banking Act of 1903 (St. 1903, c. 266), authorizing the people on the relation of the attorney general to proceed in equity to have a bank declared insolvent. People *v.* Bank, 159 Cal. 65, 112 Pac. 866.

§ 76 (5) Accounting.—In Louisiana oppositions to the final account of administration by the liquidators of a bank are limited to their actions as liquidators, and their acts as directors of the bank previous to the passing of the bank into liquidation, if subject to attack by the stockholders, should be attacked in some other proceeding.[18]

§ 76 (6) Reference.—In proceedings under Laws of New York 1849, c. 226, relative to closing up the affairs of insolvent banks, it is not necessary that the referee should ascertain preliminarily whether the officers were not liable under Laws 1852, c. 71, § 4.[19]

§ 76 (7) Costs.—In an action by stockholders to make the directors liable, and to wind up the affairs of the bank, each stockholder should contribute to pay the costs in proportion to the amount of stock held by him.[20]

§ 76 (8) Supplying Vacancies in Board of Directors.—Under the California statute where vacancies occur in the board of directors after the commencement of the action to wind up the affairs of the bank, the court on application may fill the vacancy.[21]

§ 77. Assets and Receivers on Insolvency[22]—§ 77 (½) Assets—§ 77 (½a) What Constitutes—§ 77 (½aa) In General.—The capital stock[23] and assets of an insolvent banking corporation constitute from the

18. Accounting by liquidators of bank.—In re Liquidation, 118 La. 664, 43 So. 270.

19. Reference.—In re Empire City Bank, 6 Abb. Prac. 385.

Act 1849, relating to insolvent banking associations, authorizes the receiver to ascertain the debts and liabilities of the bank, and report the same to a justice of the supreme court, who is then to refer the matter to a referee, "with directions, after giving notice to all persons concerned, to apportion the debts and liabilities * * * among the stockholders ratably," and then report his proceedings to said justice. Held, that the referee, in apportioning such debts and liabilities, is not bound by the report of the receiver. In re Empire City Bank, 8 Abb. Prac. 192, 18 N. Y. 199.

20. Costs.—Dunn v. Kyle, 77 Ky. (14 Bush) 134.

21. Notice of application.—In proceedings for the liquidation of a bank, notice of an application to the court to appoint a director to take place of one who has resigned pendente lite need not be given a person claiming to have been elected to such office, where he has given no notice to the court of his incumbency, the statute not requiring any notice. Braslan v. Superior Court, 124 Cal. 123, 56 Pac. 792.

Burden of proof.—On application, in proceedings to liquidate a bank, for the appointment of a director to take the place of one who has resigned, the burden is on the one claiming to have been elected to the office to show such election, and where there is no evidence of, but merely an answer to the petition alleging, such appointment, the court is authorized to appoint another. Braslan v. Superior Court, 124 Cal. 123, 56 Pac. 792.

22. Assets and receivers on insolvency.—Liability of stockholders for debts and acts of bank, see ante, "Nature and Extent," § 47; "Actions and Proceedings to Enforce," § 49.

Right of receiver to set aside mortgage illegally executed by cashier, see post, "Bills, Notes and Securities," § 109.

In dissolution proceedings, see post, "Liability of Bank to Drawer for Refusal to Pay," § 143; "Payment of Lost or Stolen Paper," § 146.

23. Capital stock a trust fund for all creditors.—Bank Comm'rs v. Security Trust Co., 75 N. H. 107, 71 Atl. 377; In re Columbian Bank, 147 Pa. 422, 23 Atl. 626.

"The capital stock of an incorpo-

date of insolvency a trust fund for the payment of the debts of the bank, in the order prescribed by law, or otherwise pro rata,[24] and may be followed

rated bank is deemed a trust fund for all the debts of the corporation; and no stockholder can entitle himself to any dividend or share of such capital stock, until all the debts are paid, and if the capital stock should be divided, leaving any debts unpaid, every stockholder, receiving his share of the capital stock, would, in equity, be held liable pro rata to contribute to the discharge of such debts out of the fund in his own hands.' In conformity with this is the doctrine held by this court in Mumma *v.* Potomac Co. (U. S.), 8 Pet. 281, 8 L. Ed. 945." Curran *v.* Arkansas (U. S.), 15 How. 304, 14 L. Ed. 705.

No power to increase or diminish it belongs inherently to the bank. It is a trust fund, held by the corporation as a trustee. It is subject to taxation like other property. If the bank fail, equity may lay hold of it, administer it, pay the debts, and give the residuum, if there be any, to the stockholders. If the corporation be dissolved by judgment of law, equity may interpose and perform the same functions. Farrington *v.* Tennessee, 95 U. S. 679, 24 L. Ed. 558.

24. Assets are trust fund for creditors.—Curran *v.* Arkansas (U. S.), 15 How. 304, 14 L. Ed. 705; Baring *v.* Dabney (U. S.), 19 Wall. 1, 22 L. Ed. 90; Nevitt *v.* Bank (Miss.), 6 Smedes & M. 513; State *v.* Commercial State Bank, 28 Neb. 677, 44 N. W. 998; Ex parte Sav. Bank, 73 S. C. 393, 53 S. E. 614, 5 L. R. A., N. S., 520n; State *v.* Bank, 64 Tenn. (5 Baxt.) 101; Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471; Comfort *v.* Patterson, 70 Tenn. (2 Lea) 670; Leipold *v.* Maroney, 75 Tenn. (7 Lea) 128; Hewitt *v.* Traders' Bank, 18 Wash. 326, 51 Pac. 468; Lamb *v.* Laughlin, 25 W. Va. 300.

After the insolvency of a bank, and the nonuser of its franchises, the officers or agents of the corporation, in whose hands the assets remain, hold them as quasi trustees for the creditors, and, as such, may defend the right of title thereto, of all the creditors of cestui que trusts; otherwise, they would, after a payment to a single creditor of all the assets, be without remedy. State *v.* Bank, 64 Tenn. (5 Baxt.) 101; Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471; Smith *v.* St. Louis, etc., Life Ins. Co., 2 Tenn. Ch. 727; Moseby *v.* Williamson, 52 Tenn. (5 Heisk.) 278; Comfort *v.* Patterson, 70 Tenn. (2 Lea) 670; Lamb *v.* Pannell, 28 W. Va. 663, approving Lamb *v.* Cecil, 28 W. Va. 653.

The assets of an insolvent banking corporation are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of others than bona fide creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the property to the satisfaction of their debts. Curran *v.* Arkansas (U. S.), 15 How. 304, 14 L. Ed. 705.

Notes to bank.—The superintendent of banking, upon finding a bank reduced in its capital, required the deficit to be promptly supplied, and, upon negotiation, accepted a note from one of the directors as sufficient therefor. Upon the subsequent failure of the bank, the receiver brought suit on said note. Held, that the note was an asset of the bank, and not mere collateral, and was therefore primarily available to creditors. Sickles *v.* Herold, 11 Misc. Rep. 583, 32 N. Y. S. 1083, 66 N. Y. St. Rep. 337.

Defendant and another made a note payable to a bank under an agreement that, if defendant would assign to the bank a judgment owned by him, he should not be liable on the note. On the death of the other maker, the note was proven as a claim against his estate, and defendant assigned, in accordance with the agreement, the judgment held by him to the bank. Held, that the note ceased to be an asset of the bank. First Nat. Bank *v.* New, 146 Ind. 411, 45 N. E. 597.

Note given in payment for stock.—Where one selling the charter of a bank agrees, after its reorganization, to surrender a note for part of the purchase price, and accept stock for his debt, whereupon the note is canceled without payment, and the amount thereof, together with the amount paid in cash, charged to the bank, the note so transferred is assets of the bank, and liable for its debts, and not subject to cancellation; and the stockholders for whose benefits the charter was purchased are pro rata liable for its

wherever traceable.[25] Accordingly, it is held that a conveyance thereof is fraudulent and void.[26] It should be observed, however, that the assets would only be the balance of debt due from the debtor, at the date of insolvency, after deducting any just credit or setoff. It is only what remains after a just settlement of mutual debts, which becomes a trust fund for distribution.[27] The fact that the state is sole stockholder in a banking corpora-

satisfaction. Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

Discounts.—Where one rediscounted at a certain bank the notes of another, who conveyed property to the one so discounting in satisfaction of the debt, the receiver of the bank is not thereby entitled to such property as purchased with money of the bank. Peters *v.* Bain, 133 U. S. 670, 33 L. Ed. 696, 10 S. Ct. 354.

Dividends paid out of capital stock.—The receiver of an insolvent bank may recover of stockholders the dividends paid them out of the capital stock of the bank. Corn *v.* Skillern, 75 Ark. 148, 87 S. W. 142.

Claim against third person.—A demand held by an insolvent bank against a third person is an asset of the bank only in so far as there may be a balance due upon the same after deducting whatever the bank may be owing the person against whom the demand is held. State *v.* Brobston, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138.

Money paid depositor by insolvent bank.—Money paid by a bank to a depositor in the usual course of business while the bank is a going concern, although in fact insolvent, is not impressed with a trust in favor of other creditors, where the depositor did not know the fact of insolvency, and was assured by the officers that the bank had money to pay all depositors, even though he was induced to withdraw the money by rumors of its embarrassment. Livingstain *v.* Columbian, etc., Trust Co., 81 S. C. 244, 62 S. E. 249, 22 L. R. A., N. S., 445.

Case contra.—In Catlin *v.* Eagle Bank, 6 Conn. 233, it was held, that the mere insolvency of a bank incorporated with the usual powers of such an institution does not convert its effects into a trust fund for its creditors; therefore when the Eagle Bank of New Haven became insolvent, and the directors afterwards mortgaged its real estate, assigned sundry promissory notes and paid a sum of money to the Savings Bank in security and payment of a debt due from the former to the latter institution for moneys deposited, it was held on a bill in chancery brought by another creditor of the Eagle Bank to have these conveyances set aside and all the funds of the bank distributed ratably among its creditors, that such bill could not be sustained.

25. Following trust fund.—Johnston *v.* Laflin, 103 U. S. 800, 26 L. Ed. 532; State *v.* Bank, 64 Tenn. (5 Baxt.) 101.

If such assets "'have been distributed among stockholders, or given in the hands of other than bona fide creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property clothed with the trust in favor of the corporation creditors; and a court of equity will follow the property and enforce and compel its application to the corporation debts.' Citing 2 Story's Eq. Jur., § 1252; Curran *v.* Arkansas (U. S.), 15 How. 304, 14 L. Ed. 705; Mumma *v.* Potomac Co. (U. S.), 8 Pet. 281, 8 L. Ed. 945; 3 Mason 308; Miss. R. 319; Hightower *v.* Thornton, 8 Ga. 486; 3 Edwards C. R., affirmed in 9 Paige 152." State *v.* Bank, 64 Tenn. (5 Baxt.) 101.

Notes and mortgages.—Where a bank has used general assets, consisting of notes and mortgages, held by it as a trust for general creditors, as a consideration for the purchase of lands deeded in trust for depositors in the bank, and the amount used is definite and certain, and the bank becomes insolvent, equity will follow the notes and mortgages, and require the amount to be treated as a trust fund for the general creditors. Sadler's Appeal, 87 Pa. 154.

26. Conveyance of bank assets fraudulent.—Swepson *v.* Exchange, etc., Bank, 77 Tenn. (9 Lea) 713.

The rule applies to the property of a foreign corporation doing business in the state. Leipold *v.* Marony, 75 Tenn. (7 Lea) 128.

27. Moseby *v.* Williamson, 52 Tenn. (5 Heisk.) 278; Comfort *v.* Patterson, 70 Tenn. (2 Lea) 670.

It has been held, "in cases of cross indebtedness, the assets of the bank consist only of the balance of the accounts. That is, all the fund which the bank itself would have had to

tion does not prevent the assets from becoming, in case of insolvency, a trust fund for the creditors.[28] And property conveyed away under an invalid assignment for creditors is an asset and may be recovered by the receiver.[29] But the receiver can not seize and hold as a part of the assets of the bank, the individual property of one of its officers.[30]

Drafts given a depositor to keep him from withdrawing his money from a bank in failing circumstances is not a trust fund in favor of other creditors.[31]

satisfy its creditors, in case no receiver had been appointed." Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111.

28. Effect where state owns bank.— State *v.* Bank, 64 Tenn. (5 Baxt.) 1.

"That a state, by becoming interested with others in a banking corporation, or by owning all the capital stock, does not impart to that corporation any of its privileges or prerogatives, that it lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege in respect to those transactions not derived from the charter, has been repeatedly affirmed by this court, in the Bank *v.* Planters' Bank (U. S.), 9 Wheat. 904, 6 L. Ed. 244; Bank *v.* Wistar (U. S.), 3 Pet. 431, 7 L. Ed. 731; Briscoe *v.* Bank (U. S.), 11 Pet. 257, 324, 9 L. Ed. 709; Darrington *v.* Bank (U. S.), 13 How. 12, 14 L. Ed. 30. And our opinion is, that the fact that the capital stock of this corporation came from the state which was solely interested in the profits of the business, does not affect the complainant's right, as a creditor, to be paid out of its property; a right which, as we have seen, follows the fund into the hands of every person, save a bona fide creditor or purchaser, and which a court of equity is bound to enforce by its decree against any party except such a creditor or purchaser capable by law of being brought within its jurisdiction." Curran *v.* Arkansas (U. S.), 15 How. 304, 14 L. Ed. 705.

"So far, therefore, as the property of this bank has become vested in the state or gone to its use, it is so vested and used, charged with a trust in favor of this complainant, as an unpaid creditor, unless there is something in the character of the parties, or the consideration upon which, or the operation of the laws by force of which, it has been transferred, taking the case out of the principles above laid down." Curran *v.* Arkansas (U. S.), 15 How. 304, 14 L. Ed. 705.

Where the state was the sole stockholder, the bank, as a corporation, could not complain of any course of action which the legislature saw fit to adopt or prescribe. In relation to the state, it was alter et idem. In this respect its position was very different from that of private corporations. The action of the legislature could only be questioned by the creditors of the bank. As to the bank itself, the wishes of the legislature were commands. Baring *v.* Dabney (U. S.), 19 Wall. 1, 22 L. Ed. 90.

29. Receivers appointed to receive, take, and hold all the property and effects conveyed by an insolvent bank acquire all the rights of the assignee; accordingly if the bank has made any preferred assignments in contravention of the Act of 1833, while insolvent or in contemplation of insolvency, such transfer being void except as to bona fide purchasers without notice, the effects so fraudulently transferred become a trust fund in the hands of the transferees, which may be recovered by the receivers. Hill *v.* Western, etc., R. Co., 86 Ga. 284, 12 S. E. 635.

30. Individual property of officers.— Where a receiver of an insolvent bank, under an order of the court to open a safety-deposit vault belonging to the president of the bank, and get bank property, seized individual property of the president, the bank did not acquire an equitable lien thereon, good against a subsequent transfer of the property by the president. University *v.* Globe Sav. Bank, 185 Ill. 514, 57 N. E. 417.

When lands conveyed by the president of an insolvent bank had been purchased with bank funds, which he had misappropriated, but which were afterwards replaced by him, the bank has no claim upon such property. University *v.* Globe Sav. Bank, 185 Ill. 514, 57 N. E. 417.

31. Petitioner made a check on a bank for the amount of his deposit therein, and received payment in

Secret agreements that assets carried as such and on which creditors have a right to rely shall not be so treated or regarded are of no avail.[32]

§ 77 (½bb) Surplus from Sale of Collateral.—The well-settled general rule that property pledged as security for a debt can not be appropriated by the pledgee to other debts, applies to securities pledged as collateral for a loan from a bank. Accordingly, upon the insolvency of the pledgor bank the pledgee has no right to hold the property for any other debt than that for which it was pledged. Accordingly the surplus must be returned to the receiver for the benefit of general creditors.[33]

§ 77 (½cc) Unpaid Subscriptions and Statutory and Other Liabilities of Stockholders.—Undoubtedly unpaid subscriptions to stock are assets, and have frequently been treated by courts of equity as if impressed with a trust sub modo, in the sense that neither the stockholders nor the corporation can misappropriate such subscriptions so far as creditors are concerned. Creditors have the same right to look to them as to anything else, and the same right to insist upon their payment as upon the payment of other debt due to the corporation. The shareholder can not transfer his shares when the corporation is failing, or manipulate a release therefrom, for the purpose of escaping his liability. And the principle is the same where the shares are paid up, but the shareholder is responsible in respect thereof to an equal additional amount.[34] A recovery against bank stock-

money in the usual course of business. He was induced to withdraw his deposit by rumors that the bank was in difficulty, and the knowledge that there had been a run on it for the previous two days. He inquired of the officers, however, and was told that the bank was solvent, and would pay all checks as presented. After receiving and counting the money, believing such statements in good faith, he returned it, and took drafts for the amount. The bank was in fact insolvent, and was declared insolvent the next day. The drafts were not paid because the bank on which they were drawn applied the fund to the payment of notes of the insolvent bank, which it held, and which were secured by collateral. Held, that the money which petitioner received was not impressed with any trust in favor of other creditors, and that he stood in the same position as any purchaser of the drafts for cash, and was entitled in equity to be subrogated to the rights of the bank on which they were drawn in the collateral which it held. Livingstain v. Columbian, etc., Trust Co., 81 S. C. 244, 62 S. E. 249, 22 L. R. A., N. S., 445.

32. **Validity of agreements as to what constitutes assets.**—Where a bank transfers to a director shares of its stock it had taken in payment of a debt, but which it was not permitted by law to retain, and receives in exchange the director's note, which is renewed, and held by the bank as an asset for several years, upon the failure of the bank the maker of the note can not plead a secret agreement with another director which nullifies the note. Atwater v. Smith, 73 Minn. 507, 76 N. W. 253.

33. **Surplus from sale of collateral.**—In a receivership proceeding to wind up the affairs of an insolvent bank, evidence considered, and held to support a finding that collateral, given by the insolvent bank to a correspondent bank as security for loans, covered such loans only, and did not apply to subsequently accruing indebtedness. Brown v. Sheldon State Bank, 139 Iowa 83, 117 N. W. 289.

34. **Unpaid subscriptions and statutory liability of stockholders as assets.**—Peters v. Bain, 133 U. S. 670, 33 L. Ed. 696, 10 S. Ct. 354.

On the question whether the statutory liability of stockholders is or is

holders on the ground of illegal payment of dividends, the publishing of false reports, the unlawful permitting of excessive loans, or the acceptance of deposits while insolvent would be an asset of the bank, and the action therefor should be brought by the receiver.[35]

§ 77 (½dd) Credits.—Credits allowed a stockholder on his note given in payment of the stock issued to him by the bank may be recovered by the receiver for the benefit of creditors.[36]

§ 77 (½ee) County Money Wrongfully in Bank.—Where a county treasurer deposited county funds in a bank and failed to withdraw the excess of the deposit over the amount secured by the indemnity bond, required by Rev. Codes, § 3003, no one would be heard to say that the funds wrongfully in the bank should not be withdrawn on its insolvency.[37]

§ 77 (½b) Distribution of Assets.—General Rules for Distribution of the Assets.—An examination of the authorities indicates that the rule applicable to the distribution of an estate assigned for the benefit of the creditors of an insolvent govern in the distribution of the estate of an insolvent corporation in the hands of a receiver.[38]

not a corporate asset, there is considerable conflict. In some jurisdictions it is not so regarded. McLaughlin *v.* Kimball, 20 Utah 254, 58 Pac. 685, 77 Am. St. Rep. 908.

But in others a contrary rule has apparently been adopted. Wilson *v.* Book, 13 Wash. 676, 43 Pac. 939; Watterson *v.* Masterson, 15 Wash. 511, 46 Pac. 1041; Cushing *v.* Perot, 175 Pa. 66, 34 Atl. 477, 34 L. R. A. 737, 52 Am. St. Rep. 835.

Rule in Georgia.—Under the Act of 1894 (Civil Code, § 1890), the individual liability of the stockholder under a charter imposing such liability is declared to be an asset of the corporation, subject to be enforced by the assignee, receiver, or other officer, having the legal right to collect, marshal, and distribute the assets of the insolvent corporation. Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626.

Where an act incorporating a bank provides that each stockholder shall be individually liable for the ultimate payment of the debts of said corporation to an amount equal to the amount of stock held by him, such liability, since the passage of the act of 1894, may be enforced by the receiver of an insolvent corporation, notwithstanding the act was passed subsequently to the act of incorporation which fixed the liability. The provision of the subsequent act that such liability shall be considered as an asset of the bank and enforced by the receiver, is remedial in its nature, does not affect any vested right of the creditor, and is applicable in this case. Moore *v.* Ripley, 106 Ga. 556, 32 S. E. 647.

Rule in Kentucky.—The double liability of stockholders in an insolvent banking corporation to creditors, imposed by Ky. St. 1903, § 547, does not constitute assets of the corporation subject to administration by a receiver, under § 616. Conway *v.* Owensboro Sav., etc., Trust Co., 165 Fed. 822.

35. McTamany *v.* Day (Idaho), 128 Pac. 563.

36. Credits allowed a stockholder.—Fitzpatrick *v.* McGregor, 133 Ga. 332, 65 S. E. 859.

Interest on credits.—In an action to hold defendant, a stockholder of the bank of which plaintiff was receiver, liable, for the benefit of creditors of the bank for the amount of a credit allowed defendant by the bank while insolvent, on a note held against him by the bank in consideration of a sale by him to the bank of his shares of stock, the receiver may recover interest on the credit received at the same rate the note bore. Fitzpatrick *v.* McGregor, 133 Ga. 332, 65 S. E. 859.

37. County money wrongfully in bank.—Yellowstone County *v.* First, etc., Sav. Bank (Mont.), 128 Pac. 596.

38. Rules for distribution of assets.—Citizens' Bank *v.* State, 8 Kan. App. 468, 54 Pac. 510.

Compelling Election between Securities.—In the distribution of the estate of an insolvent banking corporation in the hands of a receiver, the assets of the estate should be distributed upon equitable principles. Accordingly, where there are two funds to which a creditor can resort, and other creditors are limited to one of them, the former will be compelled to exhaust the fund upon which he has an exclusive lien, and will be permitted to resort to the other for the deficiency only.[39]

Right of Stockholders to Interpose Objections.—In distributing the assets between creditors and stockholders, the stockholders can insist on excluding the creditors as to all demands against the corporation which are barred by the statute of limitations.[40]

Costs of Administration.—The general rule that the expense incident to administering a special fund is a charge upon it, applies in the case of funds created by banks for the special benefit of a class of their creditors.[41]

§ 77 (1) Appointment and Removal of Receiver—§ 77 (1a) Purpose of Appointment.—The appointment of a receiver is only a provisional appointment for the more speedy getting in of the estate or assets, in relation to which the appointment extends, and for the better securing the same for their safety and the benefit of those who may be entitled thereto.[42]

§ 77 (1b) Selection, Qualification and Compensation—§ 77 (1aa) In General.—A person appointed as a receiver of a bank should be an impartial and disinterested person.[43]

§ 77 (1bb) Oath.—A statute requiring a receiver of an insolvent bank to take an oath of office is merely directory, and the omission to take it before the commencement of a suit does not incapacitate him to sue.[44]

§ 77 (1cc) Bond.—The rules as to the liability of sureties on the official bond of a receiver are in no wise different from the rules applying to other official bonds.[45]

39. **Compelling election between securities.**—Citizens' Bank *v.* State, 8 Kan. App. 468, 54 Pac. 510.

40. Johnston *v.* Talley, 60 Ga. 540.

41. **Costs of administering fund.**—Bank Comm'rs *v.* Security Trust Co., 75 N. H. 107, 71 Atl. 377.

42. **Purpose of appointment of receivers.**—Lafayette Bank *v.* Buckingham, 12 O. St. 419.

43. **Qualification of receivers.**—Cunningham *v.* United States Nat. Bank, 6 Okl. 184, 51 Pac. 119.

Where a large part of the assets of an insolvent banking corporation consists of obligations of subsidiary companies and firms formed by its officers and largely financed by it, an officer and director who, although not an active participant in such transactions, was cognizant of and consented to them, should not be appointed or continued as its receiver. Coy *v.* Title, etc., Trust Co., 157 Fed. 794.

Bank officer should not be receiver.—On a proceeding against a bank for the appointment of a receiver under the statute, on account of insolvency, an officer of the bank is not a proper person to be appointed receiver. Attorney General *v.* Bank (N. Y.), 1 Paige 596.

44. **Oath of receiver.**—Dayton *v.* Borst, 20 N. Y. Super. Ct. 115.

45. **Liabilities of sureties on receiver's bond.**—The legislature having allowed the assignees appointed to wind up the affairs of the Bank of Illinois

§ 77 (1dd) Number of Receivers.—The number of receivers to be appointed is usually left to the discretion of the court.[46]

§ 77 (1ee) Compensation.—A receiver of an insolvent bank may be allowed compensation for his services, to be fixed by considering the responsibility assumed, the skill and labor expended, and the rate of pay usually allowed for similar work; and not to be determined by a percentage on collections and for commissions for services rendered by him as broker in raising money for mortgage debtors to the bank to enable them to discharge their debts.[47]

§ 77 (1ff) Temporary Receivers.—By statute in New York, in an action brought by the attorney general to dissolve a banking corporation because of its insolvency, the court may appoint a temporary receiver until final judgment is entered, with power to collect and receive the debts, demands and other property of the corporation, to preserve the property and the proceeds of the debts and demands collected, and to sell or otherwise dispose of the property as directed by the court. And this receiver is at all times entitled to the advice and protection of the court.[48]

four years to discharge their duties, requiring a bond for the faithful performance thereof, it was held that a subsequent extension of the term for two years, without the assent of the sureties, operated as a discharge of the sureties as to all acts of a principal done after the expiration of the four years. But the sureties were liable for moneys received by the principal, and not paid over as required by law, during the said four years. Thomas *v.* Lagow, 43 Ill. 134; Thomas *v.* Bowman, 44 Ill. 499.

Though Comp. St. 1901, c. 8, § 35, provides for the delivery of the assets of an insolvent bank to the officers or owners furnishing a bond, a delivery to one of several parties entitled thereto under the statute does not relieve the sureties on the bond from liability, where by their acts they assent to such delivery. Taylor *v.* Weckerly, 69 Neb. 739, 96 N. W. 618.

46. **Number of receivers to be appointed.**—By § 62, Rev. St. of Maine, 1841, the number of receivers to be appointed by the court, to take possession of the property of a bank on application of the bank commissioners, in case they deem the bank unsafe, is left to the discretion of the court, or of the justice by whom the appointment is made. Wiswell *v.* Starr, 50 Me. 381.

47. **Compensation of receivers.**—A gratuity paid by him to a policeman for assisting in keeping order during dividend payments will be disallowed. Special Bank Comm'rs *v.* Franklin Sav. Inst., 11 R. I. 557.

Partial compensation.—In a suit by the state to dissolve a bank under Rev. St. 1899, § 3101, a stockholder was appointed receiver. It appeared that there was an understanding between the receiver and other stockholders and creditors that, when the work was done and the affairs of the bank completed, the court should fix a reasonable compensation, depending on the outcome of the affairs of the bank. Held, that the understanding did not preclude the court from allowing partial compensation from time to time for services rendered and less than the value thereof, but the court could not fix the entire compensation until all the services had been performed and his final report approved. Riordan *v.* Horton (Wyo.), 94 Pac. 448.

48. **Temporary receivers under New York statute.**—People *v.* St. Nicholas Bank, 76 Hun 522, 28 N. Y. S. 114, 58 N. Y. St. Rep. 843.

Notice of an application for appointment of temporary receivers of a bank, as authorized by Laws 1902, p. 113, c. 60, § 1, having been improperly dispensed with, it was proper for the judge who granted the order of appointment, to thereafter grant an order, on application by the bank, to show cause why the order appointing receivers should not be set aside, and thus give the bank an opportunity to

§ 77 (1c) Grounds for Appointment of Receiver.—While the appointment of a receiver for a bank is in the sound discretion of the court or judge,[49] a receiver should be appointed where a banking corporation has ceased to exercise its corporate functions,[50] or where its capital has become seriously impaired,[51] even though the bank makes an assignment for

be heard to set aside the order improvidently granted without notice, and the effect of the order to show cause was not to review the former order, but rather to grant a hearing on the propriety of appointing receivers at all, and to advance the hearing on the original order to show cause why the receivers should not be made permanent, embraced in the order for temporary receivers. People *v.* Oriental Bank, 124 App. Div. 741, 109 N. Y. S. 509.

Order of court.—An order to show cause why a bank should not be dissolved, and appointing temporary receiver, may be granted on application of the directors, though the superintendent of banks has previously taken possession of the bank's property and business under Laws 1892, c. 689, § 17 (Banking Act), as such statute authorizes him only to hold the property, and not to manage the bank's concerns, or act for it in any way. Williams, J., dissenting. In re Murray Hill Bank, 9 App. Div. 546, 41 N. Y. S. 914.

In an action commenced by the attorney general for the dissolution of a banking corporation on the ground of insolvency, an order appointing temporary receivers was reversed on appeal because receivers had previously been appointed for the property of the bank, by another branch of the court, in a pending action commenced for its voluntary dissolution by the directors. Afterwards a judgment of dissolution was entered in the action by the people. Held, that an order of the court in which the action for voluntary dissolution was pending, thereafter made on motion of its receivers, requiring the former receivers of the other court to turn over the property remaining in their hands to its own receivers, was without jurisdiction. In re Murray Hill Bank, 14 App. Div. 318, 43 N. Y. S. 836, affirmed in 153 N. Y. 199, 47 N. E. 298.

49. Grounds for appointment of receiver.—In an action by the attorney general against a bank under the general statutes of Minnesota for the appointment of a receiver, the rule is as follows: Before the formal determination of any issue upon the plaintiff's allegations essential to sustain the action, or upon facts alleged in defense, it is discretionary with the court to appoint a receiver or not, yet before such formal determination, if it is admitted that the facts which give the right of action exist, and there is no defense, it will be an abuse of discretion to refuse to appoint a receiver. State *v.* Bank, 55 Minn. 139, 56 N. W. 575.

50. Failure to exercise corporate functions.—A creditors' bill, brought by certain creditors of a bank which had never been organized under the terms of its charter, against the executrix of S., the deceased owner, who had operated the bank under its corporate name, and certain creditors, who, after the death of S., had obtained judgments against the bank and were seeking to enforce them, prayed to have the judgments in favor of the defendants declared void, and the supposed assets of the bank declared a part of the estate of S., and for the taking of an account, etc. It appeared that, if the bank ever had any corporate existence as to those who had done business with it in good faith, it had voluntarily dissolved; that no one claimed the stock; and that all the supposed officers disclaimed their offices. Held a proper case for the appointment of a receiver. Dobson *v.* Simmonton, 78 N. C. 63.

51. Impairment of capital as ground for appointment of receiver.—In a proceeding by the commonwealth for the appointment of a receiver for a bank on the ground of impairment of its capital, insolvency, and violation of the law, evidence held to show that the bank's capital was seriously impaired when the proceeding was begun. Imperial Bank *v.* Commonwealth, 140 Ky. 210, 130 S. W. 1074.

A bill filed by a stockholder on behalf of herself and others who may choose to join, against a banking corporation, which charges that the assets thereof have been wrongfully converted, can be traced by a receiver, if appointed, and will be dissipated if a receiver is not appointed, and which likewise charges, among other things, that the principal of the offending of-

creditors after the commencement of the action for the appointment of the receiver.[52] But no appointment should be made unless it appears that there is danger of loss of or injury to the property.[53] Moreover, to justify the appointment of a receiver of a bank, the facts on which such relief is granted must be proved by competent legal evidence.[54]

ficers of such corporation has been discharged in bankruptcy, that the complainant stockholder has been paid nothing on account of her investment, and that no account has been made with her or her fellow stockholders, makes a proper case for the appointment of a receiver for such corporation. Chandler Mortg. Co. *v.* Loring, 113 Ill. App. 423.

52. Effect of assignment by bank.—After the institution by a creditor of an action against an insolvent banking corporation, under Gen. St. 1878, c. 76, his right to the appointment of a receiver and to an injunction under such chapter can not be affected by an assignment made by the corporation under the insolvent law of 1881. State *v.* Bank, 55 Minn. 139, 56 N. W. 575.

53. In a proceeding by the attorney general for appointment of a receiver of a bank, it was alleged that the president had obtained proxies from eighty per cent of the stockholders, couched in such terms as to be dangerous to the health of the bank. It was also charged that the promotion expenses were charged to the bank without being allowed by its board of directors, and that a note for such expense, signed by the president and certain other individuals, should be paid. It was also contended that L., was chosen president and director, though he was not the bona fide owner of two shares of stock, as required by Rev. St. 1899, § 1281. Held, that all of such objections were curable by proceedings which the secretary of state was authorized to take by § 1305, and were therefore not grounds for the appointment of a receiver to wind up the affairs of the bank. Hadley *v.* People's United States Bank, 197 Mo. 574, 94 S. W. 953.

Issuance of fraud order against bank.—Where a bank was incorporated for the purpose primarily of doing a mail order banking business, the issuance of a fraud order against it by the post office department, in the absence of the facts on which such order was based, could not operate as a ground for the appointment of the receiver of the bank, nor as proof in itself that the bank was organized for the purpose of furthering a fraudulent scheme. Hadley *v.* People's United States Bank, 197 Mo. 574, 94 S. W. 953.

Failure of stock books to reveal stockholders.—Where subscriptions to the stock of a bank were received in small amounts by its president, and in some instances not fully paid for, the fact that the stock was carried in the name of the president, and that the stockbooks did not show the names of the actual stockholders, was not ground for the appointment of a receiver of the bank; a bona fide effort having been made to remedy such defect on demand of the secretary of state. Hadley *v.* People's United States Bank, 197 Mo. 574, 94 S. W. 953.

Unlawful purchase of stock.—Where a bank purchased certain stock in other corporations in violation of Rev. St. 1899, § 1276, which was also a violation of its charter, but a demand of the secretary of state that the stock be immediately disposed of was promptly complied with, such misconduct was not ground for the appointment of a receiver to wind up the bank's affairs, as provided by §§ 1305, 1307. Hadley *v.* People's United States Bank, 197 Mo. 574, 94 S. W. 953.

Election of dummy directors.—Under Rev. St. 1899, §§ 1305, 1307, granting to the secretary of state visitorial powers over banks, to be exercised and enforced by the attorney general, the fact that a bank after its organization wrongfully elected certain directors who were mere dummies to the president, who was its chief promoter, and thereafter loaned large sums to corporations controlled by such president, in violation of representations made by him, which defects were corrected on objections by the secretary of state, constituted no ground for the interposition of equity and the appointment of a receiver to wind up its affairs on a petition filed by the attorney general on behalf of the state. Hadley *v.* People's United States Bank, 197 Mo. 574, 94 S. W. 953.

54. Showing as to grounds for appointment of receiver.—This requirement is not met by a verified complaint alone, though the allegations are positively made, and especially where the

§ 77 (1d) Proceedings for Appointment of Receiver—§ 77 (1aa) In General.—The statutory provisions prescribing proceedings for the appointment of a receiver must be complied with.[55] By the statute of California, the court is authorized to appoint a receiver as a part of the relief sought in the action to enjoin the bank from the transaction of any further business, without any allegation of the necessity therefor in the complaint. The appointment of a receiver for the purpose of liquidation is a part of the method provided by the act for the winding up of the affairs of the corporation and under the terms of the act necessarily follows the adjudication of the insolvency.[56]

allegations of the complaint are on information and belief, or such as can only come from information. People *v.* Oriental Bank, 124 App. Div. 741, 109 N. Y. S. 509.

55. Ex parte petition.—Neither Code Civ. Proc., §§ 141, 142, providing for the appointment of a receiver in certain cases "by the court in which the action is pending;" nor Gen. St., § 258, providing that, when suits are brought against stockholders, "courts of equity shall have full power, on good cause shown, to dissolve the corporation and appoint a receiver," authorize the appointment of a receiver on an ex parte petition by an insolvent bank, in which it asks to be dissolved, if at the time no action is pending. Jones *v.* Bank, 10 Colo. 464, 17 Pac. 272.

Notice.—Under Hurd's Rev. St. 1905, c. 16a, § 11, which provides that the auditor of state shall give thirty day's notice to the president of a bank to have the impairment of its capital stock made good by the stockholders, or a reduction of the stock, and that, should neither be done, the auditor shall sue the stockholders, or, if the conditions so warrant, have a receiver appointed to wind up the affairs of the bank, a bill by the auditor for the appointment of a receiver is insufficient if it does not allege that the auditor gave the proper thirty days' notice, since the giving of the notice is a condition precedent to both the suit against the stockholders and the bill for a receiver. People *v.* Milwaukee Ave. State Bank, 230 Ill. 505, 82 N. E. 853.

Rule in Louisiana.—On the same day that a holder of a bank bill filed in court a notice of its protest for nonpayment a sequestration was ordered to issue, a receiver was appointed, and the bank was ordered to show cause within ten days why the said note was not paid on presentation. Held, that under Act March 15, 1855, as amended by Act March 18, 1858, it was erroneous to make the order for a sequestration and appointment of a receiver without a previous judgment by default. Huntington *v.* Crescent City Bank, 18 La. Ann. 350.

Rule in Kansas.—Under chapter 43, Laws 1891, requiring the bank commissioner to "take charge" of the assets and affairs of an insolvent bank, it was necessary for the bank commissioner to take actual personal possession of the property and assets, as a condition precedent to the institution of an action by the attorney general for the appointment of a receiver for such bank; and the property of an insolvent bank, prior to the taking of such actual possession by the commissioner, was subject to seizure by attachment or other legal process at the suit of its creditors. Dodson *v.* Wightman, 6 Kan. App. 835, 49 Pac. 790.

An order of court directing money to be deposited with a banker upon condition that he pay interest thereon as long as it is in his hands, does not constitute him a receiver so that his assignees are subject to a rule for its payment to the receiver appointed. Coleman *v.* Salisbury, 52 Ga. 470.

56. Rule in California.—In a suit by an attorney general under Act March 24, 1903, § 10, St. 1903, p. 368, c. 266, authorizing a suit to enjoin a bank from continuing business if it fails to obey the order of the bank commissioners as to the manner of doing business, or if the commissioners decide it is unsafe for the bank to continue business, the attorney general, on being notified, shall commence an action to enjoin the bank from transacting further business, and the court, if it finds it insolvent, shall order the commissioners to surrender the property to a receiver appointed by the court, it was unnecessary to make an issue as to the appointment of a receiver or to pray for such relief, since the statute authorized such appointment, upon a finding of

§ 77 (1bb) Jurisdiction and Powers of the Court.—The particular judge or court to whom the application for the appointment of a receiver is to be presented is governed by statute in the various jurisdictions and these acts should always be consulted first.[57] But ordinarily this appointment may be made in vacation.[58] If the judge making the order appointing a receiver is a debtor of the bank this disqualifies him.[59] However, the court appointing the receiver acquires plenary powers over the entire subject matter of the receivership.[60]

§ 77 (1cc) The Petitioner.—As to who is the proper petitioner, the statutes in the different jurisdictions vary.[61] But such appointment is

insolvency, as a part of the relief sought by the action. People *v.* Bank, 154 Cal. 194, 97 Pac. 306.

St. Cal. 1877-78, p. 740, as amended by St. 1887, p. 90, creating a board of bank commissioners, and authorizing (section 11) the attorney general, on their request, to commence suit to enjoin any bank which is violating its charter from transacting further business, and cause its affairs to be wound up under the direction of the commissioners, does not authorize the court, in such a proceeding, to appoint a receiver. Murray *v.* American Surety Co., 17 C. C. A. 138, 70 Fed. 341; S. C., 61 Fed. 273; People's Home Sav. Bank *v.* Superior Court, 103 Cal. 27, 36 Pac. 1015.

57. Jurisdiction and power to appoint receiver.—Const., art. 6, § 2, confers original jurisdiction on the supreme court in all civil cases in which the state is a party. Banking Law, § 14 (Laws 1889, p. 397), provides that, in certain contingencies, the attorney general shall apply to the supreme court, or to the district court of the county where the bank carries on business, for the appointment of a receiver to take charge of and wind up the business of a bank which is insolvent or carrying on its business in an unsafe manner, etc. Held, that the supreme court had jurisdiction of such application. State *v.* Commercial State Bank, 28 Neb. 677, 44 N. W. 998.

The power of the circuit court to appoint a receiver, under the Act of 1869, to place insolvent banks in liquidation, held not to be superseded by an order —under a bill filed by the president and directors to wind up the affairs of the bank "according to the course they had been pursuing"—directing payment of creditors' claims at the banking house, out of the assets, "the president and cashier acting as receivers," etc. Donaldson *v.* Johnson, 3 S. C. 216.

Acts 1891, c. 155, as amended by Acts 1893, c. 478, requires the state treasurer to appoint some one to examine and report on the condition of the state banks, and, if it appears that a bank is insolvent, or in immediate danger of becoming so, the treasurer is to institute proceedings in the superior court of Wake county for winding up the bank and appointing a receiver. Held, that an application by the treasurer for the appointment of a receiver can be made to the resident judge, or the judge holding the courts by assignment or by exchange, of the judicial district in which Wake county is situated. Worth *v.* Piedmont Bank, 121 N. C. 343, 28 S. E. 488.

58. Power of court in vacation.—In the absence of any statute, the circuit court has power in vacation to appoint a receiver of an insolvent bank, and to confirm the provisional appointment on the assembling of court, and this power is not abridged by Rev. St. 1889, § 2193, providing that the court or any judge in vacation shall have power to appoint a receiver, whenever it shall be deemed necessary, whose duty it shall be to keep any money or other thing deposited in court, or that may be the subject of a tender, and to keep all property and protect any business intrusted to him pending any proceeding concerning the same. Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429.

59. Qualification of judge appointing receiver.—United States Nat. Bank *v.* National Bank, 6 Okl. 163, 51 Pac. 119.

60. Where a court in a suit by the state appoints a receiver of a banking corporation, it secures full jurisdiction to adjust all interests and demands, legal or equitable, and to control all controversies affecting the receivership. State *v.* State Bank, 84 Kan. 366, 114 Pac. 381.

61. Who may petition for receiver.—In West Virginia the commissioner of banking, by and with the consent of

usually made on petition of the creditors,[62] or stockholders.[63]

§ 77 (1dd) Notice.—Although the banking act makes no provision with regard to notice of proceedings for the appointment of a receiver, such notice must be given, otherwise all proceedings of the court in the matter of the receivership will be void for want of jurisdiction.[64] But by statute in

the governor and attorney general, is allowed to petition a court of competent jurisdiction to appoint a receiver for an insolvent bank or any such institution refusing to make special reports. West Virginia Code, 1906, § 2418.

Appointment by legislature.—The appointment of a receiver by the legislature, to settle the affairs of an insolvent bank, is not a judicial act. Carey *v.* Giles, 9 Ga. 253.

Directors.—Under St. 1903, p. 155, c. 88, § 94, providing that, whenever the assets of a corporation are in danger of waste from litigation, holders of one-tenth of the capital stock may apply for an order dissolving the corporation and appointing a receiver, and Comp. Laws, § 3212, providing that an injunction suspending the business of a corporation shall not be granted without notice, in a proceeding by stockholders to appoint a receiver for a bank and to enjoin its further operation, the directors must be made parties, and notice commanding an appearance forthwith to show cause why a receiver should not be appointed is not a sufficient notice. Golden *v.* Averill (Nev.), 101 Pac. 1021.

62. Creditors are usually the petitioners.—Creditors of an insolvent bank petitioned to be substituted as plaintiffs, instead of a stockholder who had commenced an action for the appointment of a receiver; alleging that the bank's money had been wasted through fraudulent practices of the directors, and that plaintiff was one of the guilty parties. Held, that the creditors were competent to prosecute such an action. Gager *v.* Marsden, 101 Wis. 598, 77 N. W. 922.

The North Carolina statutes (Acts 1891, c. 155, as amended by acts 1893, c. 478), do not give the treasurer exclusive right to institute proceedings for a receiver, so as to take away the right of a creditor of the bank to sue for that purpose in the superior court of the county where the bank is situated. Worth *v.* Piedmont Bank, 121 N. C. 343, 28 S. E. 488.

It can make no difference in the treasurer's right to make such application that the examiner did not make his report until the insolvency of the bank was publicly known. Worth *v.* Piedmont Bank, 121 N. C. 343, 28 S. E. 488.

63. Stockholders may petition for receiver.—Where a bank has ceased to exercise its corporate rights for three years, while the directors have had charge of its assets without accounting to the stockholders, the latter, in a suit against the former for neglect and waste of the assets, are entitled to the appointment of a receiver ex parte. Warren *v.* Fake (N. Y.), 49 How. Prac. 430.

All the stockholders of an insolvent bank are not necessary parties to an application for appointment of a receiver for the bank. Judgment, 57 N. Y. S. 187, 39 App. Div. 151, affirmed. Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725.

The right of a stockholder to obtain the appointment of a receiver of a state banking corporation is not prohibited by Code 1873, § 1572, providing that the auditor, when satisfied from its report that such corporation is insolvent, shall direct the attorney general to commence proper proceedings to have a receiver appointed; or by Code, tit. 20, c. 6, providing for ousting corporations from their franchises and winding up their affairs. Dickerson *v.* Cass County Bank, 95 Iowa 392, 64 N. W. 395.

Code 1873, § 2903, provides that, on petition of either party to a civil proceeding, wherein he shows that he has a probable right or interest in the property which is the subject of the controversy, and that such property or its use is in danger of being injured, the court, if satisfied that the interests of one or both parties will be thereby promoted, and the substantial rights of neither unduly injured, may appoint a receiver. Held, that a court of equity has jurisdiction to appoint a receiver of a state banking corporation on the petition of a stockholder. Dickerson *v.* Cass County Bank, 95 Iowa 392, 64 N. W. 395.

64. Notice of receivership proceedings.—Holcomb *v.* Tierney, 79 Neb. 660, 113 N. W. 204.

Where, in an action against an in-

some jurisdictions such notice may be dispensed with in cases of urgent necessity.[65]

§ 77 (1ee) Petition and Answer.—In petition for receiver to wind up the affairs of a trust company, a traverse to the averment of insolvency is ineffectual which admits that the institution has closed its doors.[66]

§ 77 (1ff) Hearing and Determination of Motion.—A motion for the appointment of a receiver to take control of the assets, and wind up the

solvent bank to wind up its affairs, a receiver is appointed without notice to the bank except such as is implied from being dispossessed of its property, and the receiver proceeds, without objection, to convert the assets into cash, and pays the proceeds out to the creditors, the proceeding is not void to the extent that the status of the property involved is open to collateral attack. Holcomb *v.* Tierney, 79 Neb. 660, 113 N. W. 204.

Under Laws 1902, p. 113, c. 60, § 1, authorizing the court to appoint a receiver of a bank, and in its discretion to dispense with notice of application therefor, where the only proof before the court was that contained in the complaint by the attorney general to dissolve a bank because insolvent, which showed that the funds of the bank were in the hands of the superintendent of banks, notice of the application for appointment of receivers ought to have been given, the law contemplating the giving of notice unless facts are presented showing a necessity for instant action to prevent impending wrong. People *v.* Oriental Bank, 124 App. Div. 741, 109 N. Y. S. 509.

Appointment on court's own motion.—The appointment of the receiver on the court's own motion, upon a finding of insolvency, is not an appointment without notice to the corporation, as the act itself constituted full notice that such appointment would be made upon a finding of insolvency in such an action. People *v.* Bank, 154 Cal. 194, 97 Pac. 306.

Petition as sufficient notice.—Ky. St., § 616 (Russell's St., § 2256), permits the secretary of state, when any bank has become insolvent, or its capital has become impaired, or it has violated any provision of law, with the attorney general's approval, to apply to the circuit court for the appointment of a receiver. Section 586 (§ 2175) provides that, if the capital stock of any bank become impaired, the secretary of state shall give notice to the president to have the impairment made good, and, if the bank fail for thirty days after such notice to do so, the secretary of state may, with the attorney general's advice, institute proceedings to wind up its affairs. Held, that while thirty days' notice should be given as required by § 586 before appointing a receiver under § 616, in an action for the appointment of a receiver for a bank, both on the ground that its capital had become impaired and because it was insolvent and had violated the law, where the receiver was not appointed until thirty days after the petition therefor was filed, and no effort was made to replace the impaired capital, a receiver could be appointed without other notice; the petition being sufficient notice. Imperial Bank *v.* Commonwealth, 140 Ky. 210, 130 S. W. 1074.

A bill was filed in the court of chancery in New Jersey against a bank, subpœna ad respondendum was issued, and returned by the officer, "Not served," with his affidavit that he could not find and believed no such bank or bank officer to be in his county, and thereupon a receiver was appointed. Held, that the return and affidavit left the court at liberty to appoint a receiver without notice to the bank. Dayton *v.* Borst, 20 N. Y. S. Ct. 115.

65. When notice of appointment of receiver dispensed with.—A bill by depositors and creditors of a bank, alleging the insolvency of the bank caused by the fraud and mismanagement of the directors then in charge of it, justified the immediate appointment of a receiver without notice, under Ann. Code 1892, § 574, providing that a receiver shall not be appointed without notice of the application, unless an immediate appointment is necessary, and the appointment without notice would be proper on the emergency, independent of the statute. Benjamin *v.* Staples, 93 Miss. 507, 47 So. 425.

66. Petition and answer.—Bell *v.* Tradesmen's Trust Co. (Pa.), 85 Atl. 363.

affairs of a bank, will be denied as irregular, if it appears that the order to show cause against the appointment was served before the action was commenced.[67]

§ 77 (1gg) The Order of Court.—An order appointing a receiver for a bank, no appeal having been taken therefrom, is conclusive against the bank on the question of insolvency.[68]

§ 77 (1e) Removal and Discharge.—A receiver of a bank may be removed for cause.[69] On the discharge of a bank receiver the management of its affairs reverts to the directors, who have full authority to enter into any lawful arrangement to meet its obligations.[70]

A temporary receiver may be discharged and the bank permitted to resume business with consent of the depositors upon a proper resort from the banking department showing a sufficiency of assets.[71]

Filling Vacancies.—If one of several receivers is removed, or resigns, it is discretionary with the court to appoint another person in his stead, or allow the remaining ones to act without the appointment of another.[72]

§ 77 (2) Operation and Effect—§ 77 (2a) In General.—After a receiver has been appointed for a bank it is virtually dissolved and must

67. **Hearing and determination of motion.**—Kattenstroth *v.* Astor Bank, 9 N. Y. Super. Ct. 632.

68. **Order of court appointing receiver.**—State *v.* German Sav. Bank, 59 Neb. 292, 80 N. W. 901.

69. **Removal of receiver.**—If the receiver of a bank has failed to do his duty, application should be made to the court to compel him to do so, or to remove him, as he ought to proceed and recover all the assets and distribute them as provided by law. McTamany *v.* Day (Idaho), 128 Pac. 563.

A receiver of the assets of an insolvent bank, appointed pursuant to the provisions of § 41, Act Feb. 24, 1845, "to incorporate the State Bank of Ohio and other banking companies" (1 Swan & C. St., p. 131), can not, under existing laws, be removed from his office at the pleasure of the state officers by whom he was appointed. State *v.* Claypool, 13 O. St. 14.

70. **Effect of discharge of receiver.**—Approval in the order discharging the receivers, of an agreement between the bank and another, whereby the latter was to advance a sufficient amount to pay all depositors and creditors, was unnecessary, as was also the direction to the superintendent of banks to release the assets in his hands, and to that extent the order will be modified. People *v.* Oriental Bank, 124 App. Div. 741, 109 N. Y. S. 509.

71. **Discharge of temporary receiver.**—On motion for an order discharging a temporary receiver of an embarrassed bank, and directing that the property in the receiver's hands be turned over to the bank, and permitting it to resume business, it was shown that about ninety per cent of the depositors had signed an agreement looking toward a resumption of the bank. The report of the banking department showed that on the close of business of the bank it had sufficient assets, after making various deductions, to pay its depositors in full, provide for its capital stock of $200,000, and have a surplus of over $250,000. Affidavits of officers of the bank and depositors tended to show that the inventory and appraisal of the banking department was well made, that the property owned by the bank was worth the amount there set down, and that collateral held as security for the various loans was of ample margin to provide for their prompt payment on becoming due. The superintendent of banks did not oppose application, and the attorney general was satisfied to have the bank reopened if in a proper condition to be opened. Held, that the bank was entitled to the relief asked. People *v.* Hamilton Bank, 57 Misc. Rep. 345, 108 N. Y. S. 461.

72. **Filling vacancies in office of receiver.**—Wiswell *v.* Starr, 50 Me. 381.

thereafter act through him.[73] And the right to secure the satisfaction of demands by the usual processes of the laws is suspended.[74] After the court in the receivership proceedings obtains jurisdiction of the assets of the bank, a creditor can not commence an action and obtain a judgment which would be a lien and interfere with the ratable distribution of the assets to all the creditors.[75] But the appointment of a receiver for a bank, after it has made an assignment for the benefit of creditors, does not supersede and vacate the assignment and impose upon the property and assets of the bank a different rule of distribution from the one prescribed by the assignment.[76]

Rule in Louisiana.—Both in the cessio bonorum, and the liquidation of banks, under acts of 1842, the property vests in the creditors, and the former owner has no longer any but a residuary right, and, to secure it, that of coercing a final settlement by the commissioners or syndic. Neither the insolvent nor the stockholders can appear in court to control the administration of the assets.[77]

§ 77(2b) On Rights of Attaching Creditors.—The property of an insolvent bank, prior to the appointment of a receiver therefor, is not exempt from seizure at the suit of its creditors.[78] Accordingly, the appointment of receivers for a bank does not necessarily dissolve an attachment of the assets of the bank previously made.[79] But assets in a receiver's hands

73. Effect of appointment of receiver.—Davenport *v.* City Bank (N. Y.), 9 Paige 12; Miami Exporting Co. *v.* Gano, 13 O. 269.

Where the court appoints a receiver for a bank, it may refuse to allow a claim on the assets in its custody to be litigated in an independent action, and may adjust the matter in the receivership proceeding. State *v.* State Bank, 84 Kan. 366, 114 Pac. 381.

A chancery order placing a bank's assets in the hands of a receiver suspends the bank's corporate functions, and statute damages for allowing bills to be protested can not be recovered after that time. Sanford *v.* Kentucky Trust Co. Bank (Ky.), 1 Metc. 106.

But the appointment of a receiver for an insolvent bank does not revoke the bank's charter nor terminate its corporate existence, so as to enable it to plead that fact in bar of an action pending against it when the receiver was appointed. Ahrens *v.* State Bank, 3 S. C. 401.

74. State *v.* State Bank, 84 Kan. 366, 114 Pac. 381.

75. Richards *v.* Osceola Bank, 79 Iowa 707, 45 N. W. 294.

76. Effect on previous assignment.—Where a bank has made a voluntary assignment, the court, on application of a judgment creditor, can not, under Sandb. & B. Ann. St., §§ 3216, 3217, providing that on judgment against a corporation, and execution returned unsatisfied, the circuit court may, upon petition, sequester the assets of a corporation and appoint a receiver thereof, sequester the assets in the hands of the assignee, and appoint a receiver therefor, so as to supersede the assignment, and change the rule for the distribution of assets to the rule prescribed by statute in receivership cases. Garden City Banking, etc., Co. *v.* Geilfuss, 86 Wis. 612, 57 N. W. 349.

77. Rule in Louisiana.—Mudge *v.* Commissioners (La.) 10 Rob. 460.

78. Effect of receivership on attaching creditors.—Arnold *v.* Weimer, 40 Neb. 216, 58 N. W. 709; Arnold *v.* Globe Invest. Co., 40 Neb. 225, 58 N. W. 712.

79. The issuance of an injunction and the appointment of receivers of a bank for the purpose of distributing its assets among creditors pro rata, in proceedings instituted under St. 1838, c. 14, § 5, does not dissolve the lien on bank property acquired by attachment prior to institution of the proceedings. Hubbard *v.* Hamilton Bank (Mass.), 7 Metc. 340.

An attachment of the property of a bank, made before the bank commissioners applied for an injunction, un-

are in custodia legis and not subject to attachment by a creditor.[80] And where creditors of the bank attach the assets after proceedings to wind up the bank have commenced, a separate, distinct proceeding unconnected with the original suit against the bank, to dissolve the attachments will be dismissed; he may obtain relief by petition filed in the original suit.[81]

§ 77 (2c) On Right to Sue the Bank.—The general rule is that, so long as the corporation over which a receiver has been appointed has not been dissolved, and no order of injunction exists restraining suits against it, it may still be sued and defend in its own name.[82] But after a bank has

der St. 1838, c. 14, § 5, to restrain the bank from further proceeding with its business, was not dissolved by the subsequent appointment of receivers, pursuant to the provisions of that statute, to take possession of the property and effects of the bank. Hubbard *v.* Hamilton Bank (Mass.), 7 Metc. 340.

The suspension of a national bank and the appointment of a receiver do not defeat a right previously acquired by service of an attachment against the bank as garnishee, but the assets pass to the receiver burdened with a lien in favor of the plaintiff in the attachment, which can not be disregarded or displaced by the comptroller of the currency. Earle *v.* Pennsylvania, 178 U. S. 449, 44 L. Ed. 1146, 20 S. Ct. 915.

80. Assets of receivership in custodia legis.—Under Comp. St. c. 8, § 24, defining the powers of the state bank examiner, when an examiner, under authority of the banking board, has taken possession of the assets of an insolvent bank, such assets are not subject to attachment at the suit of a creditor of the bank while possession is so retained. Andrews *v.* Steele City Bank, 57 Neb. 173, 77 N. W. 342.

The bank commissioners' act (St. 1877-78, p. 740, as amended by St. 1887, p. 90, et seq.) provides that the board of bank commissioners may examine into the solvency of any bank, and if it finds that the bank is violating its charter or the laws of the state, or is in an unsafe condition, it may order the bank to discontinue its unsafe practices, and, on its refusal the attorney general may commence suit to enjoin the transaction of further business; and that if the court finds that the business is carried on in an unsafe manner, and that the bank is insolvent, he shall grant the injunction, and direct the commissioners to take such proceedings against the bank "as may be decided upon by its creditors." Held, that the act was intended for the equal benefit of all creditors, and that no attachment can be levied on the assets of a bank after the date of its insolvency, as decreed in proceedings under the act. Crane *v.* Pacific Bank, 106 Cal. 64, 39 Pac. 215, 27 L. R. A. 562; Murphy *v.* Pacific Bank, 106 Cal. xvii, 39 Pac. 218.

The sequestration intended to be made by force of Rev. St. c. 44, of the property of an insolvent bank whose charter has expired, is for the benefit of all the creditors of the bank, and takes effect, not merely from the time of the appointment of the receivers, but from the filing of the bill, or at least from the issuing of the injunction. Atlas Bank *v.* Nahant Bank (Mass.), 23 Pick. 480. See Davenport *v.* Tilton (Mass.), 10 Metc. 320.

81. Suits to dissolve attachments.—After the granting of an injunction against the officers of an insolvent bank in a suit to wind up its affairs, and before the appointment of a receiver, certain creditors attached. Held, that the receiver could not bring a separate proceeding to dissolve the attachment, and enjoin the creditors from further attaching, as the relief must be obtained by petition in the original suit. Atlas Bank *v.* Nahant Bank (Mass.) 23 Pick. 480.

82. On right to sue the bank.—Warner *v.* Imbeau, 63 Kan. 415, 65 Pac. 648.

Laws 1891, c. 43, § 26, providing for the appointment of a receiver of a banking corporation, who shall wind up its business for the benefit of the depositors, creditors, and stockholders, before its repeal, did not inhibit the bringing of an action against an incorporated bank after the appointment of a receiver to wind up its affairs, as the general rule is that, so long as a corporation of which a receiver has been appointed has not been dissolved, and no order of injunction exists restraining the bringing of suits against it, such corporation may be

been placed in the hands of a receiver, it can not sue in its own right, but must sue by the receiver.[83]

§ 77 (3) Title, Rights, Powers and Duties of Receivers—§ 77 (3a) In General.—It may be stated at the outset that the receiver stands in the place of the bank whom he represents, and has only such rights as it had, "so that the rights of third parties are not increased, diminished, or varied by his appointment."[84] In other words, he takes only such title to the assets as the bank itself had, subject to all equities which existed against the assets in the hands of the bank.[85] Therefore, a bank receiver can not repudiate contracts and obligations entered into by the bank, and at the same time retain the fruits.[86] Nor can a bank receiver ordinarily repudiate the acts of a trustee who was previously in charge of the affairs of the bank.[87]

§ 77 (3b) Relation of Receiver to Bank and Creditors.—A receiver of a bank appointed represents both the bank and its creditors, and can look behind its acts in the assertion of their rights.[88]

sued and defend in its own name. Warner *v.* Imbeau, 63 Kan. 415, 65 Pac. 648.

The receiver of an insolvent bank can not defeat claims against the bank because of the receivership. Jordan *v.* Harris, 98 Ark. 200, 135 S. W. 830.

On the other hand, some cases hold that no action can be maintained against a bank after the appointment of receivers thereof. Leathers *v.* Shipbuilders' Bank, 40 Me. 386; and hence, where a bill has been filed for the purpose of obtaining a decree against the receiver, as such, the answer of the bank, under its corporate seal, can not affect the question between the complainant and receiver. Davenport *v.* City Bank (N. Y.), 9 Paige 12.

83. Miami Exporting Co. *v.* Gano, 13 O. 269.

84. Nature and extent of receiver's title.—Jordan *v.* Harris, 98 Ark. 200, 135 S. W. 830.

85. Casey *v.* La Societe De Credit Mobilier, Fed. Cas. No. 2,496, 2 Woods 77; National Life Ins. Co. *v.* Mather, 118 Ill. App. 491.

Receivers, for the purpose of closing its concerns, have no rights superior to those which the bank would have had, if the management of its affairs had continued with its directors, and the liabilities of third parties are not changed by their appointment. Lincoln *v.* Fitch, 42 Me. 456.

Assignees and receivers of insolvents are not regarded as purchasers for value without notice, but rather as personal representatives of the insolvents, and stand in their shoes so far as their assets are concerned, and take same subject to set-offs, liens, and incumbrances as they existed at the time of their appointment and therefore the appointment of a receiver of an insolvent bank did not deprive a depositor of the right to set off his general deposit against a note given by him to the bank. Steelman *v.* Atchley, 98 Ark. 294, 135 S. W. 902.

The receiver derives his rights to the bank's contracts from the bank itself, and is affected by them as the bank would be. Armstrong *v.* National Bank, 11 Ky. L. Rep. 90.

86. The receiver of a bank can not repudiate a pledge of its assets made by the bank, for advances to it, either on the ground that the pledge was not formally executed, or that the contract was void, because not authorized by the charter of the bank, so long as he retains, as assets, the advances to secure repayment of which the pledge was given. Casey *v.* La Societe De Credit Mobilier, Fed. Cas. No. 2,496, 2 Woods, 77, reversed in 96 U. S. 467, 24 L. Ed. 779.

87. The trustees of a bank the affairs of which were embarrassed, and which afterwards passed into the hands of a receiver, assented in good faith to an arrangement with a debtor of the bank whereby his property was conveyed to trustees for his creditors, and he procured an extension. Held, that the receiver could not repudiate the transaction. Greene *v.* Sprague Mfg. Co., 52 Conn. 330.

88. Relation of receiver to bank and creditors.—Hayes *v.* Kenyon, 7 R. I. 136.

§ 77 (3c) Conflicting Receiverships.—And in case of conflicting receiverships, he who is prior in time is prior in right.[89]

§ 77 (3d) Title and Rights as to Assets.—The powers of the receivers of an insolvent bank whose charter has expired extends to all the property of the bank, real as well as personal.[90] Ordinarily, a receiver of a bank does not become vested with the title to the property or assets which he administers. His relation to the property, like that of a constable, sheriff or master in chancery, is merely that of a ministerial officer.[91] But in some jurisdictions a receiver seems to be vested with title to the assets.[92] The receiver has no title to real estate owned by the bank in another state.[93]

§ 77 (3e) Powers of Receiver in General.—A receiver has implied

89. **Conflicting receiverships.**—Where two persons are on the same day appointed receivers of an insolvent bank by different justices, it was held that both could not act, and that the question which of them was entitled to the assets of the bank must be determined as a legal right, and depended on the priority of judicial action on the petitions for the appointment of a receiver, without regard to the time of the verification of the papers, or the time of actually getting possession of the assets. People *v.* Central City Bank, 53 Barb. 412, 35 How. Prac. 428.

90. **Title and right with respect to assets.**—Atlas Bank *v.* Nahant Bank (Mass.), 23 Pick. 480.

Where the owners of a private bank, after having appropriated certain of its assets, sold the bank and its existing assets to T. and his associates, their receiver in insolvency, not having succeeded to the rights of creditors of the bank, was not entitled to sue their vendors to recover such assets. Harrington *v.* First Nat. Bank (Tex. Civ. App.), 125 S. W. 598.

Rights of action vested in stockholders.—A receiver of an insolvent bank becomes vested with the property and rights of action that had theretofore vested in the bank, but not so with respect to the right of action vested in the stockholders as such or in the creditors as such; they still retain the cause of action that they had against the officers or directors of the bank prior to its dissolution and it is for them to enforce such cause or causes of action, and not the receiver. Higgins *v.* Tefft, 4 App. Div. 62, 38 N. Y. S. 716, 74 N. Y. St. Rep. 100.

91. **The receiver's title.**—Lafayette Bank *v.* Buckingham, 12 O. St. 419.

92. On the appointment of a receiver for an insolvent bank, the title of a note secured by mortgage owned by the bank passed to the receiver, and by a subsequent sale by him of the assets of the insolvent bank to the purchaser. Brynjolfson *v.* Osthus, 12 N. Dak. 42, 96 N. W. 261.

A warranty deed of land covered by a mortgage, executed by the president of the mortgagee bank before its insolvency, but delivered after its insolvency, and after the appointment of a receiver, did not operate as an equitable assignment of the mortgage, as the title had already passed to the receiver, and the president had no authority to make such delivery. Brynjolfson *v.* Osthus, 12 N. Dak. 42, 96 N. W. 261.

Title of receiver to drafts.—Where defendant drew drafts which were discounted by a bank, when it was insolvent to the knowledge of its officers, and the bank failed and was placed in the hands of a receiver, whereupon defendant brought suit in another state against the bank to recover the amount of the drafts, as "due and owing for a balance on deposit to plaintiff's credit in the hands of the bank," and garnished the drawee who had accepted the drafts, such action constituted an election to affirm the discount, and defendant was not entitled to recover the amount of the drafts on the ground that they had been obtained by the bank's officers by fraud. Davis *v.* Butters Lumber Co., 132 N. C. 233, 43 S. E. 650.

93. **Title to foreign assets.**—The judgment of a court of the state where a bank is located, restraining the latter from doing business, and appointing a receiver, does not transfer to the receiver title to real estate owned by the bank in another state. City Ins. Co. *v.* Commercial Bank, 68 Ill. 348.

as well as express powers.[94] But ordinarily his authority is defined in the order appointing him.[95] A receiver of an insolvent bank may compromise doubtful claims,[96] employ real estate agents to dispose of the assets,[97] and transfer the assets of the bank in discharge of claims against it.[98] But

94. The extent of the powers possessed by receivers of a bank appointed in proceedings instituted by the bank commissioners under St. 1838, c. 14, § 5, not being clearly defined by that act, may be inferred from Rev. St. c. 44, § 8, authorizing the appointment of receivers for banks whose charters have expired. Hubbard *v.* Hamilton Bank (Mass.), 7 Metc. 340.

95. An insolvent bank, in a proceeding under Comp. St. c. 8, to wind up its business, remains an interested party even after the appointment of a receiver, and may resist an application for an order conferring on the receiver authority not granted by the order appointing him. State *v.* German Sav. Bank, 50 Neb. 734, 70 N. W. 221.

96. **Power of receiver to compromise claims.**—The powers conferred on a receiver of an insolvent bank by Comp. St. c. 8, § 35, to compound all bad or doubtful debts, when approved by the court, includes the right to compromise doubtful claims against stockholders of a bank for the double liability imposed upon them by Const. art. 11b, § 7. State *v.* German Sav. Bank, 65 Neb. 416, 91 N. W. 414.

Where, after the insolvency of a bank, the receiver was ordered to sue the stockholders for their liability, and it appeared that a considerable number of the stockholders had died, that many had moved beyond the jurisdiction of the court, and that others were insolvent, and that others denied their liability on various grounds, an order by the court approving a compromise of doubtful claims on the part of the receiver against such stockholders was not an abuse of discretion. State *v.* German Sav. Bank, 65 Neb. 416, 91 N. W. 414.

A court appointing a receiver for an insolvent bank may authorize the receiver to settle suits brought by himself in behalf of the estate, where for the best interests of the estate. State *v.* Bank, 57 Neb. 608, 78 N. W. 281.

But whether a receiver has the power to effect a compromise with the bank's debtors, or not, the bank may elect to affirm the transaction by electing to charge the receiver with the value of securities surrendered by him under such compromise. Brown *v.* Bass (U. S.), 4 Wall. 262, 18 L. Ed. 330, reaffirmed in Brown *v.* Johnson, 154 U. S. 551, 18 L. Ed. 333, 14 S. Ct. 1197.

97. **Employment of real estate agents.**—A receiver of an insolvent bank employed an agent to sell real estate upon commissions of ten per cent. It was not agreed whether the commissions should be paid out of cash payment or out of the entire price when paid. The agent sold for $85,000, whereof $10,000 was paid and default made as to residue. Held, that the agent was entitled to ten per cent only on such sum as had been or should be paid. Peters *v.* Anderson, 88 Va. 1051, 14 S. E. 974.

Receiver reported sale to court stating agreement as to commissions, and procured a decree for payment thereof, "whenever whole price should be fully paid." Agent, who was no party to the suit, drew an order on receiver for a sum out of any funds payable to him as commissions under the court's decree. Held, the order did not estop agent from denying correctness of the decree. Peters *v.* Anderson, 88 Va. 1051, 14 S. E. 974.

98. **Power of receiver to transfer assets.**—Receivers of a bank transferred to plaintiff a negotiable note against third persons, which was part of the assets, in payment of a demand which he had against it. Held that, in the absence of anything to show the extent of the receivers' authority under their appointment, or that other creditors of the bank had not been paid, or of fraud or unfair dealing in the transaction, it would be presumed that they acted within the scope of their authority, and that the legal title to the note passed to plaintiff. Atchison *v.* Davidson (Wis.), 2 Pin. 48.

The receivers of a bank transferred to plaintiff a negotiable note against third persons, which was part of the assets, in payment of a demand which he had against it. Held, that the transfer was presumptively legal, though other creditors had not been paid in full; since, in such case, the receivers would be liable for misapplication of assets, and the transfer was at the risk of the receivers. Atchison *v.* Davidson (Wis.), 2 Pin. 48.

a receiver, either general or special, whether appointed at the suit of a stockholder or at the suit of a creditor, has no power to bring an action to recover the statutory liability of a stockholder of an insolvent banking corporation.[99] Nor will a motion be allowed to require a receiver of a bank to do an impossible act.[1]

Temporary Receivers under New York Statute.—The New York statute does not confer general powers upon the temporary receiver, but enables the court to enlarge his powers and give him additional authority when in a given case it is shown to be necessary for the wise and proper administration of the affairs of such insolvent corporation.[2] Where temporary receivers have been appointed, a reversal of the order appointing them does not deprive them of the right, nor relieve them from the duty, of holding and protecting such property as has come into their hands until it is taken from their possession by order of the court.[3]

§ 77 (3f) Duties of Receiver in General.—It is the duty of the receiver appointed for an insolvent bank to take immediate possession of all the real estate as well as the personal estate.[4] Comp. Laws of Michigan, § 6144, which requires receivers of state banks to pay over all money collected or received by them to the State Treasurer, is not ambiguous, and it is the duty of a court, to see that its receiver complies with such requirement.[5] It is also the duty of a receiver to allow set-offs in a proper case.[6]

99. **Action by receiver to enforce statutory liability of stockholders.**—Steinke *v.* Loofbourow, 17 Utah 252, 54 Pac. 120; McLaughlin *v.* Kimball, 20 Utah 254, 58 Pac. 685, 77 Am. St. Rep. 908.

The authority for the appointment of a receiver, conferred by Rev. St. 1898, § 3114, subd. 6, does not extend to the appointment of a receiver of a bank for the purpose of enforcing stockholders' statutory liabilities over and above the amount of their stock. McLaughlin *v.* Kimball, 20 Utah 254, 58 Pac. 685, 77 Am. St. Rep. 908.

1. **Return of property not in his possession.**—Where petitioner, having three checks in possession against a bank, sent them to the bank for collection, and the checks were received by the bank, who delivered to the petitioner its check on another bank to pay those checks, and the bank on which the check was drawn refused to honor it, and on the insolvency of the first bank the petitioner asked for a return of the three checks which it had presented for payment and in payment of which it had received the check drawn by the insolvent bank, the receiver of such insolvent bank will not be ordered to deliver such checks to the petitioner when they are not in his possession, but have been returned as paid to the depositors, who drew them. People *v.* Federal Bank, 107 App. Div. 611, 94 N. Y. S. 732.

2. **Powers of temporary receiver.**—People *v.* St. Nichols Bank, 76 Hun. 522, 28 N. Y. S. 114, 58 N. Y. St. Rep. 843.

3. In re Murray Hill Bank, 14 App. Div. 318, 43 N. Y. S. 836.

4. **Duties of receiver in general.**—Baker *v.* Cooper, 57 Me. 388.

5. **Duty to pay over money.**—Moore *v.* Donovan, 141 Mich. 398, 104 N. W. 665.

6. **Duty to allow set-offs.**—The receiver of an insolvent bank has all the powers and authority of trustees of insolvent debtors, and is subject to all the duties and obligations imposed on them by Laws 1849, c. 26, § 11 (2 Rev. St., pp. 469, 470, §§ 68, 74), one of which is that, where mutual credits have been given by a debtor and any other person or mutual debts have subsisted between such debtor and another, to set off such credits or debts, and pay the proportion or receive the balance due. In re Van Allen (N. Y.), 37 Barb. 225.

§ 77 (3g) Liabilities of Receivers in General.—A receiver, no matter how appointed, is the ministerial officer and servant of those from whom he receives the appointment; and he is responsible for the exercise of good faith and reasonable diligence in the discharge of his duties.[7] Under the peculiar provisions of the Ohio statute, a receiver of an insolvent bank can not be held liable for delinquencies in the discharge of his duty, provided he has acted under the directors of the board of control.[8]

Liability for Fraud of Bank.—Nor is a receiver liable to an action by a stockholder for the fraud of the bank or its officers in inducing him to purchase stock.[9]

For Failure to Enforce Stockholder's Liability.—But a receiver is liable for a failure to proceed with diligence to enforce a stockholder's statutory liability.[10]

For Penalties.—In some jurisdictions statutory penalties are recoverable in actions against receivers.[11]

Accountability for Moneys Received and Disbursed.—The fact that an instrument by virtue of which money has been received by the receiver and disbursed according to law, is subsequently declared invalid by decree of court, does not make the receiver liable to refund the money.[12]

7. **Liabilities of receivers in general.**—Lafayette Bank *v.* Buckingham, 12 O. St. 419.

8. **Liability for negligence.**—Act 1845, incorporating the State Bank of Ohio and other banking companies (§ 16), provides that the board of control shall be a body corporate. Section 24 provides that, upon an act of insolvency by any branch bank, all its property, credits, securities, liens, and assets of every description shall forthwith vest in, and be the property of, the board of control for the uses declared in this act. Section 25 makes it the duty of the board of control, in such a case of insolvency, to appoint a receiver to take immediate possession of the assets of the bank, and hold the same for the benefit of other branches of the State Bank and the creditors of such failing branch. Section 27 provides that the receiver, under the direction of said board, shall proceed to settle up the affairs of the bank. Held, that a creditor of such insolvent bank can not recover against the receiver for delinquency in the discharge of his duty, so long as he has acted under and in accordance with the direction of the board. Lafayette Bank *v.* Buckingham, 12 O. St. 419.

9. **Liability of receiver for bank's fraud.**—Lantry *v.* Wallace, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878.

10. **Failure to enforce stockholder's liability.**—A receiver of an insolvent state bank, who fails to enforce a stockholder's liability created by Const., art. 8, § 7, and Banking Law (Consol. Laws, c. 2) § 52, while the stockholder was, for two years subsequent to the dissolution of the bank, financially responsible, is liable for the loss sustained. People *v.* Bank, 70 Misc. Rep. 633, 127 N. Y. S. 908.

11. **Suit against assignee by bill holder.**—Carey *v.* Greene, 7 Ga. 79.

After the assignment of a bank and the forfeiture of its charter by a judgment of the proper court, the legislature authorized the assignee to act as receiver. Held, that the holder of bills of the bank is not entitled to damages on account of the failure of the assignee to pay the bills on demand, under the Act of 1832, requiring banks that fail to pay their bills on demand to pay ten per cent damages on a suit to collect the bills. Carey *v.* Greene, 7 Ga. 79.

12. **Accountability for rent received under mortgage subsequently declared void.**—Where a husband and his wife mortgaged property belonging to the wife to secure notes which passed into the hands of an insolvent national bank, it was held that, for rents received from such property, with the consent of the husband, by the receiver of the bank appointed by the comptroller of the currency, from the time of his appointment to the date of a decree declaring such mortgage void

§ 77 (3h) Instructions from Court.—A receiver of an insolvent bank is an officer of the court, and may properly apply to it on suitable occasions for instructions.[13]

§ 77 (4) Collection and Protection of Assets—§ 77 (4a) In General.[14]—The statutes in most states confer upon the trustee appropriate powers to realize and protect the assets.[15] In winding up the affairs of an insolvent bank the receiver of such bank, when so authorized by the court, may take such steps as shall be necessary to enable him to secure possession of the assets of the bank of their value.[16] But he is usually entitled to exercise a sound discretion in the matter of collecting its assets.[17] In collecting the assets of an insolvent bank, the receiver may set aside fraudulent or improper conveyances by it of its assets.[18]

as to the wife, and paid by him into the treasury of the United States subject to the order of the comptroller, as required by § 5234, Rev. Stat., of the United States, and distributed among the creditors of the bank, such receiver is not to be held accountable in equity at the instance of the wife. Hitz *v.* Jenks, 123 U. S. 297, 31 L. Ed. 156, 8 S. Ct. 143.

13. Instructions from court.—In re Van Allen (N. Y.), 37 Barb. 225.

Code Civ. Proc., § 1788, authorizes a temporary receiver to collect debts and to preserve the property of the corporation, and to sell and otherwise dispose of property as directed by the court, and provides that, unless additional powers are specially conferred on him, he has only those specified. Section 1789 provides that the court may confer on a temporary receiver the powers of a permanent receiver. Held that, where a depositor in an insolvent bank was indebted to the bank on a note secured by collaterals, a temporary receiver could not allow the deposit as a set-off against the note, and therefore he was entitled to instructions from the court on an application by the depositor to surrender the collaterals on payment of the balance due on the note after deducting the amount of the deposits. People *v.* St. Nicholas Bank, 76 Hun 522, 28 N. Y. S. 114, 58 N. Y. St. Rep. 843.

14. Actions by or against receiver, see post, "Power to Make Loans in General," § 176.

15. Collection and protection of assets.—State *v.* Bank, 64 Tenn. (5 Baxt.) 101.

16. Proceedings by receiver to collect assets.—State *v.* Commercial, etc., Bank, 37 Neb. 174, 55 N. W. 640.

The section of the Georgia Code regulating the collection and distribution of the assets of a bank by a receiver appointed upon a judgment forfeiting its charter, does not apply in the case of a voluntary assignment by the bank of its assets to pay its debts according to the requirements of law. Fouche *v.* Brower, 74 Ga. 251.

Under the statute of Mississippi, approved February 28, 1846, authorizing the trustee of an insolvent bank to collect the debts due the latter and distribute the proceeds in payment of its debts, the trustee, in collecting the debts, is not limited to just what is sufficient to pay off liabilities, but may collect all debts due. Davis *v.* Robertson, 11 La. Ann. 752.

17. Discretion of receiver.—It is within the sound discretion of the receiver of an insolvent bank when to prosecute suits on its claims, and to dispose of its real estate for the purpose of collecting assets, with which the court will not interfere, except in special cases. In re Van Allen (N. Y.), 37 Barb. 225.

18. Authority of receiver to set aside conveyances.—The receiver of an insolvent bank may maintain a bill to set aside a trust deed made by the bank, where it appears that the trustee in such deed was interested in sustaining the same. Leavitt *v.* Yates (N. Y.), 4 Edw. Ch. 134.

Where the manager of a bank who, at the bank's request, with others, became its surety for money deposited, purchased in his own name real estate mortgaged to the bank, using the bank's funds to pay his bid, and intending to hold the property for the security of himself and his co-sureties, and the bank afterwards became insolvent, its receiver could not compel a conveyance of such property without indemnifying the sureties. Smith *v.* Lansing, 22 N. Y. 520.

Evidence.—In an action by the re-

§ 77 (4b) Surrender of Assets to Receiver.—Where parties have, by the fraudulent conduct of themselves or their agents, obtained possession of the assets of an insolvent bank, and are unable to return them to the receiver in kind, such parties will be held to strict accountability for the value thereof.[19] A bank officer wrongfully withholding the assets of the bank can not impose conditions to the delivery of the possession of such assets.[20]

§ 77 (4c) Compromise of Claims.—In an action by a receiver of an insolvent bank against the managers to compel them to make good to depositors losses sustained by their misconduct, the court will not advise acceptance of an offer of compromise made by some of the defendants, where the receiver submits the question without recommendation, and a large portion of the depositors who have expressed a preference are opposed to its acceptance.[21] But a court which is administering the affairs of a defunct bank may entertain a petition filed against the receiver by a creditor suggesting a plan of compromise to avoid litigation, and the judge may order the receiver to accept the offer of compromise.[22]

§ 77 (4d) Proceedings to Collect—§ 77 (4aa) Form of Proceedings.—In the event a bank refuses to comply with an order of the court, to pay money to a receiver, the court has no power to imprison its officers as for contempt, but the receiver must resort to his remedy by action against the bank.[23]

§ 77 (4bb) Jurisdiction and Power of Courts.—A chancery court or other court with equitable powers, acquiring jurisdiction, may administer the assets and enjoin separate creditors from prosecuting independent suits

ceiver of a bank whose charter had been forfeited to set aside an assignment of effects made by that bank for fraud, evidence is admissible, under the allegations of fraud in the bill, to prove that, before the assignment of such effects, the board of directors had resigned, and that the office of presidency had been usurped by a person who was neither an officer nor a director. Carey *v.* Giles, 10 Ga. 9.

19. Surrender of assets wrongfully withheld.—State *v.* Commercial, etc., Bank, 37 Neb. 174, 55 N. W. 640.

20. In proceedings to obtain possession of the assets of an insolvent bank, wrongfully withheld by one of its former officers, the latter can not require the allowance of a set-off or counter claim as a condition precedent to the delivery of the possession of such assets. State *v.* Commercial, etc., Bank, 37 Neb. 174, 55 N. W. 640.

21. Compromises by receiver.—Williams *v.* Halliard (N. J.), 14 Atl. 880.

22. Suit to enforce a compromise.—When a court of competent jurisdiction has undertaken to exercise exclusive control over the winding up of the affairs of a defunct bank, a creditor may, in behalf of himself and other persons at interest, file an intervention praying leave to effect a settlement with the receiver of a valid claim held against the bank; and if the receiver, as the representative of its stockholders and other creditors, fails to show cause, upon being cited to do so, why the proposed settlement should not be authorized the court may in its discretion, order him to accept the terms of settlement offered by the intervening creditor, to the end that long and expensive litigation may be rendered unnecessary. McGregor *v.* Third Nat. Bank, 124 Ga. 557, 53 S. E. 93.

23. Proceedings to collect assets.—First Nat. Bank *v.* Clauss, 16-26 O. C. D. 107.

against the common trust assets.[24]

§ 77 (4cc) Parties.—A recovery against bank stockholders on the ground of illegal payment of dividends, the publishing of false reports, the unlawful permitting of excessive loans, or the acceptance of deposits while insolvent being an asset of the bank, the action therefor should be brought by the receiver.[25]

Parties to Proceedings to Collect.—It is not necessary, in proceedings to obtain possession of the assets of an insolvent bank, wrongfully withheld by one of its former officers, to join as parties to the proceedings other individuals, for whose benefit the misappropriation took place.[26]

Parties to Proceedings to Protect.—The minority stockholders are entitled to a remedy against persons who act in bad faith or mismanage the affairs of the bank in liquidation.[27] And one depositor may sue on behalf of himself and other depositors to assert the title of the bank to assets against adverse claimants after its insolvency.[28]

24. Jurisdiction and powers of court.—Leipold *v.* Marony, 75 Tenn. (7 Lea) 128.

A creditor of an insolvent bank, whose charter has been forfeited, who has exhausted the legal remedies against it, may sue in chancery for the assets of the bank and have them applied in payment of its debts. Hightower *v.* Mustian, 8 Ga. 506.

25. Recovery against stockholders.—McTamany *v.* Day (Idaho), 128 Pac. 563.

26. Parties to proceedings to collect assets.—State *v.* Commercial, etc., Bank, 37 Neb. 174, 55 N. W. 640.

27. If, in the liquidation of a bank, the minority stockholders, by mismanagement, fraud, or otherwise on the part of the liquidating committee, are deprived of any part of the full amount to which they are entitled as the value of their stock in liquidation, they have a remedy against the persons so offending in a suit against them for damages. Green *v.* Bennett (Civ. App.), 110 S. W. 108.

The dissenting minority stockholders of a bank in process of liquidation have a right to demand that the assets be so disposed of that the full value thereof may be received for distribution among the shareholders, so that they shall receive the full value of their shares, not in a prosperous and going concern, but in a bank in liquidation. Green *v.* Bennett (Civ. App.), 110 S. W. 108.

28. In an action by a bank depositor against the bank and its president to establish the equitable title of the bank to certain shares of railroad stock, the bank filed a cross complaint, and judgment was rendered in favor of plaintiff and the bank, directing a sale of the stock, and the distribution of the proceeds to the president, in the amount of his disbursements, with interest, and to the bank the balance after payment of plaintiff's costs and expenditures for counsel fees. Held, that a contention of the president that the judgment was inequitable to him, because, in taking the bonds and the stocks, which he was required to take with them, he incurred obligations by which he might have been damnified, was untenable, where he made no claim that he was in fact in any way injured, and made no attempt to show that there were any existing liabilities against which he should be indemnified. Dundon *v.* McDonald, 146 Cal. 585, 80 Pac. 1034.

The objection that a bank depositor could not maintain an action against the bank and its president to establish the equitable title of the bank to certain shares of railroad stock alleged to have been received by the president to the use of the bank in lieu of other shares, until after demand on the directors to bring suit, was obviated by the filing of a cross complaint by the bank, in whose favor judgment was rendered. Dundon *v.* McDonald, 146 Cal. 585, 80 Pac. 1034.

In a suit by a bank depositor against the bank in process of liquidation and its president to establish the equitable title of the bank to certain shares of railroad stock claimed by the president as his individual property, evidence held sufficient to sustain a find-

§ 77 (4e) Retention of Assets by Bank.—By statute in some jurisdictions, an insolvent bank may execute a bond to the state and thereby secure a return of its assets.[29]

§ 77 (5) Sale or Other Disposition of Assets—§ 77 (5a) Marshaling the Assets.—If there be sufficient assets to pay creditors in full, the resident creditors should not be forced to first resort to the deposit before looking to the general assets of the corporation, since this would operate to deprive the resident shareholders of the protection the statute gives them by allowing them to participate in the deposit.[30]

§ 77 (5b) Sale of Assets.—After a proper appraisal of the assets of the bank,[31] they may be sold by the receiver, acting under an order of the court,[32] and such sale may not be impeached in the absence of fraud or bad faith.[33] In making this sale the trustees may exercise a broad discre-

ing that a purported purchase of the stock was for the use of the president, though in the name of another person. Dundon *v.* McDonald, 146 Cal. 585, 80 Pac. 1034.

The evidence was also sufficient to sustain a finding that the purchase of the stock by the president was not ratified by the bank. Dundon *v.* McDonald, 146 Cal. 585, 80 Pac. 1034.

29. Forthcoming bonds.—Where, pending an application for the appointment of a receiver, under Comp. St. 1901, c. 8, a bond conditioned for the payment of all just claims of the bank is given to procure the return of the assets of such bank under the provisions of § 35 of said chapter, the execution of such bond is not a dissolution of the bank. Rawson *v.* Taylor, 69 Neb. 473, 95 N. W. 1033.

Where, pending application for the appointment of a receiver for an insolvent bank, under Comp. St. 1901, c. 8, a bond is given, conditioned for the settlement in full of all the liabilities of said bank, to procure the return of the assets of such bank, under the provisions of § 35 of said chapter, and said proceedings are dismissed and the assets returned, any creditor who is a beneficiary of such bond may maintain an action at law thereon, after the condition is broken to his damage. Rawson *v.* Taylor, 69 Neb. 473, 95 N. W. 1033.

30. Marshaling assets.—People *v.* Granite State Provident Ass'n, 41 App. Div. 257, 58 N. Y. S. 510, affirmed in 161 N. Y. 492, 55 N. E. 1053.

31. Appraisal of property.—A receiver of the property of an insolvent bank was ordered to sell its banking house and the furniture and fixtures therein. The order did not require an appraisal, but the receiver caused it to be appraised and the appraisers fixed the value at a lump sum for the building, the ground, and the furniture and fixtures in the building, and the property was sold for a lump sum. Held, that the real property should have been appraised as a right of redemption existed as to such property, but appraisal was unnecessary as to the personal property, and that the real estate should have been appraised separately in order to preserve the right of redemption, and that such irregular appraisement vitiated the sale. Vaughn *v.* Pedley, 137 Ky. 737, 126 S. W. 1093.

32. Effect of order of court.—An order authorizing the assignment by the receiver of a bank of certain judgments held by it, duly made in the dissolution proceedings of the bank, is prima facie binding upon all its stockholders, and the title of the assignee can only be assailed by a direct proceeding to which he is made a party. In re Grand Cent. Bank, 27 Misc. Rep. 116, 57 N. Y. S. 418; In re Voluntary Dissolution, 42 App. Div. 157, affirmed in 58 N. Y. S. 1022; Treacy *v.* Ellis, 45 App. Div. 492, 61 N. Y. S. 600.

33. Where the liquidation of a bank pursuant to the decision of a duly called stockholders' meeting sold the assets at auction at a fair price, and there is no fraud, nor bad faith, and opponents made no objection to the sale at the stockholders' meeting nor until after it took place, and do not seek to have the sale set aside, their demand to charge the liquidators with the face value of the assets is not well

tion.[34]

Conduct of Sale.—Postponements of the sale are determined by the court that ordered the sale.[35]

§ 77 (5c) Purchaser of Notes.—A receiver of an insolvent bank has power to sell, under order of the court by which he was appointed, notes of the bank and thereby confer on purchasers the right to enforce payment of such evidences of indebtedness by suits in their own name.[36]

§ 77 (5d) Right of Receiver to Purchase at His Own Sale.—As a general rule a receiver can not purchase at his own sale.[37]

grounded and will be rejected. In re Liquidation, 118 La. 664, 43 So. 270.

Action by purchaser of note.—In a suit against the makers of negotiable paper bought by plaintiff at a sale of an incorporated bank's assets, made by its trustees, where the declaration alleges that "the charter was surrendered," but was continued by virtue of the several statutes for the settlement of the bank's affairs, and that the trustees appointed thereunder assigned the paper to plaintiff, a plea averring "that the charter of the bank was not forfeited, and its corporate existence was not dissolved," is fatally defective on demurrer. The first allegation is no answer to the declaration, which alleges that "the charter was surrendered," and the second is an allegation of matter of law. Savage *v.* Walshe, 26 Ala. 619.

34. Public or private sale.—The laws for the liquidation of the Bank of Illinois were designed to vest the assignees with authority to sell the real estate of the bank at public or private sale, and they are not bound to sell to the person who first offers to pay the appraised value. Atwood *v.* Caldwell, 12 Ill. 96.

35. Postponement of sale.—It is for the judge alone to determine, upon an application for a sale by the receivers of demands due to the bank, that it ought to be postponed. In re Hollister Bank, 23 N. Y. 508.

36. Defense to purchase-money note.—In an action by the purchaser of a note sold to him by the receiver of an insolvent bank under an order of court directing such sale, the fact that the entire capital stock of such bank was held by its cashier at the time of the making of such note or thereafter constitutes no defense. Shabata *v.* Johnson, 53 Neb. 12, 73 N. W. 278.

37. Purchase of bank's assets by liquidating officers.—One of the liquidating trustees of a bank which is entirely solvent is not incapacitated to become a purchaser at a sale of the assets of the bank by such trustees, made at auction to the highest bidder after giving notice. Shappard *v.* Cage, 19 Tex. Civ. App. 206, 46 S. W. 839, affirmed in 93 Tex. 656, no op.

Where the liquidating committee, composed of the directors owning two-thirds of the stock of the bank in process of liquidation, disposed of its assets by sale and transfer to another bank organized and controlled by them, it was held that although this was, in some sort, a sale to themselves, this would not avoid such sale, but only subject it to the closest scrutiny on the part of a court of equity, and subject it to be set aside and annulled if it was not conducted with the utmost fairness, to the end that full value and, in fact, the best price obtainable, were realized for the property sold. Green *v.* Bennett (Civ. App.), 110 S. W. 108.

Purchase by bank in which receiver interested.—Rev. Civ. Code, § 1619, provides that a beneficiary, having capacity to contract, with full knowledge of the motives of the trustee, and of all the facts concerning the transaction, and without the use of any influence on the part of the trustee, may permit the latter to take part in a transaction concerning the trust property in which the trustee has an interest adverse to the beneficiary, and § 2431 declares that the law neither does nor requires idle acts. Held that where the purchase of a bank's assets from a receiver, by a bank in which the receiver was interested, was permitted by the insolvent bank's stockholders, or they were not injured thereby, the sale would not be vacated because of the receiver's interest. Jackson *v.* First State Bank, 21 S. Dak. 484, 113 N. W. 876.

§ 77 (5e) Interest on Purchase Money.—If payment of the purchase money is deferred, interest may be recovered.[38]

§ 77 (6) Actions by or against Receiver[39]**—§ 77 (6a) Actions by—§ 77 (6aa) Jurisdiction.**—Receivers appointed by state courts can not sue in the courts of the United States, unless the jurisdiction of the latter courts is shown.[40]

§ 77 (6bb) Right of Action.—The receiver may sue the directors for negligence.[41] And he may also sue to recover funds misappropriated by its cashier from one receiving them with knowledge of the misappropriation,[42] or to set aside fraudulent transfers of the assets.[43] If a bank issues certificates of deposit to its stockholders without consideration, and thereafter

38. **Interest on purchase money.**—Where a creditor of an insolvent bank bid off property of the bank at an auction sale, and gave to the receiver of the bank a receipt, which stated an agreement that the amount of the bid should stand unpaid until a dividend should be declared, and should then be applied as an advance dividend to the creditor, of the date of the receipt, and that, for the amount not so applied, he should account to the receiver as for "so much money advanced by him to my use on this date," it was held that the receiver should recover interest upon the full amount of the receipt from its date, and not merely from the time that the dividend was declared. Gillet *v.* Van Rensselaer, 15 N. Y. 397.

39. **Actions by or against receiver.**—Action to have proceeds of collections declared a preferred claim, see post, "Holding Bank as Trustee," § 166 (1).

Collection and protection of assets, see ante, "Collection and Protection of Assets," § 77 (4).

Enforcement of liability of bank officers, see ante, "Actions and Proceedings to Enforce," § 58.

Enforcement of stockholder's liability, see ante, "Actions and Proceedings to Enforce," § 49.

Right to sue depending on plaintiff's title to character of receiver, see ante, "Appointment and Removal of Receiver," § 77 (1).

40. **Jurisdiction of federal courts.**—Where a receiver appointed under the Michigan statute for the dissolution of banking corporations brings an action in his own name in behalf of the bank in the federal court, he must show that the court would have jurisdiction as between the defendant and the bank. Bradford *v.* Jenks, Fed. Cas. No. 1,769, 2 McLean 130.

41. **Right of action by receivers.**—Burns Supp. 1897, § 2938, provides that where a bank is insolvent the auditor of state shall apply for a receiver. Burns' Rev. St. 1901, § 1242, empowers such receiver, under the control of the court, to take and keep possession of the property, collect debts in his own name, and generally to do such acts respecting the property as the court may authorize. A bank organized under the laws of the state became insolvent, and on the application of the auditor the court appointed plaintiff receiver, and he accepted the appointment, gave bond, and took the oath required. The order authorized him to take charge of and reduce to his possession all the bank's property, credits, etc., of every description, and to prosecute in his own name, as such receiver, all actions necessary in the discharge of his duties whenever he deemed proper. Held, that there was no defect of plaintiff's title to the character of receiver, so as to prevent him suing the directors of the bank for negligence. Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567.

42. Kitchens *v.* Teasdale Comm. Co., 105 Mo. App. 463, 79 S. W. 1177.

43. **Transfer of securities for worthless obligations.**—Sayle *v.* Guarantee Sav., etc., Co., 15-25 O. C. D. 503.

Criminal prosecution not prerequisite.—In order for receivers to maintain suits against the preferred creditors of an insolvent bank, it is not necessary as a condition precedent, that the president, directors or other officers consenting to such fraudulent transfers, should first be prosecuted. Hill *v.* Western, etc., R. Co., 86 Ga. 284, 12 S. E. Rep. 635.

goes into the hands of a receiver, the latter can maintain an action to recover payment on such certificates.[44]

§ 77 (6cc) In Whose Name Action to Be Brought.—As the legal title to the assets is in the bank a receiver in the absence of statute, must sue in the name of the bank to collect them but it is no objection to the action that the usee is not named because the debtor is protected by the judgment and the question of beneficial interest does not concern him.[45] But by statute in many jurisdictions a bank receiver is authorized to sue in his own name.[46] And in such case the proceedings should be so entitled.[47]

Suits by Successors of Original Receivers.—Though the rule at law is different, in equity, the successors of the receivers originally appointed may sue in their own names.[48]

44. State v. Bank, 65 Neb. 20, 90 N. W. 961, 91 N. W. 497.

A bank having a nominal capital of $25,000 and an indebtedness besides to the amount of about $14,000, its entire assets being only about $21,400, issued certificates of deposits for $12,500 to its several stockholders, and $12,500 of new capital stock to take up the former capital stock. Held, that the certificates of deposit were without consideration as against a receiver and creditors of the bank. State v. Bank, 90 N. W. 961, 65 Neb. 20, 91 N. W. 497.

45. In whose name action by receiver to be brought.—Chicago Fire Proofing Co. v. Park Nat. Bank, 44 Ill. App. 150; Burnap v. Cook, 32 Ill. 168; Bank v. Pahquioque Bank (U. S.), 14 Wall. 383, 20 L. Ed. 840.

Where a receiver for a bank has been appointed, the legal title to notes held by it remains in the bank, and the receiver may sue on the notes in the name of the bank. Chicago Fire Proofing Co. v. Park Nat. Bank, 44 Ill. App. 150, affirmed on another point 145 Ill. 481, 32 N. E. 534; S. C., 145 Ill. 487, 32 N. E. 536.

Action on note payable to bearer.—A receiver appointed under the Michigan statute for the dissolution of bank corporations can not sue as bearer in an action brought by him on a note payable to bearer, but must sue as assignee. Bradford v. Jenks, Fed. Cas. No. 1,769, 2 McLean 130.

Rule in New York.—The superintendent of banks, through whom the affairs of an insolvent bank in New York are liquidated, may sue at law in the name of the corporation to collect moneys due the bank. Union Bank v. Kanturk Realty Corp., 72 Misc. 96, 129 N. Y. S. 635, citing Lafayette Trust Co. v. Higginbotham, 136 App. Div. 747, 121 N. Y. S. 489.

In Connecticut bank receivers are authorized, "in the corporate name of the bank, or in their own names, as receivers, to commence and prosecute any suits in law or equity, and generally to do and perform all other acts, necessary and proper, in the execution of their trust. Stat., title 3, chap. 15." Eastern Bank v. Capron, 22 Conn. 639.

46. Receiver may sue in his own name.—Ueland v. Haugan, 70 Minn. 349, 73 N. W. 169; Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; De Wolf v. Sprague Mfg. Co., 11 R. I. 380.

Prior to the enactment of N. C. statute (Code, § 668) and the merging of the courts of law and the courts of equity into one tribunal, having jurisdiction of both legal and equitable rights, a receiver appointed by a court of equity, and holding the relation that plaintiff holds to the corporation, its assets, and its debtors and creditors, could not maintain in his own name a suit on a note due to the bank, and in his hands a receiver. Battle v. Davis, 66 N. C. 252; Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

47. Entitling the proceedings.—Where a receiver has been appointed in a suit by the bank commissioner, and the office of bank commissioner was abolished before the termination of the suit, an order to the master, to whom the claims of creditors had been referred, to proceed in the reference, was directed to be entitled as in the original suit, but the subsequent proceedings were to be entitled "In the Matter of the Receiver of" the bank against which the proceedings were instituted. In re City Bank (N. Y.), 10 Paige 378.

48. Suits by successors of original receiver.—A bond and mortgage exe-

§ 77 (6dd) Representative Capacity of Plaintiff.—The capacity in which the receiver sues must appear.[49]

§ 77 (6b) Actions against.—Action to Recover Deposits.—Where a receiver of a bank has been appointed at the instance of creditors, an action can not be maintained against him to recover a deposit; the remedy being by petition in the receivership action.[50]

§ 77 (6c) Defenses—§ 77 (6aa) In Actions by Receivers.—A defendant in a suit brought by the receiver of an insolvent bank may take advantage of any defense that might have been made if the suit had been brought by the corporation before its insolvency.[51] But where an act has been done in fraud of the rights of creditors of an insolvent bank, the receiver may sue for their benefit, even though the defense set up might be valid as against the corporation itself.[52]

cuted to the receivers of an insolvent bank may be sued upon in equity by their successors in their own names as equitable assignees of all their rights under the same. Iglehart *v.* Bierce, 36 Ill. 133.

49. Representative capacity of plaintiff.—In a suit by the receivers of a dissolved corporation, appointed by the Act of February 13, 1842, it was necessary that the receivers should show the capacity in which they prosecuted the suit. Miami Exporting Co. *v.* Gano, 13 O. 269.

Action on notes due bank.—Receivers are trustees for the creditors of the bank, and not for the bank; and their appointment and possession of notes due to the bank is an assignment of the notes for the benefit of all creditors; and the receivers may maintain an action in their proper names, as indorsers, without specifying their capacity as receivers, on a note belonging to the bank, and indorsed in blank. Haxton *v.* Bishop (N. Y.), 3 Wend. 13.

50. Action against receiver to recover deposit.—Crutchfield *v.* Hunter, 138 N. C. 54, 50 S. E. 557.

51. Defenses available in suit by receiver.—Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302.

Defense to suit on note by receiver.—Where the property and effects of a bank have passed into the hands of a receiver, the receiver has not the rights of a bona fide purchaser of notes held by the bank, but as to defenses he stands precisely in the original position of the bank. Bank *v.* Demmon (N. Y.), Talor's Supp. (Hill & Denio) 398.

Where notes are given a bank as an accommodation for the purpose of swelling its apparent assets, the defense of no consideration is good as against the receiver of the bank. Chicago, etc., Trust Co. *v.* Brady, 165 Mo. 197, 65 S. W. 303.

An agreement by the officers of a bank holding notes of defendant to accept from a corporation satisfactory securities in substitution for such notes constitutes no defense to an action on the notes by a receiver for the bank, where no substitute securities were presented by the corporation prior to the bank's failure. Fowler *v.* Peet, 170 Fed. 620.

Defendants, in a judgment by confession, alleged as ground for opening it that they were induced to execute the note with the understanding on the part of the bank owning it that it would not be enforced, but would be used as an asset to enable it to continue business, and that it would relieve the maker of the note on collection of certain outstanding obligations. Held, that such a defense would not prevail as against the receiver of the bank on its subsequent insolvency. People's Bank *v.* Stroud, 223 Pa. 33, 72 Atl. 341.

52. In an action on a note by the receiver of an insolvent bank, an affidavit of defense alleging that defendant made and delivered the note to the bank as part of a scheme to deceive the bank examiner, upon the bank's promise that defendant would not be held liable thereon, is insufficient. Lyons *v.* Benney, 230 Pa. 117, 79 Atl. 350.

In an action by a receiver against a bank officer to recover assets misappropriated by him, he can not set up the defense that no one was injured by his act.[53] Nor is the negligence or gross neglect of a bank director any defense to an action by a receiver to recover funds misappropriated by the cashier from one receiving them with knowledge of the misappropriation.[54]

§ 77 (6bb) In Actions against Receivers.—Usury.—In some jurisdictions a receiver is forbidden by statute to set up the defense of usury.[55]

Statute of Limitations.—Where a court undertakes to wind up the affairs of a bank through a receiver, the statute of limitations against ordinary actions does not apply, and lapse of time before proceeding against funds in the receiver's hands is important only as indicating laches or unreasonable delay.[56] And a receiver of a bank is estopped to set up the statute of limitations against the beneficiaries of the trust fund.[57]

§ 77 (6d) Set-Offs—§ 77 (6aa) Set-Offs by Receivers.—Claims that are mutual and due from the same person in the same capacity may be set off by the receiver.[58]

53. Action by receiver for misappropriation for assets.—In an action brought by a receiver of a bank, appointed under Rev. St. c. 146, against the president of the bank, to recover the value of certain securities fraudulently appropriated by him to his own use, it can not be objected that it is not shown that some bill holder, depositor, or other creditor, or some stockholder, has been injured by the defendant's act, or that the parties, the bank and the defendant are in pari delicto, or that certain shares given by the defendant in consideration of the securities have not been tendered to him. Hayes *v.* Kenyon, 7 R. I. 136.

54. The fact that directors of a bank were culpably negligent in the supervision of the bank's business, and permitted the cashier to have exclusive management of its affairs, is no defense to an action by the receivers of the bank to recover from a commission company funds of the bank transmitted to such company by draft on its correspondent, over the cashier's official title, to be used in the cashier's private speculation. Kitchens *v.* Teasdale Comm. Co., 105 Mo. App. 463, 79 S. W. 1177.

55. Right of receiver to set up usury.—No receiver of any free banking association, since the Act of 1850, can plead, or set up, or prove, or in any manner "interpose," the defense of usury; and the act, being in the nature of a repeal of penalties and forfeitures, and containing no reservation, express or implied, operates as well on existing as subsequent suits, extinguishing, not only the right of pleading such defense thereafter, but of urging or maintaining the plea, although previously put in, if not already allowed and established. Curtis *v.* Leavitt (N. Y.), 17 Barb. 309.

56. Right of receiver to set up limitations.—State *v.* State Bank, 84 Kan. 366, 114 Pac. 381.

57. Effect of adverse possession by trustee or receiver.—The statutes vesting title to personal property in the adverse holder thereof in three years, and to such holder of realty in seven years, can have no application to this case; besides, it is held, that the trustee, having failed to execute the required bond, was appointed a receiver of the court, and, as such, held the assets of the bank for the benefit of those to whom the court might award them, and he is, therefore, estopped from setting up the statute of limitations, either for himself or any persons other than those ultimately entitled. State *v.* Bank, 64 Tenn. (5 Baxt.) 101.

58. Set-offs by receiver.—A receiver of an insolvent bank has no right to set off a claim due from the bank to one member of a firm in his individual capacity against a debt of the firm to the bank. In such case the claims are not mutual, nor due it from the same persons in the same capacity, and hence the right of set-off does not

§ 77 (6bb) Set-Offs against Receivers.—In General.—A receiver takes choses in action of a bank in the same plight in which they existed at the time of the filing of the proceedings under which he was appointed, and subject to all set-offs which might have been pleaded thereto in a suit by the bank itself.[59]

exist. In re Van Allen (N. Y.), 37 Barb. 225.

Bill of exchange as set-off.—A bank discounted a bill of exchange, passed the amount to the drawer's credit, and soon after failed. Acceptance was stopped, and his claim against the bank assigned by the drawer. Meanwhile the bill came into the possession of a second bank, which had a lien thereon for general balance. The receiver of the insolvent bank satisfied this lien, took up the bill, and canceled the credit given. In an action by the assignees of the claim against the receiver, no notice of the assignment having been given, he was held to be entitled to avail himself of the draft as a set-off, although it was not in the possession or control of the bank when the assignment was made. Robinson *v.* Howes, 20 N. Y. 84.

Action for conversion of deposits.—In an action against a bank and its officers and receivers for the conversion of a special deposit, a set-off will be allowed for the payment of part of the deposit by an agent bank in a foreign country, also in the hands of a receiver, to which the deposit had been transferred. El Paso Nat. Bank *v.* Fuchs (Tex. Civ. App.), 34 S. W. 203.

Debts of a partner and his firm to a bank can not be set off by a receiver of the bank against trust moneys which the partner, after the debts were contracted, mingled with the firm deposits, without the bank's knowledge and the whole amount of which remained in the bank until it failed. Knight *v.* Fisher, 58 Fed. 991, affirmed in 9 C. C. A. 582, 61 Fed. 491.

59. Set-offs against receiver.—Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111, opinion of Lamar, J., now of the federal supreme court.

The right to a set-off against the receiver of a bank is to be governed by the state of things existing at the moment of insolvency, and not by conditions thereafter created. Yardley *v.* Philler, 167 U. S. 344, 42 L. Ed. 192, 17 S. Ct. 835, reversing decree Philler *v.* Yardley, 10 C. C. A. 562, 62 Fed. 645, 25 L. R. A. 824.

Claimant bank, having received a New York draft from the M. bank in settlement of a clearance, on June 6, 1905, forwarded the same for collection. On the 9th a preliminary clearance showed the M. bank indebted to claimant for a clearance balance for that day of $1,462. A duebill was given for this amount, but later in the day the M. Bank returned claimant's checks, surrendered on the preliminary clearance, because of an assignment for the benefit of its creditors, whereupon claimant executed to the M. Bank's assignee a credit slip for $964.59, to which such items amounted, before it was advised of the protest of the draft given on the 6th. Held, that claimant was entitled to have such credit set off against its claim on the draft as against the M. Bank's receiver, under the rule that a receiver occupies no better position than the insolvent, and takes the latter's property subject to the same equities as existed at the time of his appointment. Citizens' Bank *v.* Kretschmar, 91 Miss. 608, 44 So. 930.

Where a depositor is sued by the temporary receiver of a bank on a note payable thereto, set-off to the amount of his deposit may be allowed defendant, on application to the court. Sickels *v.* Herold, 15 Misc. Rep. 116, 36 N. Y. S. 488; People *v.* St. Nicholas Bank, 76 Hun 522, 28 N. Y. S. 114, 58 N. Y. St. Rep. 843.

Allowing set-off against debts due bank.—Under an order of the court directing the receiver of a bank "to allow parties indebted to said bank, where their promissory notes or other evidences of indebtedness are held by said bank, to set off and credit upon such evidences of indebtedness whatever sums may be to the credit of said parties upon the books of said bank at the date of the closing thereof," he will act at his peril as to the real existence and rightfulness of any demand he may allow as a set-off. State *v.* Brobston, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138.

When bank A failed it was carrying on its books an indebtedness against bank C for an overdraft, and at the same time, bank A owed the trustee of bank C, which had failed

But unaccepted or unpresented checks can not be used as set-offs or counterclaims in actions by receivers of insolvent banks.[60] And the fact that the bank has failed and closed its doors before the holder has an opportunity to present the check for acceptance and payment is of no consequence and does not relieve the situation for the defendant.[61] Claims against or liabilities of a bank obtained after insolvency can not be set off by the holder thereof against demands of the bank.[62] And since the appointment of receivers of a bank that has failed, constitutes them trustees, not for the bank, but for its creditors, it is held that in a suit brought by them in their names, upon a negotiable promissory note, against the maker, which note became payable, after the failure of the bank and the appointment of the receivers, the defendant can not set off, against the note, the bills of

on a deposit by him as such trustee, the sum of $2,440.30. It was held, that this debt which the trustee holds against the bank A is not the subject of set-off with the debt which the bank A holds against the bank C. The assets of the bank C had come to his hands charged with no right of offset in favor of bank A, but only with the duty of pro rata distribution to that bank, along with other creditors. If, subsequently, he changed that relation, so that, instead of paying the bank A only a pro rata, he, by the operation of the law of offsets, pays said bank in full to the detriment of other creditors, it is a matter affecting his personal responsibility. When he deposited the money in the bank A. it was not then subject to an offset in favor of that bank, and did not subsequently become so. Akin *v.* Williamson (Tenn.), 35 S. W. 569.

Right of executor to set-off deposit against his own note.—The maker of a promissory note held by the receiver of an insolvent bank has no right to set off a deposit in the bank standing in his name as executor. Stasel *v.* Daugherty, 7 N. P., N. S., 424, 19 O. D. N. P. 720.

Rule to compel allowance of set-off.—In proceedings to liquidate a bank under Act March 14, 1842, No. 98, which are to be conducted as in a voluntary surrender, a debtor can not by rule compel the commissioners to allow an offset against his obligation, and surrender the evidence of it. White *v.* Commissioners (La.), 4 Rob. 363.

60. Unaccepted checks as set-offs.—An unpresented and unaccepted check gives the holder no right against the bank upon which it is drawn, though the drawer have sufficient funds there to pay it, and hence, in an action by the receiver of an insolvent bank on a note, the defendant can not set up such a check as a valid counterclaim. Le Brenton *v.* Stanley Contracting Co., 15 Cal. App. 429, 114 Pac. 1028.

"To allow it would be to open the door to the commission of fraud on the great body of the creditors of the insolvent bank, and would practically defeat the great object of the insolvent law, which is the equal distribution of the assets of the insolvent company among the creditors. In every case where a bank failed, having a large number of both creditors and debtors, it would be the easiest matter in the world for a number of each class to collude together, and, by the former giving antedated checks to the latter, to absorb all the assets of the bank to the exclusion of the other creditors." Northern Trust Co. *v.* Rogers, 60 Minn. 208, 62 N. W. 273, 51 Am. St. Rep. 526.

61. Le Breton *v.* Stanley Contracting Co., 15 Cal. App. 429, 114 Pac. 1028.

62. Claims acquired after insolvency.—Where, between suspension by a bank and commencement of an action for and resulting in its dissolution and appointment of a receiver, one liable to it as indorser on notes takes assignments of deposit accounts, he may offset them against his liability, in an action by the receiver, unless it be shown that the bank was insolvent at the time of the assignment of the accounts; and this is not shown by the recital in an agreed statement of facts that, at the commencement of the action to dissolve, the bank "was insolvent, and having suspended its business" on a certain day. Higgins *v.* Worthington, 90 Hun 436, 35 N. Y. S. 815, 70 N. Y. St. Rep. 300.

the bank.[62]

Counterclaim.—In actions by receivers to collect debts due the bank all legal or equitable counterclaims against the corporation must be allowed.[64]

§ 77 (6e) Plea, Answer and Reply.—As a superintendent of banks under the New York statute is given power to collect the assets, he is by necessary implication vested with all the powers necessary to be exercised in the performance of his duties. Among these is the power to interpose a verified reply in an action brought by him in pursuance of his duty in liquidating the affairs of the bank.[65]

§ 77 (6f) Issues, Proof and Variance.—The well-settled general rule that the issues and proof must correspond applies strictly in actions by receivers to recover and collect the assets of the bank.[66]

§ 77 (6g) Parties.—In a suit by a bank receiver to set aside conveyances by the bank, all persons interested may be made parties and are entitled to be heard and may introduce evidence on that point, but the court can not decree for or against them.[67] The state treasurer is a proper party

62. **Set-off of bills of bank.**—Eastern Bank v. Capron, 22 Conn. 639; Haxton v. Bishop, 17 N. Y. 3 Wend. 13.

In an action brought in the name of an insolvent bank, by receivers appointed under the statute, against the indorser of a note, which was held as part of the assets of such bank, it was held that bills of the same bank could not be set off against the plaintiffs' demand although a portion of said bills were holden by the defendant, at the time of the failure of such bank, and when the note became due. Eastern Bank v. Capron, 22 Conn. 639.

64. **Counterclaims.**—Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

In an action on a note payable to a bank, brought by its receiver, evidence held not to sustain the maker's counterclaim based on a deposit at the time the bank passed into the hands of a receiver. Rhodes v. Guhman, 156 Mo. App. 344, 137 S. W. 88.

65. **Verified reply by receiver.**—Under Banking Law (Consol. Laws 1909, c. 21, § 19, providing for liquidation of the affairs of banks through the superintendent of banks who may appoint deputies to assist him therein, and giving him power to collect money due the bank, which he can do by action in the name of the bank, a verified counterclaim requiring a verified reply, being interposed, he or his deputy is vested with powers, as an agent of the bank, for verifying and interposing the reply. Union Bank v. Kanturk Realty Corp., 72 Misc. Rep. 96, 129 N. Y. S. 935.

66. **Conformity between pleadings and proof.**—In an action by the receiver of a bank to recover funds misappropriated by the cashier from one receiving them with knowledge of the misappropriation, where the answer was a general denial, and there was no application to amend, evidence of a secured note given by the cashier after the misappropriation, and of its acceptance by the bank directory in settlement, was properly excluded. Kitchens v. Teasdale Comm. Co., 165 Mo. App. 463, 79 S. W. 1177.

67. In a suit by the receiver of a bank whose charter has been forfeited, to set aside an assignment of effects made by that bank, for fraud, it is not possible to make it a party, it being extinct. Carey v. Giles, 10 Ga. 9.

Bill by receiver to set aside assignment—Parties.—In a bill filed by the receiver of a bank to set aside an assignment of certain notes, it is held that persons liable upon those notes, and who had been sued thereon by the assignee, and who were made parties defendant to the bill have an interest in the question of title to their notes, and upon the trial may introduce evidence, and be heard as to that question, but no decree can be rendered for or against them. Carey v. Giles, 10 Ga. 9.

defendant to a bill by the receiver of an insolvent bank to charge the bank fund.[68] But the bill in an action by the receiver of a bank against directors for losses occasioned by their wrongful acts need not include all of the directors who participated in any of such acts.[69]

§ 77 (6h) Evidence.—In actions by or against receivers of banks the same general rules apply with respect to the relevancy, competency and admissibility of evidence as obtain in other civil actions.[70]

§ 77 (6i) Judgment.—Operation and Effect of Judgment.—A judgment against a receiver of a bank operates only as an established claim against the assets of the bank held by him as receiver and it is error to direct execution to issue thereon.[71]

§ 77 (6j) Costs.—Right to and Liability for Costs.—If the receiver is cast in the suit the defendant is entitled to his costs payable out of the fund in the receiver's hands.[72]

68. **State treasurer.**—Danby Bank v. State Treasurer, 37 Vt. 541.

69. **Parties to actions against directors.**—Gaither v. Bauernschmidt, 108 Md. 1, 69 Atl. 425.

70. **Relevancy.**—Where, in an action by a corporation against a bank and its receiver to compel the payment of a certain claim, the question in issue was whether the transaction between the corporation and the bank was such that the relation of debtor and creditor existed, it was not error to sustain an objection to a question as to whether the corporation kept or authorized a general account with any bank outside of certain ones. McCormick Harvesting Mach. Co. v. Yankton Sav. Bank, 15 S. Dak. 196, 87 N. W. 974.

Record in chancery cause.—The bank of P. was ruined by the late war; and no officers of the bank have been elected nor has there been a meeting of the board since April, 1865, and it has done no business since, and in fact it had been abandoned and ceased to exist. In April, 1866, H. and M. suing as well for themselves as for all the other stockholders, creditors and depositors, etc., filed their bill against the bank and the president, for a settlement of its affairs and a distribution of its assets. The court appointed a receiver in the case, and in June, 1866, there was a decree for an account. Held, in an action by the receiver against a debtor of the bank, the record in the chancery cause is evidence for the plaintiff. Finney v. Bennett, 68 Va. (27 Gratt.) 365.

Banking customs.—In an action by the receiver of a bank to recover funds misappropriated by the cashier, from one receiving them with knowledge of the misappropriation, testimony of a banking expert that it was a general custom for bank cashiers to draw drafts on their own banks in payment of their own indebtedness was not admissible, where the drafts received by defendant were not drawn in that form, but were drawn on the bank's correspondent by the cashier over his official signature. Kitchens v. Teasdale Comm. Co., 105 Mo. App. 463, 79 S. W. 1177.

Presumptions.—On a showing that ever since complainant's wife deposited his money in a bank, without his knowledge or consent, the general funds of the bank have exceeded the amount of the deposit, he establishes a presumption that the money is still in the bank, as affecting his right to recover against the receiver thereof. Patek v. Patek, 166 Mich. 446, 131 N. W. 1101.

Where a bank, knowing its insolvency, receives from a customer, as cash, a check on a foreign bank, and sends the paper to its correspondent, who credits the check to it as cash, and subsequently pays the proceeds thereof to a receiver appointed for it in the meantime, it is presumed, in an action by the depositor against the receiver to recover the proceeds, that the correspondent credited the check to the bank before its failure. Friberg v. Cox, 97 Tenn. 550, 37 S. W. 253.

71. **Effect of judgment against receiver.**—Arnold v. Penn, 11 Tex. Civ. App. 325, 32 S. W. 353.

72. **Liability of receiver for costs.**—Where the receivers in insolvency of

Security for Costs.—Nonresidents desiring to come into receivership proceedings must give security for costs.[73]

§ 78. Assignments for Benefit of Creditors[74]—§ 78 (1) Right to Make.—Unless restrained by its charter or by express statute, an insolvent banking corporation may make an assignment for the benefit of creditors, as a natural person may do, by virtue of its general power to contract, acquire and transfer property.[75] In other words, the right of a

a bank proceeded in a suit at law commenced by the bank, and upon trial the plaintiffs were nonsuited, it was held that the defendant was entitled to all his costs out of the fund in the receiver's hands, down to the time of the nonsuit. Camp *v.* Niagara Bank (N. Y.), 2 Paige 283.

73. Security for costs by nonresidents.—Where nonresident stockholders of an insolvent bank moved to set aside a receiver's sale of its assets and for the appointment of a new receiver, it was error to deny the motion without prejudice to another application for the same relief, provided the moving parties within thirty days deposited $500 with the clerk to abide the orders of the court; the only protection the receiver was entitled to being security for costs as provided by Rev. Code Civ. Proc., § 433. Jackson *v.* First State Bank, 21 S. Dak. 484, 113 N. W. 876.

74. Representation of bank by officers in making, see post, "Rights and Liabilities of Stockholders in General," § 246.

Civil liability on insolvency, see post, "Civil Liability on Insolvency," § 82.

Presentation and payment of claims, see post, "Presentation and Payment of Claims," § 80.

Rights of persons making deposits after insolvency, see ante, "Rights of Persons Making Deposits after Insolvency," § 75.

75. Banks may assign assets for creditors.—Lenox *v.* Roberts (U. S.), 2 Wheat. 373; Pope *v.* Brandon (Ala.), 2 Stewart 401, 20 Am. Dec. 49; Catlin *v.* Eagle Bank, 6 Conn. 233; McCallie *v.* Walton, 37 Ga. 611, 95 Am. Dec. 369; Gresham *v.* Crossland, 59 Ga. 270; Seay *v.* Bank, 66 Ga. 609; Fouche *v.* Brower, 74 Ga. 251; Wright *v.* Rogers, 26 Ind. 218; State *v.* Bank (Md.), 6 Gill & J. 205, 26 Am. Dec. 561; Union Bank *v.* Ellicott (Md.), 6 Gill & J. 363; Town *v.* Bank (Mich.), 2 Doug. 530; Arthur *v.* Commercial, etc., Bank (Miss.), 9 Smedes & M. 394, 48 Am. Dec. 719; Grand Gulf R., etc., Co. *v.* State (Miss.), 10 Smedes & M. 428; Chew *v.* Ellingwood, 86 Mo. 260, 56 Am. Rep. 429; People *v.* Hudson Bank (N. Y.), 6 Cow. 217; Haxton *v.* Bishop (N. Y.), 3 Wend. 13; Commonwealth *v.* Bank (Pa.), 3 Watts & S. 205; Dana *v.* Bank, (Pa.), 5 Watts & S. 223; Dabney *v.* Bank, 3 S. C. 124; Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888; Farmers' Bank *v.* Willis, 7 W. Va. 31; Lamb *v.* Cecil, 25 W. Va. 288; Garden City Banking, etc., Co. *v.* Geilfuss, 86 Wis. 612, 57 N. W. 349.

Act 1840, declaring that no bank shall transfer any note, bill receivable, or other evidence of debt, does not take from a bank the right to make an assignment for the benefit of creditors. Montgomery *v.* Commercial Bank (Miss.), 1 Smedes & M. Ch. 632.

Right of insolvent bank to assign.—Rev. St. 1899, §§ 976, 1305, 1306, relative to the dissolution of corporations, declaring that it shall be unlawful for a bank or trust company to make a voluntary assignment, and that if it finds itself to be in a failing condition, it shall place itself in the hands of the secretary of state and defining the duties of that officer in case he shall believe that the capital stock of any banking corporation or individual banker is reduced by impairment below the amount required by law, etc., have no application to the settlement of the affairs of a banking corporation which is perfectly solvent at the time its existence terminates by the limitations of its charter. Clifford Banking Co. *v.* Donovan Comm. Co., 195 Mo. 262, 94 S. W. 527.

Sess. Laws 1835-36, p. 162, providing that, where a state bank has become insolvent, the bank commissioner shall proceed to wind up its affairs through a receiver appointed by a court of chancery, prescribes the exclusive mode by which such banks shall be dissolved and their effects administered, and hence a deed of assignment by an insolvent state bank

banking corporation to make such an assignment, if not expressly or impliedly forbidden by its charter or other positive law, must be regarded as clear and undoubted as that of a natural person.[76]

§ 78 (2) Involuntary Assignments.—By statute in some jurisdictions banks may be compelled by the proper authorities to make an assignment.[77]

§ 78 (3) Requisites and Validity—§ 78 (3a) Requisites—§ 78 (3aa) In General.—The deed of assignment must bear the corporate seal,[78] and be for a sufficient consideration.[79]

to a trustee for the benefit of its creditors is void. Bank Comm'rs *v.* Bank (Mich.), 1 Har. 106.

Rule in Alabama.—In the absence of authority by its charter, the president and directors of a banking corporation can not use its cash or credits, etc., for the purpose of effecting a settlement of the demands of its creditors; and an assignment by them of property of the bank to a third person for that purpose will not be valid, though the seal of the corporation be affixed. Gibson *v.* Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

76. Garden City Banking, etc., Co. *v.* Geilfuss, 86 Wis. 612, 57 N. W. 349.

The provision of 1 Rev. St., p. 791, that no assignment by any moneyed corporation giving preferences shall be valid, implies that an assignment without preference is valid. In re Bowery Bank (N. Y.), 5 Abb. Prac. 415, 16 How. Prac. 56.

77. Involuntary assignments.—"The state being the only stockholder, the legislature might direct the bank to make an assignment, and give any other direction not in conflict with the existing laws and the vested rights of others, as the stockholders of any other bank might do." State *v.* Bank, 64 Tenn. (5 Baxt.) 1.

Necessity for order of court.—Act 1850, § 27, relating to the assignment of insolvent banks, provides that, upon complaint of a creditor that the bank has refused to pay its liabilities in gold and silver coin, the court may, upon being satisfied of the truth of the complaint, compel the directors to make an assignment. Held, that an assignment by an insolvent bank, by the voluntary direction of its directors, was not void, on the ground that it was not made pursuant to an order of court, as such order could only have compelled the action which the directors voluntarily took. News *v.* Shackamaxon Bank (Pa.), 16 Wkly. Notes Cas. 207.

Effect of national bankrupt law.—Since Act April 16, 1850, providing that, where an insolvent state bank had failed to pay a depositor on demand, it might be compelled, by proceedings before a tribunal, to assign all its property for distribution among its creditors, was suspended by the national bankruptcy law, a deed of assignment made under the Act of 1850, after its suspension, was void. Shryock *v.* Bashore (Pa.), 11 Phila. 565, 33 Leg. Int. 56.

78. Seal of corporation.—Where a deed of assignment from a banking corporation has affixed to it the common seal of the corporation, and the signature of the proper officer is proved, courts are to presume, that the officer did not exceed his authority, and the seal itself is prima facie evidence, that it was affixed by proper authority. The contrary must be shown by the objecting party. Lamb *v.* Cecil, 25 W. Va. 288; Hopkins *v.* Gallatin Turnpike Co., 23 Tenn. (4 Humph.) 403.

79. Consideration.—Generally, a bank may convey or transfer its property in possession, or choses in action, either for a new consideration, or to satisfy or secure a pre-existing debt. When a bank is insolvent, or in danger of insolvency, the just principle of equality in part payment of creditors, alike entitled to satisfaction, suggests not only the legal right, but the moral duty of an assignment, or other measure, to secure and effect a ratable distribution of its assets among such creditors. When the assignment is to trustees to secure antecedent debts, these constitute a valuable consideration entirely adequate to sustain the assignment, which becomes completely effectual to protect the creditors against demands thereafter acquired

§ 78 (3bb) Execution of Assignment.—The assignment should also be actually executed by the directors of the bank[80] or by some other officer acting under authority from the board of directors,[81] but it is not necessary that the officer act under power of attorney; the affixing of the corporate seal to the instrument of assignment is prima facie evidence of authority and regularity.[82]

§ 78 (3cc) Assent of Stockholders.—And this assignment may be made without the authority or consent of the stockholders,[83] or at least with the assent of a bare majority.[84]

by any one. Farmers' Bank *v.* Willis, 7 W. Va. 31; Wickham *v.* Martin & Co., 54 Va. (13 Gratt.) 427; Evans *v.* Greenhow, 56 Va. (15 Gratt.), 153.

80. Execution of assignment.—Until the appointment of a receiver and the award of the injunction, the management of the affairs of a bank remains in the hands of the directors, and assignments by them in payment of the company's debt may be lawfully made. Planters' Bank *v.* Whittle, 78 Va. 737.

Assignment by majority of directors.—Where three of the seven directors of a bank were out of the state, inaccessible, and beyond the reach of any notice of a meeting of the board that would have been available at the time the bank became insolvent, and two of them afterwards ratified the acts of the other directors at such meeting, the fact that the directors were not notified under such circumstances is not sufficient to render void a deed of assignment authorized by a majority of the directors present at the meeting. National Bank *v.* Shumway, 49 Kan. 224, 30 Pac. 411.

81. Authority of officer to execute assignment.—Since the bank, as a corporation, acts through its governing body, the board of directors, unless otherwise provided by law, an assignment executed by the proper officers by authority of the directors is valid. Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

Assignments by bank officers after expiration of term.—A deed of assignment executed by certain officers of a bank after their term of office has expired, is valid where such officers were expressly authorized to make the assignment by the stockholders, they being for that purpose officers de facto if not de jure. Milliken *v.* Steiner, 56 Ga. 251; Gresham *v.* Crossland, 59 Ga. 270; Mechanics' Bank *v.* Heard, 37 Ga. 401.

82. Necessity for power of attorney.—Darnell *v.* Dickens, 12 Tenn. (4 Yerg.) 7; Union Bank *v.* United States Bank, 23 Tenn. (4 Humph.) 369; Hopkins *v.* Gallatin Turnpike Co., 23 Tenn. (4 Humph.), 403.

83. Necessity for assent of stockholders.—The president and directors of a bank have a right to assign for the payment of its debts, without the assent of the stockholders. Merrick *v.* Bank (Md.), 8 Gill 59.

The directors of a bank have the power to assign its property in trust for the payment of preferred creditors, without the authority or consent of the stockholders. Dana *v.* Bank (Pa.), 5 Watts & S. 223.

A bank chartered by act of assembly, not being a bank of issue, but of deposit, and therefore not subject to the provisions of the Banking Act of April 16, 1850, has power to make a general assignment for the benefit of creditors; and this power may be exercised by the board of directors, without obtaining the consent of a majority of the stockholders. In re Miners' Bank (Pa.), 13 Wkly. Notes Cas. 370.

84. An assignment by a bank, made by the directors with the assent of a majority of the stockholders, but without the knowledge of some stockholders, is valid. Town *v.* Bank (Mich.), 2 Doug. 530.

The consent of all the stockholders of a savings bank need not be first obtained to the bank's assignment for benefit of creditors, if such assignment is made in good faith. Descombes *v.* Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239.

But it has been held that a bank president can not make the assignment without consulting the directors or stockholders. Thus, after an insolvent bank was sued, its president, without consulting its directors or stockholders, executed, in its behalf, a conveyance for the benefit of creditors. Held, that this conveyance should be deemed made without au-

§ 78 (3dd) Acceptance of Trust by Assignee.—But an assignment for creditors, to be valid, must be assented to by the assignee.[85]

§ 78 (3b) Validity—§ 78 (3aa) In General.—An assignment of its assets by a bank with intent to hinder, delay or defraud creditors is fraudulent and void.[86] In some jurisdictions an assignment to an officer or stockholder, or an assignment to any person in contemplation of insolvency, is forbidden.[87] And an assignment by the directors of a bank to a trustee

thority, and that, in the absence of evidence of ratification, ratification could not be presumed. McKeag *v.* Collins, 87 Mo. 164.

85. Acceptance of assignment.—The Chattahoochee Railroad & Banking Company made an assignment, in 1841, to Van Leonard, W. P. Yonge, and John Bethune, of its effects, to collect and pay its debts. There is no evidence that Van Leonard ever accepted the trust. There is no proof that the other two did. In December, 1843, the legislature passed an act, in which it is recited that an assignment had been made by said railroad and banking company, to John Bethune, and confirming and making valid said assignment for all purposes, both in law and equity; and declaring that said assignee might sue and be sued in his said character of assignee for any demand due to and from said banking institution. Held, that said act is constitutional and valid, and that the subsequent renunciation by John Bethune, in December, 1844, of this legislative ratification of his appointment by the bank, does not discharge him from liability. Bethune *v.* Dougherty, 30 Ga. 770.

86. Fraudulent assignment by bank.—An assignment of assets of a bank, insolvent at the time, and about making a general assignment, and against which proceedings are pending to revoke its charter, made to a creditor cognizant of these things, and by collusion with him to defraud other creditors, is void, and the assets so assigned to him is a trust fund, to be applied to the payment of the debts of the corporation. Hightower *v.* Mustian, 8 Ga. 506.

But a trust deed is not fraudulent on its face because no time is specified for the sale of the property conveyed; and the trustee, a young man without property, and excused from bond, is authorized to rent until sale; and allowed to sell on credit in his discretion; and to compromise or arbitrate any matter of litigation; and to do all other proper and necessary acts as fully as could the grantor; and the amount of the preferred debts is not specified. Swepson *v.* Exchange, etc., Bank, 77 Tenn. (9 Lea) 713.

Allowing trustee to sell or pledge assets.—A clause, in an assignment by a bank for the benefit of its creditors, permitted the trustees "to sell or pledge any of the property or effects conveyed, including the notes of the bank, in case any pressing emergency not otherwise provided for should render it necessary to so employ said bank notes." Held that, since the provision was not in itself an improper appropriation of the assets, it did not vitiate the assignment, or render it fraudulent in law, though it might lead to such a result. Montgomery *v.* Galbraith (Miss.), 11 Smedes & M. 555.

87. Assignments in contemplation of insolvency.—Armstrong *v.* Grannis, 4 O. Dec. 54, Cleve. L. Rec. 71; Appeal of Scranton Trust Co. (Pa.), 4 Walk. 208, (assignment to president).

An assignment for the benefit of creditors, made by a bank incorporated under the Ohio general banking law of 1845, is not void, although made in contemplation of general insolvency, if it is not made in contemplation of suspending specie payments on its circulating notes. Armstrong *v.* Grannis, 4 O. Dec. 54, Cleve. L. Rec. 71.

An assignment of its property by a bank, after it had stopped paying to persons other than officers or stockholders, in trust for the benefit of creditors, is valid, and not prohibited by the act to prevent fraudulent bankruptcy; 7 St., p. 540a, § 6, prohibiting an assignment of any property to an officer or stockholder of a corporation for the payment of any debt, and assignment to any person in contemplation of insolvency. Haxton *v.* Bishop (N. Y.), 3 Wend. 13.

Assignment by director to pay individual debt.—Objection that assignments of assets made by the directors of a bank to pay debts for which they are individually bound, are void, under Va. Code, 1873, ch. 57, § 18, which provides that "No member of the board

for the benefit of creditors, with a view to evade the statute prescribing the mode in which the affairs of banking associations established under the general law shall be wound up in case of insolvency, is void, as being against the policy of the law.[88] But the fact that a private banking firm may have violated their fiduciary relations to a national bank, of which they were also officers, or have not done their duty by their own depositors, does not in itself render an assignment by them for the benefit of creditors, fraudulent.[89] Nor is an assignment for creditors by a bank invalid because it contains an express reservation of the surplus, after payment of the debts specified,[90] or because the amount of effects assigned is larger than would be reasonably sufficient to pay the debts,[91] or because it is made to avoid the consequences of pending, hostile legislation.[92] Nor is the assignment invalid for want of the vote of the stockholders therefor.[93]

By statute in Ohio if any banking institution makes an assignment with intent to prevent or hinder such institution from being closed up by the bank commissioner, such bank commissioner may take possession of, collect and distribute the assets, as if no such assignment had been made.[94]

shall vote on a question in which he is interested, otherwise than as a stockholder," must be made in the court below, and can not be raised for the first time in an appellate court. Planters' Bank *v.* Whittle, 78 Va. 737.

88. Bank Comm'rs *v.* Bank (Mich.), 1 Har. 106.

89. Where the members of a private banking firm who controlled the management of a national bank, being heavily indebted to the bank and also to their depositors, made a general assignment of all their property to secure their creditors in classes, and it is said that they indulged in wild speculations in real and personal estate, stocks, bonds, mines, railroads, etc.; that applies as well to the squandering of the seven hundred thousand dollars and upwards of deposits with them as a banking firm, as it does to the money that they absorbed from the bank; and in any view, the violation of their fiduciary relations to the bank, of which they were officers, or their treatment of the depositors in the banking firm of which they were members, does not render the assignment of all their property for the benefit of their creditors therefore fraudulent. Peters *v.* Bain, 133 U. S. 670, 33 L. Ed. 696, 10 S. Ct. 354.

90. Dana *v.* Bank, 5 Watts & S. (Pa.), 223.

Validity of reservations in assignment.—An assignment made by an insolvent bank to pay an existing debt to a creditor, is not void in law by the general law, or under the act of 1818, because there is a stipulation that the excess shall be returned to the bank. Such a transfer is valid in law, per se. The excess in this case, is not even a badge of fraud in fact, but a reasonable allowance to cover bad debts and the expense of collection, and the stipulation that the excess shall be returned upon the face of this assignment to the bank, does not create such a trust as is condemned by the act of 1818. Carey *v.* Giles, 10 Ga. 9.

91. Carey *v.* Giles, 10 Ga. 9.

92. After an act had passed both houses of the legislature, and while it was before the governor for his approval, compelling all assignees of the Bank of the United States to accept its notes in payment of debts assigned, the bank made an assignment for the benefit of certain preferred creditors. Other creditors claimed that the assignment was hurried in order to evade the act, and should therefore be held to be void. Held, that such objection was no ground for defeating the assignment. Dana *v.* Bank, 5 Watts & S. (Pa.) 223.

93. A general assignment by a bank for benefit of creditors executed by proper officers by resolution of the directors is not governed by Rev. St., § 1524 (19 St. at Large, p. 543), providing for a corporation's securing debts by mortgage by vote of the stockholders. Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

94. Right of assignee who was maker of note to sue surety.—In 1842,

§ 78 (3bb) Preferences.—At common law and in the absence of restrictions in its charter a bank in failing circumstances may make an assignment for creditors preferring some over others, provided there is no fraudulent intent; the insolvency of the bank at the time of such assignment does not impair its power to assign for the benefit of preferred creditors.[95] But preferences by insolvent debtors have never been favored; accordingly in most jurisdictions there are statutes forbidding preferences among creditors of the bank and providing that assignments infringing these statutes are invalid or void,[96] and in some states the statutes even make it a crime for

the Bank of Hamilton assigned all its effects to three trustees, McC., M. and C., among which was a joint and several note of McC. & J. as principals, and R. as surety, for $900. After its maturity, the makers gave a new note of like character, and, by way of renewal, to assignees, at ninety days. The last note was not paid at maturity, and was retained by the assignees for several years, during which period the principals became insolvent. The assignees then transferred it to F., for collection merely. F. brought suit thereon against R., and it was held that an action might be maintained on said note, in the names of the assignees, against R., although one of them was also a maker of the note, there being no such suspension of a right of action upon the note in the hands of the assignees as authorizes the court to hold the note assets in the hands of the trustees, or either of them. Rossman *v.* McFarland, 9 O. St. 369.

Under the bank Acts of 1839 and 1840, providing that no bank shall make assignments in favor of their creditors, and authorizing the commissioners to take possession of all the assets in insolvency, an assignment by a bank for the benefit of its creditors is not wholly void, but only void in so far as it conflicts with the action of the commissioners. Rossman *v.* McFarland, 9 O. St. 369.

95. Validity of preferences by bank.—Peters *v.* Bain, 133 U. S. 670, 33 L. Ed. 696, 10 S. Ct. 354; Catlin *v.* Eagle Bank, 6 Conn. 233; Dana *v.* Bank, 5 Watts & S. (Pa.) 223; Planters' Bank *v.* Whittle, 78 Va. 737.

Though the assets of an insolvent bank are a trust fund for creditors to the extent that they can not be diverted from the creditors, yet no definite trust attaches in favor of any one creditor to the exclusion of others, so as to prevent the bank preferring some of its creditors. Arthur *v.* Commercial, etc., Bank (Miss.), 9 Smedes & M. 394, 48 Am Dec. 719.

The Real-Estate Bank, in making its assignment for creditors, might well prefer those holders of its notes who were willing to come forward and deposit them, and accept certificates, with 6 per cent interest; but it could not compel any creditor, who chose to run the risk of a failure of assets by payment of lawfully preferred creditors, to forego any part of his claim or demand against the assets of the bank. He might be postponed, but could not be deprived of any claim on the surplus assets. Ringo *v.* Biscoe, 13 Ark. 563.

96. Preferences by banks not favored.—State *v.* Bank, 64 Tenn. (5 Baxt.) 101; Robinson *v.* Gardiner, 59 Va. (18 Gratt.) 509; Exchange Bank *v.* Knox, 60 Va. (19 Gratt.) 739, reaffirmed in Saunders *v.* White, 61 Va. (20 Gratt.) 327; Bank *v.* Marshall, 66 Va. (25 Gratt.) 378; Garden City Banking, etc., Co. *v.* Geilfuss, 86 Wis. 612, 57 N. W. 349. See Peters *v.* Bain, 133 U. S. 670, 33 L. Ed. 696, 10 S. Ct. 354.

"Generally, a bank may convey or transfer its property in possession, or choses in action, either for a new consideration, or to satisfy or secure a pre-existing debt. When a bank is insolvent, or in danger of insolvency, the just principle of equality in part payment of creditors, alike entitled to satisfaction, suggests not only the legal right, but the moral duty of an assignment, or other measure, to secure and effect a ratable distribution of its assets among such creditors. When the assignment is to trustees to secure antecedent debts, these constitute a valuable consideration entirely adequate to sustain the assignment, which becomes completely effectual to protect the creditors against demands thereafter acquired by any one. Wickham *v.* Martin & Co., 54 Va. (13 Gratt.) 427; Evans *v.* Greenhow, 56 Va. (15 Gratt.) 153." Farmers' Bank *v.* Willis, 7 W. Va. 31.

Set-Off against stockholder's statutory liability.—Since the statute creat-

banks to prefer its creditors.[97] However, the fact that a preference is given to some creditors over others does not affect the assignee's title.[98] Nor does the mere fact that the preferred creditor is a director of the bank render the transaction fraudulent, though in such case they must act in the utmost good faith.[99] Nor can a bank by making an assignment prevent such preference amongst its creditors as the law gives.[1]

§ 78 (4) Operation and Effect of Assignment—§ 78 (4a) In General.—An assignment by a bank for the benefit of its creditors will not have the effect of discharging it from an obligation once assumed by its own act.[2] But the drawee of a draft may refuse to pay it upon learning of the insolvency of and assignment by the drawer bank.[3]

ing a stockholder's statutory liability thereby creates a fund for distribution among all the creditors, to allow a stockholder in an insolvent bank to set-off his claims against the bank against his statutory liability would give him a preference. Parker *v.* Carolina Sav. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

97. **Preferences by banks a crime.**—Curtis *v.* Leavitt (N. Y.), 17 Barb. 309.

98. **Preference of school fund.**—Act Feb. 16, 1866, ordered the president and directors of the Bank of Tennessee to make an assignment for the benefit of the school fund and of all creditors of the bank whose claims arose before May 6, 1861, "excluding all claims or demands of all kinds after May 6, 1861, as absolutely null and void." Held, in an action in the name of the state and the assignee to effectuate such assignment, pursuant to such statute, that though such statute and the assignment were void, so far as a preference of the school fund was concerned, the statute vesting title to personal property in the adverse holder in three, and to real estate in seven years, did not apply to the title of the assignee of the assets of such bank. State *v.* Bank, 64 Tenn. (5 Baxt.) 101.

99. Buell *v.* Buckingham & Co., 16 Iowa 284, 85 Am. Dec. 516; Stratton *v.* Allen (N. J.), 1 C. E. Green 232; Railroad *v.* Clayborn (S. C.), 1 Speers 562; Planters' Bank *v.* Whittle, 78 Va. 737.

Preferences to directors.—When a director of a bank, who is also a depositor, has knowledge that the bank is probably insolvent and will likely be unable to continue its business or pay its depositors, in order to avoid the loss of his deposits, obtains from the cashier, without authority from the board of directors, discounted bills and notes of the bank equal to the amount of his deposits, the transaction will be held invalid and the assignee of the bank may recover the amount of said bills and notes from him. Lamb *v.* Cecil, 28 W. Va. 653, approved in Lamb *v.* Pannell, 28 W. Va. 663.

1. Fouche *v.* Brower, 74 Ga. 251.

2. **Operation and effect of assignment—Effect on pre-existing obligations.**—By the charter of the Bank of the United States (Laws 1835, p. 36) it obligated itself to pay to the state of Pennsylvania an annual bonus of $100,000 for twenty years. In 1841 the bank became insolvent, and executed three assignments for the benefit of its creditors. It continued its existence, however, electing officers and directors annually thereafter, but exercised no further banking privileges except those necessary to close its business. Held that, since the failure of the bank was due to no act of the state, its nonuser of its corporate privileges for which it had obligated itself to pay was no defense to an action by the state to recover the unpaid balance of the bonus. Bank *v.* Commonwealth, 17 Pa. 400.

3. **Checks drawn by assignor may be refused.**—Where a depositor bank makes a draft on a bank in which it has funds to its credit, and afterwards makes a general assignment for the benefit of creditors, and the holder of such draft presents the same to the drawee for payment after such assignment is made, and payment is refused, he can not maintain an action against the drawee, although at the time the draft was presented for payment the drawee did not know of the assignment, but learned of such assignment before making payment, and by reason of such knowledge refused payment. Guthrie Nat. Bank *v.* Gill, 6 Okl. 560, 54 Pac. 434.

§ 78 (4b) What Passes by Assignment.—In determining what an assignment includes, the intention of the assignors must be ascertained.[4] But the rule is well settled that under a general assignment by a bank, all its property capable of assignment will pass to the assignee.[5] And if the deed of assignment by the bank does not refer to the schedule of assets accompanying it, it will not be limited in its operation to the assets embraced in the schedule, but transfers all assets which come within its terms.[6] But trust property is not included in the assignment.[7]

4. **What passes by assignment—"Post notes."**—The Bank of the United States made an assignment to pay depositors and holders of notes of the bank of the ordinary kind, payable on demand, and "commonly used in circulation," and also holders of notes of the bank commonly called "post notes" (other than post notes issued to banks in P., for which security had been given), and to provide security for the payment of said deposits, notes, and post notes, except post notes provided for as above. Held, that the post notes entitled to participate in the assignment were such notes as were designated as a "part of the circulating medium," and that notes of the bank under seal, which were issued for a loan to the bank and secured by the hypothecation of collaterals, and not designated as "part of the circulation of the bank," were not entitled to take under the assignment. Appeal of Hogg, 22 Pa. 479.

5. **Money deposited with a private banker** to secure him from liability on a bond, and mingled by him with the other funds of the bank, with the knowledge of the depositor, passes to the banker's assignee, under a general assignment. Mutual Acci. Ass'n *v.* Jacobs, 141 Ill. 261, 31 N. E. 414, 33 Am. St. Rep. 302, 16 L. R. A. 516.

Money of correspondent bank.—A county bank requested its Kansas City correspondent to remit to its New York correspondent $5,000 for its account and credit, and, the New York bank being also the correspondent of the Kansas City bank, the latter accordingly drew an order on the New York bank to "pay to the order of credit the [country bank] $5,000," which it sent by mail, accompanied by a letter saying, "Please find inclosed for the credit of [the country bank] $5,000." Before the order and letter reached New York, the Kansas City bank had made an assignment, and the assignee had notified the New York bank thereof. Held, that the order operated to transfer the amount called for to the country bank, and that, therefore, the assignee was entitled to the fund attempted to be drawn on. Coates *v.* First Nat. Bank, 91 N. Y. 20.

Deposits marked "private."—Money, made up by a banking firm in a package, and marked "Private," with the name of a general depositor thereon, previous to an assignment for the benefit of creditors, who, on making the assignment, asked the assignee to give the package to the depositor, who knew nothing of these facts till afterwards, was covered by the assignment. Coots *v.* McConnell, 39 Mich. 742.

A banking firm, just before it had determined on assigning, marked a package of money with the name of a general depositor and the word "Private." The money did not amount to the depositor's full credit. On making the assignment the firm asked the assignee to give said package to the depositor, who knew nothing of these facts till afterwards. Held, that the money was not thereby delivered, and was covered by the assignment. Coots *v.* McConnell, 39 Mich. 742.

Liability of stockholders for unpaid stock.—An insolvent bank may, in its assignment for creditors, include as assets the liability of its stockholders for unpaid stock for which no call has been made. Eppright *v.* Nickerson, 78 Mo. 482.

Liabilities of officers to a bank for official misconduct pass to an assignee for the benefit of creditors by a general assignment of its property for that purpose. Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

6. Eppright *v.* Nickerson, 78 Mo. 482.

7. An assignment of the property and effects of a bank to a trustee appointed under the Mississippi statute of 1843, relating to the dissolution of banks, vests in the trustee the legal title to such property only of which the bank had the beneficial interest. Nevitt *v.* Bank (Miss.), 6 Smedes & M. 513; Commercial Bank *v.* Chambers (Miss.), 8 Smedes & M. 9; Grand Gulf

§ 78 (5) The Assignee or Trustee—§ 78 (5a) Relation of Trustee to Bank and Creditors.—The grantees in a deed of assignment by a bank are not trustees for the bank but for the creditors.[8]

§ 78 (5b) Necessity of Assignee.—If an assignment by a bank was valid when made, it will not fail for the want of an assignee; but the court, in vacation or term time, is authorized to appoint a receiver, who shall execute the assignment. When appointed, he has all the rights, privileges and powers of the assignee, but none others.[9]

§ 78 (5c) Selection or Appointment.—Manner of Selecting.—In some jurisdictions, the stockholders of a bank which has made an assignment are entitled to select an assignee, subject to the approval of the court;[10] the creditors have no voice in the matter.[11]

R. & B. Co. *v.* State (Miss.), 10 Smedes & M. 428; Bacon *v.* Cohea (Miss.), 12 Smedes & M. 516.

Trust funds do not pass to assignee.—A banking firm issued its cashier's check to its creditor, who received it upon the assumption that it would be paid by a certain bank pursuant to an arrangement between such firm and that bank, whereby such checks were to be paid through the clearing house. After the check had been deposited, and had passed through the clearing house, the firm gave securities to the bank for the payment of this class of obligations. Said firm then made an assignment for the benefit of creditors. Held, that by such deposit the securities became a trust fund for the benefit of the holder of the check, and that, therefore, they did not pass to the firm's assignee. Watts *v.* Shipman (N. Y.), 21 Hun 598.

8. Grantees in deeds trustees for creditors, not bank.—Where a bank in conformity with the Act of February 12, 1866, entitled "An act requiring banks of the commonwealth to go into liquidation," executed its deed of assignment, it ceased to exist for the purposes for which it was created. A resumption of its operations as a bank was simply impossible. The stockholders had no longer any interest in it. It only remained to wind them up for the benefit of the creditors. Therefore, the grantees in such deeds were not trustees for the bank, but for the creditors only, and are purchasers and assignees for value of all the property and effects of the bank, for the benefit of the creditors. Robinson *v.* Gardiner, 59 Va. (18 Gratt.) 509; Exchange Bank *v.* Knox, 60 Va. (19 Gratt.) 739; Saunders *v.* White, 61 Va. (20 Gratt.) 327; Bank *v.* Marshall, 66 Va. (25 Gratt.) 378; Farmers' Bank *v.* Willis, 7 W. Va. 31.

9. Necessity of assignee.—Fouche *v.* Brower, 74 Ga. 251.

10. Selection or appointment of assignee.—In re Union Banking Co. (Pa.), 12 Phila. 469, 34 Leg. Int. 230.

Where, under the law, the appointment of the assignees of a bank is subject to the approval of the court, it will not grant the application of one that he be discharged and his associate approved, where he has already entered on his trust, and charges of misconduct have been made against him. Ex parte Banking Co., 34 Leg. Int. 204.

11. Creditors may not select assignee.—News *v.* Shackamaxon Bank (Pa.), 16 Wkly. Notes Cas. 207.

Under Act April 16, 1850, providing that, on the application of a creditor, the directors of an insolvent bank shall make and execute "a general assignment to such person or persons as they may select, subject to the approval of the court of common pleas," the creditors have no right to participate in the appointment of the assignees. News *v.* Shackamaxon Bank (Pa.), 16 Wkly. Notes Cas. 207.

Creditors may object to selection of assignee.—Under Act April 16, 1850, providing for a compulsory assignment by an insolvent bank to assignees selected by the directors subject to the approval of the court, the creditors have a sufficient standing in court to entitle them to object to the assignees selected by the directors, upon the ground of disqualification or personal unfitness for the office. News *v.* Shackamaxon Bank (Pa.), 16 Wkly. Notes Cas. 207.

Though the creditors have no voice in the selection of the assignees of a

§ 78 (5d) Qualifications of Assignee.—The assignee selected should be an unbiased and disinterested person.[12] But the selection as assignee of one of the parties bound on a joint and several obligation does not affect the right of action against the others.[13]

§ 78 (5e) Joint Assignees.—An assignment to several assignees jointly may provide for survivorship, so that one may act without joining the others.[14]

§ 78 (5f) Title and Rights, Powers and Duties of Assignee.—When an insolvent bank executes an assignment of "all and every of its property and effects and credits of each and every kind and character whatsoever, in as full and complete a manner as the same are now owned, held and possessed by it," and the assignees accept the trust, the title of the property passes to the assignees, and also the right to sue for and recover all rights, credits, etc.[15]

Conflicting Rights of Assignees and Others.—If a receiver is appointed by the court pending litigation over assignees improperly appointed, the receiver will be ordered to pay over money in his hands to such assignee, after the latter has qualified.[16] And if trustees are appointed after the bank has made an assignment, the rights of the assignee are paramount to that of the trustees.[17]

bank, under Act 1850, § 27, providing that the court may order the directors of an insolvent bank to make an assignment to such persons as they may select subject to the approval of the court, they may object to the assignees selected by the directors upon the ground of disqualification or personal unfitness for the office. News *v.* Shackamaxon Bank (Pa.), 16 Wkly. Notes Cas. 207.

12. Qualifications of assignee.—The fact that one appointed as an assignee of an insolvent bank is a small stockholder therein does not disqualify him to serve. News *v.* Shackamaxon Bank (Pa.), 16 Wkly. Notes Cas. 207.

13. Where one of the parties, liable on a joint and several note, becomes one of the general assignees of the bank to which the note is payable, the other parties are not thereby released from liability. Rossman *v.* McFarland, 9 O. St. 369.

14. Survivorship between joint assignees.—A bank was put in liquidation by St. 1843, and by St. 1845, a supplementary act, it was provided that all the effects of the bank should be transferred to four assignees. It was further provided that the real estate should be conveyed to all the assignees jointly, and that the personal effects thereof at S. and of the branch at L. should be assigned to A. and B., and of the other branches to other assignees. There was no requirement that this should be done jointly, with or without the right of survivorship. A note made by the plaintiff, payable to the bank at S., was assigned to A. and B. and the survivor. A. died. Held, that the assignment, with survivorship, was authorized by the act, though the act provided for the filling of vacancies; and therefore the fact that A.'s vacancy was not filled did not invalidate the assignment. Ryan *v.* Vanlandingham, 7 Ind. 416.

15. Title, rights and powers of assignee.—Hill *v.* Western, etc., R. Co., 86 Ga. 284, 12 S. E. 635.

16. Conflicts between rights of assignees and others.—In re Union Banking Co. (Pa.), 12 Phila. 469, 34 Leg. Int. 230.

Where the appointment of assignees by a bank is defective, and the court appoints a receiver, on a subsequent legal appointment and approval of assignees, the court will direct the receiver to turn the bank property over to such assignees. Ex parte Banking Co., 34 Leg. Int. 230.

17. Rights as between trustees and assignees.—Upon quo warranto to

Duties.—Under the law, it is the duty of the assignee to ascertain whether a claim presented for payment is legal. His failure to do so would render him liable to those injured by a neglect of duty in this respect.[18]

§ 78 (5g) Compensation of Assignee.—The trustees in an assignment by a bank may forfeit their compensation by misconduct.[19]

§ 78 (5h) Removal of Assignee.—If necessary the court may remove a delinquent assignee of a bank and appoint another.[20]

§ 78 (6) Rights and Remedies of Creditors—§ 78 (6a) Assets—§ 78 (6aa) What Constitutes.—Debts owing to a bank at the time of its insolvency constitute assets in the hands of the assignee.[21] And a note deposited for collection in a bank that afterwards becomes insolvent is not impressed with the character of a trust fund in the hands of the assignee, so as to enable the plaintiff to recover its value from the assignee.[22]

annul the charter of a bank that had made a partial assignment of its assets to pay its debts, trustees were appointed, to whom the bank was ordered to deliver all its property. Held, that the right of the assignees was paramount to that of the trustees, and that, therefore, the latter took only what did not pass by the assignment. Grand Gulf R., etc., Co. *v.* State (Miss.), 10 Smedes & M. 428.

18. Duties of assignee.—Kassler *v.* Kyle, 28 Colo. 374, 65 Pac. 34.

19. Right of assignees to compensation.—Where trustees, to whom have been assigned the assets and property of a banking corporation for the benefit of its creditors, etc., have been guilty of gross misconduct toward such creditors, refusing inspection of their books, taking no steps to collect or distribute the assets, neglecting for years to sue upon the stock notes, loaning the only funds actually collected to themselves and the stockholders, etc., such trustees are entitled to no compensation as against the note holders and creditors of the bank. Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

As between the trustees and stockholders, the former having carried out the settled policy and wishes of the latter with reference to the management of the trust property, and having consulted their interests to the exclusion of the interest of creditors, a different rule might apply, entitling them to compensation, did not a rule of public policy intervene, by which to prevent a collusion between corporations and their trustees detrimental to the ends of justice and good faith, trustees should be denied all compensation from any source, where, by misconduct and mala fides towards the public they have forfeited their claim to such compensation. Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

20. Removal of assignee.—Garden City Banking, etc., Co. *v.* Geilfuss, 86 Wis. 612, 616, 57 N. W. 349.

21. The debts due to the bank of Illinois after the assignment thereof to trustees for the benefit of creditors in pursuance of the statute of Illinois of 1845 had the same force in the hands of the assignees after the dissolution of the corporation as the rights and credits of deceased persons in the hands of their representatives. Ryan *v.* Vanlandingham, 7 Ind. 416.

22. When a bank to which a note is sent for collection, instead of collecting it, takes from the maker a new note, payable to itself, which note comes to the hands of the assignee for the creditors of the bank, the equitable owner of the note can not hold the assignee as trustee for him to its amount. Harrison Nat. Bank *v.* Ellicott, 31 Kan. 173, 1 Pac. 593.

Checks and drafts of correspondent bank do not pass.—The assignees of an insolvent banking firm, the surviving partner of which has made an assignment, can not hold as assets of the firm the proceeds of checks and drafts which were in the mails at the time of the death of the other partner one morning before the banking hours, and were received by the survivor the same day and paid by charging them against the accounts of the drawers, the proceeds being placed to the credit of the bank which sent them. First

§ 78 (6bb) Collection of Assets.—The assignee has a right to sue to collect assets of the bank[23] either in his own name[24] or in the name of the assignor, depending on the statute or rules of practice in the particular jurisdiction.[25] And if the assignee refuses to bring the suit the creditors may maintain it.[26] But the trustee should exhibit the deed with his pleadings.[27]

§ 78 (6cc) Limitation on Actions by Assignee.—The limitation on actions by the assignee of a bank is governed by statute in the various jurisdictions.[28]

Nat. Bank *v.* Payne, 85 Va. 890, 9 S. E. 153, 3 L. R. A. 284, citing Overseers *v.* Bank, 43 Va. (2 Gratt.) 544, 44 Am. Dec. 399.

23. Suit by assignee to collect claims.—Whatever claims a bank could collect by suit or action before an assignment may be so collected afterwards by the trustee in the deed of assignment. Lamb *v.* Cecil, 25 W. Va. 288; S. C., 28 W. Va. 653, approved in Lamb *v.* Pannell, 28 W. Va. 663.

The president of a bank, by the authority of the directors, given before the time limited for closing the concerns of the bank, assigned certain notes to trustees, to whom the property of the bank had been transferred by a vote, and for the benefit, of the stockholders. Held, that the assignment vested the legal interest in the trustees, who were, therefore, entitled to sue on such notes. Stevens *v.* Hill, 29 Me. 133.

Foreign assignee.—A statute passed by the Illinois legislature in 1845 provided that the real estate of the insolvent bank of Illinois should be conveyed to four assignees jointly, and that the personal effects of the branch of the bank at S. should be assigned to A and B, but did not require that it should be done jointly, with or without the right of the survivorship. Held, that B had a right to sue in this state on a note assigned to himself and A, whether he was clothed with the legal title or not. Ryan *v.* Vanlandingham, 7 Ind. 416.

Estoppel.—A trustee in an assignment for the creditors of an insolvent bank is not estopped from suing to recover the amount of discounted bills and notes fraudulently received from the cashier, without authority, by a director of the bank, by the fact that the trustee has paid such director dividends on the bank's indebtedness to him. Lamb *v.* Cecil, 25 W. Va. 288; S. C., 28 W. Va. 653, approved in Lamb *v.* Pannell, 28 W. Va. 600.

24. In Wisconsin all actions for the recovery of the assigned estate or any interest therein, or for the recovery of property conveyed or transferred in fraud of creditors, or the transfer or conveyance of which is void by reason of being preferential or otherwise, are required to be brought only in the name of the assignee. Garden City Banking, etc., Co. *v.* Geilfuss, 86 Wis. 612, 57 N. W. 349.

25. Suit in name of bank for trustees.—Stetson *v.* City Bank, 12 O. St. 577; Crews *v.* Farmers' Bank, 72 Va. (31 Gratt.) 348.

26. Setting aside confessed judgments.—A judgment taken by a banking partnership (whose capital stock is not divided into shares, and transferable on the books of the "concern") in its firm name upon a note with a power of attorney to confess judgment, and releasing all errors, after a change has taken place in its membership, and before the filing of a new certificate, is invalid, and may be set aside by the debtor or his assignee for the benefit of creditors; and where the latter refuses on request of the creditors to bring suit, the creditors, or any of them, may maintain an action to set it aside for the benefit of themselves and all other creditors of the debtor. Cobble *v.* Farmers' Bank, 63 O. St. 528, 59 N. E. 221.

27. Admissibility of copy of deed.—Where a deed of assignment is made for the benefit of creditors by a banking corporation, a copy of such deed from the records of deeds of the county may be exhibited with the bill by the trustee with the same effect as if he had filed the original. Lamb *v.* Cecil, 25 W. Va. 288.

28. Limitation on actions by assignee.—The seventeenth section of the statute of Illinois of 1845, providing that the personal effects of the defunct bank of Illinois should be assigned by the bank to trustees for the benefit of creditors, was not designed to limit the assignees to sue within four years, nor was the Act of 1849

§ 78 (6b) Presentation, Proof and Payment of Claims—§ 78 (6aa) Presentation of Claims.—As a general rule, those creditors failing to present their claims to the assignee for special allowance, after the assignee has given notice to creditors of the time for the presentation and allowance of demands, are precluded from any benefit in the estate.[29]

§ 78 (6bb) Allowance of Claims.—A certificate of allowance by the assignee of a bank of the amount of a check on it does not merge or satisfy the check.[30]

§ 78 (6cc) Set-Off.—Set-Off against Assignee.—A depositor, in action by the assignee against him on a note, may set off against the note the amount of his deposit.[31] But to justify a set-off against an assignee for the benefit of creditors, there must be a present debt due at the date of the assignment. In this respect a surety stands on no better footing than any other creditor.[32]

Right to Apply Deposits to Debts Due Bank.—The assignees of a bank for the benefit of its creditors may apply a bank deposit to the payment of a debt due the bank by the depositor.[33] But if the assignee wishes to make this application of a deposit he should manifest such desire in a plead-

of that state "for the relief of the assignees" of said bank "and to extend the time for the liquidation of the affairs of said bank" designed to limit their right to sue to January 1, 1851. Ryan *v.* Vanlandingham, 7 Ind. 416.

Laches.—When a director of an insolvent banking corporation by fraud and collusion with the cashier of such institution receives from the cashier for his deposits, without the authority of the board of directors, discounted bills and notes, the property of said corporation, and suit is not brought therefor until nearly five years after such transaction, the doctrine of laches does not apply. Lamb *v.* Cecil, 25 W. Va. 288; S. C., 28 W. Va. 653, approved Lamb *v.* Pannell, 28 W. Va. 663.

29. Presentation of claims.—Section 21, assignment act of Kansas.

Owner of trust fund deposited is not "creditor."—If a trustee places the trust fund in a bank, and the bank, knowing its character, mingles it with its own funds, and, after using it in the payment of its debts, becomes insolvent, and assigns for the benefit of creditors, the beneficiary has a right to recover the trust fund from the assets of the bank in preference to its general creditors, although he fails to present his claim to the assignee for allowance. Myers *v.* Board, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263.

30. Allowance of claims.—Warrensburg Co-Op. Bldg. Ass'n *v.* Zoll, 83 Mo. 94.

31. Set-offs against assignees.—In an action by an assignee of an insolvent bank against an indorser on a note that did not fall due until after the assignment, the defendant may set off against the note the amount of his deposit in the bank at the time of the assignment. Arnold *v.* Niess (Pa.), 36 Leg. Int. 437.

32. The maker can not set off against a note to a bank, due when the bank made an assignment for creditors, the amount of his part payment after the assignment as cosurety of an account due by the bank to a depositor. Storts *v.* George, 150 Mo. 1, 51 S. W. 489.

A guarantor of a note by a bank can not set off against his own note to it, due at the time of its assignment for creditors, money paid as guarantor after the assignment. Storts *v.* George, 150 Mo. 1, 51 S. W. 489.

33. Right to apply deposits to pay debts.—Wallace *v.* Estill County Deposit Bank (Ky.), 116 S. W. 351.

The fact that the assignees paid out, in settlement of the bank, the assets in their hands did not affect the right to attach the deposit, since the assignees could not appropriate or apply the deposit to the payment of debts due by the bank. Wallace *v.* Estill County Deposit Bank (Ky.), 116 S. W. 351.

ing,[34] and if the assignee does not so apply it the deposit is liable to garnishment.[35]

§ 78 (6c) Distribution of Assets—§ 78 (6aa) In General.—The rule for the distribution of the assets of an insolvent bank, as prescribed in the assignment, is not changed or affected by the subsequent appointment of a receiver.[36]

§ 78 (6bb) Priorities.—In distributing the assets of the bank existing priorities will be recognized, but as to the other creditors of the bank who have no specific lien upon its property, they are placed upon the same footing and are entitled to share the assets ratably.[37]

§ 78 (6d) Actions by Creditors.—Right of Action.—Creditors of the bank may sue the assignee to obtain satisfaction of their claims out of the assets.[38] For example, creditors who have not accepted the assignment

34. Wallace *v.* Estill County Deposit Bank (Ky.), 116 S. W. 351.

35. Wallace *v.* Estill County Deposit Bank (Ky.), 116 S. W. 351.

36. Distribution of assets.—Garden City Banking, etc., Co. *v.* Geilfuss, 86 Wis. 612, 57 N. W. 349.

Payment by stockholders.—Where the stockholders of an insolvent bank that has made an assignment for the benefit of its creditors, voluntarily pay into the trust fund thus created the full amount of their double liability created by law, and such additions to such fund are distributed to and received by the creditors according to their right to participate in the benefits of such liability, it is thereby discharged. Killen *v.* State Bank, 106 Wis. 546, 82 N. W. 536.

37. Priorities.—Robinson *v.* Gardiner, 59 Ga. (18 Gratt.) 509.

A chartered bank may make a voluntary assignment for the benefit of its creditors, but neither the assignee nor the creditors whom he represents stand in any better situation than the assignor in respect to prior equitable liens. Seay *v.* Bank, 66 Ga. 609.

Right of depositors to priority.—A bank was placed in the hands of a receiver. Pending the receivership proceeding the bank filed a motion alleging that it was solvent and able to pay all of its creditors, set forth a scheme under which it claimed that it could be reorganized to the advantage of its creditors, and prayed that its assets be surrendered to it for this purpose. Certain of its creditors and depositors agreed in writing to the alleged reorganization scheme, and pledged themselves to aid in securing a dismissal of the receivership proceeding. The motion was granted and the assets of the bank turned over to it, upon which it proceeded to do business under a different name but under the old charter. The scheme failed, and the bank again made an assignment. Upon the petition of some of its creditors it was again placed in the hands of a receiver. Its assets are not sufficient to pay all of its creditors. Held, that, under the facts appearing in the record, in the distribution of such assets depositors who were not parties to the agreement and the application for a surrender of the assets under the first receivership are entitled to priority over those who were. Rumble *v.* Tyus, 123 Ga. 295, 51 S. E. 420.

38. Actions by creditors against assignee.—Depositors and creditors of a bank that has failed may, in an equitable proceeding against the assignee, seek satisfaction of their claims out of the assets, and also obtain a decree against the bank for the full amount of their debts. City Bank *v.* Crossland, 65 Ga. 734.

Bill of discovery against assignee.—Where a bill was filed by a judgment creditor of a bank against the assignee thereof, to account for the assets of the bank, which came into his hands as such assignee, it is held, that when the defendant has in his power the means of acquiring the information necessary to make the discovery called for, he is bound to make use of such means, whatever pains or trouble it may cost him. Green *v.* Carey, 12 Ga. 601.

may make the assignee a party to a suit to enforce the personal liability of stockholders.[39]

§ 78 (7) Proof of Assignment.—A person relying upon an assignment by a bank must prove it.[40] But the existence of the common seal to a deed of assignment by a bank is prima facie evidence that it was made bona fide to secure the payment of a just debt.[41]

§ 78 (8) Vacating and Setting Aside Assignment.—If the grounds are sufficient,[42] any party interested[43] in the method pointed out in the statute,[44] may vacate and set aside the assignment.

But pending a bill to set aside the assignment, the assignee, if solvent, will not be enjoined, at the instance of creditors, from controlling the assets.[45]

39. **Right to sue assignee.**—The creditors and stockholders of a bank will not be enjoined, at the instance of its general assignee, from instituting suit against him, the creditors not having accepted the assignment, nor reduced their demands to judgment against the bank, and they having a clear right to proceed in order to fix a personal liability on the stockholders, imposed by the charter, to which proceeding they may desire to make the assignee a party in order to reach the assets in his hands Gresham *v.* Crossland, 59 Ga. 270.

40. **Proof of assignment.**—Where the rights of a party plaintiff depend upon the facts that an assignment was made by a bank to the defendant, and that the defendant is the assignee, he must prove them, notwithstanding they are recited in a public act of the legislature. Dougherty *v.* Bethune, 7 Ga. 90.

Judicial knowledge of assignment.—The court while taking judicial notice of the Act of February 16, 1866, requiring the president and directors of the Bank of Tennessee to execute an assignment of its effects, could not judicially know that when this action was brought, in 1866, the assignment has been made, and Samuel Watson appointed trustee, and that he had accepted the trust, given the bond, and been duly qualified. Topp *v.* Watson, 59 Tenn. (12 Heisk.) 411.

41. **Import of seal.**—Hopkins *v.* Gallatin Turnpike Co., 23 Tenn. (4 Humph.) 403.

42. **Grounds for vacating assignment.**—An assignment was made by an insolvent bank of a portion of its effects to pay an existing debt, and it was stipulated that the amount of such effects in excess of the debt due should be returned to the bank. Held, in an action by the receiver of the bank whose charter had been forfeited to set aside such assignment, that it was competent to attack the assignment upon the ground of fraud in fact, and that any fact within the allegations in complainant's bill might be proven, which would go to show that the bank intended to perpetrate a fraud in making the assignment. Carey *v.* Giles, 10 Ga. 9.

43. **Who may set aside assignment.**—Any shareholder may bring an action to set aside an assignment for the benefit of creditors made by the directors of an insolvent bank as ultra vires Descombes *v.* Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239.

It is laches for a shareholder and creditor to delay bringing his suit to set aside the assignment for four years after the appointment of the assignee, during which he was engaged in administration, if no excuse is alleged. Descombes *v.* Wood, 91 Mo. 196, 4 S. W. 82, 60 Am. Rep. 239.

44. **Remedy for setting aside assignment.**—Code, § 1494, providing the method by which an assignment by a bank may be set aside at the instance of creditors, applies only to a case where there has been a voluntary surrender of the charter. Milliken *v.* Steiner, 56 Ga. 251.

45. **Powers of assignee pendente lite.**—Where the assignee is solvent, honest, and competent, and a case of real danger to the assets in his hands is not made, and where the creditors have the security of ultimate liability by solvent stockholders, the assignee will not be enjoined, at the instance of the creditors, from controlling the assets, pending a bill to set aside the

§ 79. Rights of Holders of Circulating Notes—§ 79 (1) Payment Out of Assets in General—§ 79 (1a) Right of Bill Holders to Share in Assets.—The holder of the bills of an insolvent bank is entitled to share in the distribution of its assets,[46] and for the purpose of subjecting these assets to his demand he may proceed against the assignee or trustee in a court of equity.[47] But the circulating notes issued by a bank are not "claims against the bank."[48]

§ 79 (1b) Payment in Bills, Notes or Other Obligations of the Bank.—In the absence of statute, the receiver or assignee of an insolvent

assignment and to recover from the bank, etc., and a receiver will not be appointed to supersede the assignee in his functions before a final decree. Gresham *v.* Crossland, 59 Ga. 270.

46. **Rights of bill holders to payment out of assets.**—In adjusting the claims of creditors of an insolvent bank whose assets are in the hands of a receiver, the claims of the holders of bills, issued by the bank under an unlawful agreement that they should be kept from circulation for a limited time or not be returned to the bank for redemption within a limited time, should be allowed. Atlas Bank *v.* Nahant Bank (Mass.), 3 Metc. 581.

Stockholders who hold bills of an insolvent bank are entitled to share in the distribution of its assets, as other bill holders. Belcher *v.* Willcox, 40 Ga. 391.

Amount payable to bill holders.—In the distribution of the fund of a bank among bill holders, it was held by the court that the holders should be allowed only the amount paid by each for his bills, and not the face of the bills. After that decision the holder of the bills filed in the case assigned them. Held, that the amount paid by the holder at the time of the former decision, and not the amount paid by the present holder, was what he was entitled to receive for them. Griffin *v.* Central Bank, 3 Ga. 371.

Rights of bill holders to object to other claims.—Under a bill to wind up the affairs of the Bank of the State of South Carolina, the holders of bills of the bank have no equity to compel the holders of the fire loan bonds, issued by the state and guarantied by the bank, to show that their claims against the state on the bonds will be delayed or denied, before they shall be permitted to share in the distribution of the bank's assets. Dabney *v.* Bank, 3 S. C. 124.

Right of bill holders to be subrogated.—Under a bill to wind up the affairs of the Bank of the State of South Carolina, the bill holders have no equity to be subrogated to the rights of the holders of fire loan bonds, issued by the state and guarantied by the bank, upon said holders sharing in the assets of the bank, the state being liable, by the terms of the bank charter, for all the debts of the bank, no matter how contracted. Dabney *v.* Bank, 3 S. C. 124.

Bona fide holders of the bills of an insolvent bank hold them, as against the bank, at their face value, no matter at what price they were purchased. Dabney *v.* Bank, 3 S. C. 124.

47. As any holder of the bills of the Real-Estate Bank had a right of action at law against the bank for a breach of the contract to pay on demand, he is entitled to follow the assets in the hands of the trustees, under the deed of assignment for creditors, and subject them, by proceeding in equity, to the payment of his demands. Ringo *v.* Biscoe, 13 Ark. 563.

48. **"Claims" provable.**—Circulating notes issued by a bank under its charter (Laws 1849, p. 252), secured by stocks deposited with the state treasurer, and which he is directed, on affidavit of any holder that the bank, upon due demand, has refused, to redeem out of the proceeds of the security or other assets coming to his hands from the bank, or its duly-appointed receivers, are not claims against the bank, within a provision of the charter (§ 12) providing for the appointment of a receiver, and requiring him to notify all persons having claims against the bank to file proof thereof, and authorizing him, at the expiration of one year from the notice, to distribute funds in hands ratably among proved claims. People *v.* Holmes, 3 Mich. 544.

bank may not receive the bills or notes of the bank in the payment of debts due to it, especially where the statutes in the particular jurisdiction provide for a pro rata distribution among creditors.[49] In one jurisdiction, however, it has been held that by the general law of the land, the notes and bonds payable at and discounted by any bank, may be paid in the bills of that bank; and that too, notwithstanding such notes or bonds may be transferred to any other bank.[50] But by express statute in most jurisdictions, the holders of the bills and the circulating notes of a bank may tender the same in payment of debts due by them to the bank.[51] A debtor of the bank

49. Debts due bank not payable in circulating notes in absence of statute.—There is no obligation on a bank, in making an assignment of its effects, to provide that its notes shall be received in payment of debts due to it. On the contrary, if the object is, in contemplation of insolvency, an equal and fair distribution among its creditors, the notes can not be so received, unless so held by the debtors of the bank as to become legally the subject of set-off. Ringo *v.* Biscoe, 13 Ark. 563.

The assignee of a bank instituted suit and recovered judgment, and the defendants paid the notes of the bank into court, and made a motion to have the execution which issued on the judgment entered satisfied. Held, that the assignee was not bound to receive the bank notes in payment, and that a judgment ordering an entry of satisfaction was erroneous. Commercial Bank *v.* Thompson (Miss.), 7 Smedes & M. 443.

Where, on an application by the bank commissioners, the assets and affairs of a bank had been placed in the hands of an assignee, the assignee should not be allowed to receive bills of the bank in payment of debts due to the bank, as to do so would interfere with the express injunction of the statute that such bills are to be paid pro rata. In re White Mountains Bank, 46 N. H. 143.

50. Act 1841, repealing the charter of the Bank of Darien, and authorizing the Central Bank to wind up the affairs of the Darien Bank, provided that, in all payments to be made on notes originally due the Darien Bank, the maker shall be authorized to pay in bills issued by such bank. This provision was a re-enactment of § 15 of the Act of 1832. Held that, under these acts, creditors of the Darien Bank can not complain that bills of that bank were received by the Central Bank in payment of debts founded on notes originally due the Darien Bank, even though such notes were in judgment; that, independent of the statutes, it is doubtful whether debtors of such bank did not possess the right of discharging their debts with the notes of the bank. Robinson *v.* Bank, 18 Ga. 65.

51. Debts due bank solvable in its circulating notes.—Moise *v.* Chapman, 24 Ga. 249; Belcher *v.* Willcox, 40 Ga. 391; Dunlap *v.* Smith, 12 Ill. 399; Exchange & Banking Co. *v.* Mudge (La.), 6 Rob. 397; Basehore *v.* Rhodes, 85 Pa. 44.

Requirements of Ga. statute.—Code, § 1496, provides that where the assets of an insolvent bank are to be collected and distributed by a receiver, the debtors are not allowed to pay their debts to the receiver in bills of the bank at par value, unless accompanied by an affidavit that they are the identical bills received from the bank by which the debt was created. Held, that each bill holder takes his proportion of the whole assets of an insolvent bank only in proportion to the quantum of consideration paid by him for such bills, and each should be required to state on oath in writing that he was a bona fide holder of the bills, and state as nearly as possible the amount he paid for them, and when, and to whom, and in what it was paid; every other claimant having the right to contest the statement made by each as to the quantum or true value of the consideration paid by him for bills. Belcher *v.* Willcox, 40 Ga. 391.

Receivable "at par" in Pennsylvania.—Act May 5, 1841, providing for the assignment of the Bank of the United States, directed the trustees to receive the notes or other evidences of debt issued by the bank in payment of debts due it at par. Held, that the term "at par" meant the amount really due on the security, including interest, and that a claimant might sell the principal of his claim, and retain his

can not, however, pay his debt with bills or notes of the bank acquired after notice of the insolvency and assignment by the bank of its assets,[52]

right to receive the interest. Appeal of Hogg, 22 Pa. 479.

In a suit by judgment creditors of a state bank to subject judgments in favor of the bank against others to payment of their judgments, where it appeared that by Act 1840 state banks must accept their own bank notes in payment of all claims due to them, and that, when suit was begun, the issues of the bank were worth fifty-six cents on the dollar, the liability of the judgment debtors is limited to fifty-six cents for every dollar represented by the judgments in favor of the bank. Robson *v.* Benton, etc., Banking Co. (Miss.), 7 Smedes & M. 724.

Character of debts solvable in notes of bank.—Act March 26, 1842, No. 157, which gives the right of paying notes due banks in liquidation in their own notes, though it mention only "notes," should, by a fair construction, be extended to all debts, though not in the form of notes. Exchange & Banking Co. *v.* Mudge (La.), 6 Rob. 387.

Debts for unpaid subscriptions.—A debtor of the Bank of Illinois, at the time it became insolvent, is authorized to discharge his indebtedness, in the notes and certificates of the bank, unless it appears that the indebtedness arose as a subscription for the stock of the bank. Dunlap *v.* Smith, 12 Ill. 399.

Debt due on stock note.—Under Acts March 14 and 26, 1842, and April 5, 1843, relating to the liquidation of banking corporations whose charters have been forfeited, and providing that debtors to the bank may give in payment the obligations of such bank held by them, one indebted to a bank on a stock note may turn in payment thereof a bond of the bank held by him. Saunders *v.* Smith, 4 La. Ann. 232.

Payment of drafts.—Where a draft may be payable in bills of the bank to a bank itself, it is also so payable to the receiver of the bank. Moise *v.* Chapman, 24 Ga. 249.

But in Pennsylvania the Act of 1850, declaring that the assignees of an insolvent bank shall receive, in payment of debts due the bank, "its own notes and obligations and the checks of its depositors at par," does not apply to a protested draft. Bashore *v.* Rhodes, 85 Pa. 44.

A bank, just prior to its assignment for the benefit of creditors, drew a draft in favor of F. on another bank, and the draft was protested. Subsequently F. indorsed the draft to defendant, who had notice of the assignment by the drawer. Held, that the draft was not an "obligation" which the assignee was bound to accept in payment of a claim against F. Shryock *v.* Bashore (Pa.), 11 Phila. 565, 33 Leg. Int. 56.

Debts reduced to judgment.—Judgment creditors of a bank brought their bill in equity against the bank and judgment debtors of the bank, praying that the judgment debtors be required to pay the amount of their judgment against the bank, and the debtors were enjoined from paying the bank. Held, that the creditors were not bound to receive the issues of the bank, and nothing but gold and silver, notwithstanding the statute of 1840, requiring banks to receive their own issues in payment of debts. Robson *v.* Benton, etc., Banking Co. (Miss.), 7 Smedes & M. 724.

But in other states the bills of the bank must be received in payment even of debts reduced to judgment. Robinson *v.* Bank, 18 Ga. 65; Farmers' Bank *v.* Willis, 7 W. Va. 31.

52. Notes acquired after insolvency not receivable.—3 McLean (U. S.) 397; 16 B. Mon. (Ky.) 351; 1 Duval (Ky.) 84; King *v.* Elliott (Miss.), 5 Smedes & M. 428; 34 Barb. (N. Y.) 224; 1 Paige Ch. (N. Y.) 585; Haxton *v.* Bishop (N. Y.), 3 Wend. 13; McDougal *v.* Holmes, 1 Ohio 376, 381; Northampton Bank *v.* Balliet, 8 Watts & S. (Pa.) 311; Housum *v.* Rogers, 40 Pa. 190; Saunders *v.* White, 61 Va. (20 Gratt.) 327; Farmers' Bank *v.* Willis, 7 W. Va. 21; 1 Law Reg., N. S., 238.

The provision that all "notes shall be received in payment of debts to the bank," applies only while the debts remain due and payable to the bank. When they have been endorsed or assigned and the title has passed from the bank to another holder or owner, they are no longer debts to the bank or payable in the notes of the bank, or subject to extinguishment by the set-off of notes, unless the latter were acquired by the debtor before endorsement and delivery or assignment of the bills of exchange or promissory notes, and notice thereof to him. Farmers' Bank *v.* Willis, 7 W. Va. 31.

The provision in the Code of Vir-

because the rights of all creditors attach equally after insolvency.[53]

§ 79 (2) Preference.—By constitutional and statutory provisions in most jurisdictions the holders of the bills or notes of a bank are to be preferred to all other creditors in the distribution of the assets of the bank,[54]

ginia, that, "though a bank had a branch * * * all its notes should be received in payment of debts to the bank, whether contracted at the parent bank, or a branch," applied only while the debts remained due to the bank. When a negotiable promissory note discounted by the Farmers' Bank of Virginia had been assigned by the bank to trustees, for the payment of antecedent debts, and the maker, having notice of the assignment, afterwards acquired notes of the bank, he could not, with these, pay his debt so assigned, or set them off against it. Farmers' Bank *v.* Willis, 7 W. Va. 31.

A bank which had been forced into an assignment by failure to pay its notes in specie, afterwards recovered a judgment, to the use of its assignee, against defendant, who had converted a portion of the bank's assets. Held, that the judgment was not a debt to the bank, but to assignee for creditors, and hence could not be paid in the depreciated notes of the bank. Northampton Bank *v.* Winder (Pa.), 3 Clark 284.

After a note made payable at a bank, and negotiated there, had been transferred by the bank, and notice given to the maker of the transfer, a tender by him to the cashier of the bank of the notes of the bank not procured in the usual course of business nor before notice of transfers is invalid. Reed *v.* Mitchell, 18 Pa. 405.

Where, in a suit in the United States circuit court, the court ordered that the receiver take the notes of defendant bank in payment of the debts due to it, and afterwards the court set aside such order, a plea of tender of the notes in payment of the debts of the bank, filed in a case pending in a state court, after the rescinding of the order of the United States court, the notes having been obtained after the execution and recording of the deed of the bank and notice thereof to the defendant, was not a valid defense to the action. Bank *v.* Marshall, 66 Va. (25 Gratt.) 378.

Rights of attaching creditors.—"It was held by the supreme court of appeals of this state, in the case of the Farmers' Bank *v.* Gettinger, 4 W. Va. 305, that a debtor of a bank, summoned as a garnishee, could not afterwards procure the notes of the bank and pay them or set them off, in satisfaction or discharge of the debt. We can not see that the right of the assignee in trust for creditors is inferior to that of an attaching creditor." Farmers' Bank *v.* Willis, 7 W. Va. 31.

Rule in Maryland.—Under Acts 1818, c. 177, and Act 1824, c. 199, debts due insolvent banking corporations may be paid in the notes of the bank, and in its certificates of deposit, without reference to the time when such notes or certificates were acquired. Union Bank *v.* Ellicott (Md.), 6 Gill & J. 363.

53. Reason of rule.—"It is true that a bank, as long as it is solvent, or rather, as long as it has control of its assets, is bound to take its own bills in payment of debts due to it; but when it becomes insolvent, and goes into liquidation, making an assignment of all its assets for the benefit of its creditors, the rights of all its creditors attach equally, and a debtor then takes the bills of the bank subject to the rights of other creditors to enforce his obligations against him for the equal benefit of all. Diven *v.* Phelps (N. Y.), 34 Barb. 224; 9 Cowen 413, notes; 1 Paige Ch. 585; Haxton *v.* Bishop (N. Y.), 3 Wend. 13." Farmers' Bank *v.* Willis, 7 W. Va. 31.

54. Holders of circulating notes are preferred creditors.—Taylor *v.* Hutchinson, 145 Ala. 202, 40 So. 108; Robinson *v.* Bank, 18 Ga. 65; Dobbins *v.* Walton, 37 Ga. 614, 95 Am. Dec. 371; Miller *v.* Andrews, 43 Tenn. (3 Coldw.) 380; Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471; Moseby *v.* Williamson, 52 Tenn. (5 Heisk.) 278; Bank *v.* Bank, 56 Tenn. (9 Heisk.) 408; Smith *v.* Moseby, 56 Tenn. (9 Heisk.) 501; Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398; Foulker *v.* Union Banking Co. (Pa.), 6 Wkly. Notes Cas. 109.

The holder of a certificate of deposit is not placed by law on the same footing as the holder of the notes of the bank. The holder of certificates is only a creditor of the bank entitled to pro rata distribution. Moseby *v.* Williamson, 52 Tenn. (5 Heisk.) 278.

Priority over judgment creditors.—The statutory lien of bill holders, under the charter of the Monroe Railroad

except in the payment of the expenses of settling the concern,[55] and this preference may be set forth in an assignment by the bank.[56] But as between

& Banking Company, attaches equally upon all the property and effects of that company, to the exclusion of judgment creditors. Woodward *v.* Central Bank, 4 Ga. 323.

Priority over holders of certificates of deposit.—In re Pennsylvania Bank, 39 Pa. 103.

Construction of Tennessee statute.—The Act of 1860, ch. 27, § 30, provides, that, in all cases of insolvency of any bank, or banking association, the bill holders shall be entitled to preference in payment, to all other creditors of such bank or association, and no transfer or assignment of any note, bill of exchange, or other evidence of debt by the bank, shall prevent the debtor from paying the same into the hands of the assignee in the currency of the bank. Held, that this law applies to a general assignment by the bank, and, also, to any assignment made by the bank, of its notes, bills of exchange, or other evidence of debt. Miller *v.* Andrews, 43 Tenn. (3 Coldw.) 380.

Construction of Georgia statute.—Section 1495 of the Revised Code which prescribes the order of paying off the debts of an insolvent bank, and par. 3, § 1493, which gives the bill holders a priority over creditors in the payment of debts, apply only where there has been a forfeiture of the charter and a receiver appointed by the court; they do not apply in the case of an assignment by the bank of its assets to pay its debts according to the requirements of the law. Dobbins *v.* Walton, 37 Ga. 614, 95 Am. Dec. 371.

Note holders not entitled to priority.—In Virginia the note holders of an insolvent bank, having no lien, stands upon the same footing as depositors and other general creditors, and are entitled to no priority. Robinson *v.* Gardiner, 59 Va. (18 Gratt.) 509, approved in Exchange Bank *v.* Knox, 60 Va. (19 Gratt.) 739; Saunders *v.* White, 61 Va. (20 Gratt.) 327; Bank *v.* Marshall, 66 Va. (25 Gratt.) 378.

And in Massachusetts bill holders are not entitled to a priority over other creditors, in the distribution of the assets of an insolvent bank, receivers of whose property have been appointed under St. 1851, c. 127. Stockholders *v.* Colt, 67 Mass. (1 Gray) 382.

Enforcement of right of priority.—In a proceeding under Act of February 6, 1860, ch. 27, to subject the assets of a bank, on the ground of its insolvency, to the prior right of its note holders over all other creditors to payment of its assets, it is essential that the fact of insolvency be positively alleged. McCrae *v.* Bank, 46 Tenn. (6 Coldw.) 474.

Rule for distribution.—In the distribution of the assets of an insolvent bank special preference is given by law to bill holders over other creditors of the bank, and the distribution is to be made among all bill holders whose bills have been brought in before distribution made, in proportion to the amount of the just claim of each. Belcher *v.* Willcox, 40 Ga. 391.

55. Eastern Bank *v.* Capron, 22 Conn. 639.

56. In re Pennsylvania Bank, 39 Pa. 103.

Act 1860, c. 27, § 30, provides that, in all cases of insolvency of any bank or banking association, the bill holders shall be entitled to preference, in payment, to all other creditors of such bank or association, and no transfer or assignment of any note, bill of exchange, or other evidence of debt by the bank shall prevent the debtor from paying the same into the hands of the assignee, in the currency of the bank. Held, that this law applies to a general assignment by the bank; and also to any assignment made by the bank of its notes, bills of exchange, or other evidence of debt. Miller *v.* Andrews, 43 Tenn. (3 Coldw.) 380.

A firm of bankers having issued and circulated notes payable to bearer of less denominations than five dollars, and subsequently having made an assignment giving a priority or preference in payment to the holders of these notes, it was held that such holders were entitled to the preference in the distribution of assets, notwithstanding Act July 7, 1838 [5 Stat. 309], which prohibits the issue of any note or other paper currency of a less denomination than five dollars within the District of Columbia. Tucker *v.* Fowler, Fed. Cas. No. 14,219, 1 Hayw. & H. 67.

But in Georgia it has been held that the statute providing that, where a receiver is appointed for an insolvent bank, bill holders shall be paid in preference to other creditors, does not apply where the bank makes a voluntary assignment for the payment of all the debts of the bank. Dobbins *v.* Walton, 37 Ga. 614, 95 Am. Dec. 371.

each other they share equally in the distribution.[57]

§ 79 (3) Penalties and Interest.—If bill holders of an insolvent bank demand payment of their claims and are refused, they are entitled to interest from the time of such demand.[58]

§ 79 (4) Set-Off against Bank or Receiver.—Persons holding the circulating notes of a bank at the time it becomes insolvent may set the same off against their indebtedness to the bank.[59] This set-off, however, will only be allowed against the bank,[60] and circulating notes acquired after the insolvency of the bank can not be set off against the holder's indebtedness to the bank,[61] nor will bills purchased in at a discount be allowed as a

57. Holders of circulating notes share pro rata.—The assets of an insolvent banking corporation under the laws and statutes of this state constitute a trust fund in the hands of the officers of the bank for the equal benefit of all the note holders of the bank. No diligence on the part of one can defeat the others' right to a pro rata distribution of the fund. Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471.

58. Penalties and interest.—In adjusting the claims of an insolvent bank whose assets have been put into the hands of a receiver, those creditors who have demanded payment of the bank's bills, and been refused, are not entitled to twenty-four per cent interest on such bills, under Rev. St. c. 36, § 29, which allows interest at that rate when payment has been demanded on the bank and refused, but they are entitled to six per cent interest from the time of such demand. Atlas Bank *v.* Nahant Bank (Mass.), 3 Metc. 581.

Right of bill holder's assignee to interest.—Where the holder of bank bills has obtained the right to legal interest thereon by making demand of payment, an assignee of such bills is entitled to interest out of the assets of the bank which has become insolvent. Atlas Bank *v.* National Bank (Mass.), 3 Metc. 581.

59. Set off of notes against claims of bank.—Williams *v.* Planters' Bank (La.), 12 Rob. 125; American Bank *v.* Wall, 56 Me. 167; Mandeville *v.* Bracy, 31 Miss. 460; Niagara Bank *v.* Rosevelt (N. Y.), 9 Cow. 409; Bruyn *v.* Middle Dist. Bank (N. Y.), 9 Cow. 413; 1 Paige 584, note; In re Middle Dist. Bank (N. Y.), 9 Cow. 414, 19 Am. Dec. 452, 1 Paige 585; Mann *v.* Blount, 65 N. C. 99; Blount *v.* Windley, 68 N. C. 1, 12 Am. Rep. 616; Clarke *v.* Hawkins, 5 R. I. 219.

Act April 5, 1843, § 2, No. 92, compelling banks to receive in offset their own debts, when liquidated and due, from whatever source arising, and whenever acquired, may be considered as declaratory of the former intention of the legislator. Exchange & Banking Co. *v.* Mudge (La.), 6 Rob. 387.

Plaintiffs' agent drew a time bill of exchange in favor of the Bank of Florida, which said bank discounted, paying therefor in its own notes, and sending the draft to its New York agent, who had the same accepted. Afterwards the bank failed, and its agent transferred the bill to defendant for the use of its creditors. Plaintiffs still held a large portion of the bank's notes, which it had received on the discount of the draft, and also other notes which it had received in the due course of business. Held, in an action to restrain the enforcement of the draft, that said notes constituted an equitable set-off. Mel *v.* Holbrook (N. Y.), 4 Edw. Ch. 539.

Rule in Virginia.—Under Act Feb. 12, 1866, placing all creditors of an insolvent bank on the same footing, the holder of circulating notes has no right of set-off. Exchange Bank *v.* Knox, 60 Va. (19 Gratt.) 739.

60. Where a note made payable to a bank for discount was not discounted by the bank, but was afterwards discounted by another person, and suit is brought in the name of the bank for the use of the holder, such holder may resist a set-off of notes of the bank by proof that the note in suit never belonged to the bank. Trible *v.* Bank (Miss.), 2 Smedes & M. 523.

61. Notes acquired after bank's insolvency.—American Bank *v.* Wall, 56 Me. 167; Niagara Bank *v.* Rosevelt (N. Y.), 9 Cow. 409; In re Middle Dist. Bank (N. Y.), 9 Cow. 414, 1 Paige 585, 19 Am. Dec. 452; Haxton *v.* Bishop (N. Y.), 3 Wend. 13; Diven *v.* Phelps

set-off.[62]

§ 79 (5) Rights against Officers of Bank.—It seems that the bank officers are not answerable in an action at law to the holders of circulating notes.[63]

§ 79 (6) Actions by Bill Holders.—No proof of execution of the bills is necessary in a suit by bill holders against the bank, in the absence of a plea of non est factum by the defendant.[64]

Plea in Suit by Bill Holder against Stockholder.—Where stockholders in a bank are personally liable for the ultimate redemption of its bills, to a suit by a bill holder against a stockholder, a plea that the bank has assets

(N. Y.), 34 Barb. 224; Clarke *v.* Hawkins, 5 R. I. 219; Exchange Bank *v.* Knox, 60 Va. (19 Gratt.) 739; Saunders *v.* White, 61 Va. (20 Gratt.) 327.

The bank notes of the Pennsylvania Bank of the United States can not be set off to a note sued upon by the trustees of the bank, to whom it had been assigned for the payment of its creditors. Gee *v.* Bacon, 9 Ala. 699.

A depositor in a bank, as it was about to suspend, obtained, on account of his deposit from an officer, an undue note, which had been discounted; and afterwards, receiving other securities in excess of his deposit, paid back part of the excess in bills of the bank. In an action by him on the note, it was held that the drawers could not set off against the note bills of the bank obtained after the plaintiff's payment on account of the excess, except as to the balance remaining; and, as that balance arose out of other securities subsequently given to the plaintiff by the bank, and not from the note, which securities were not shown to have been fully paid, the set-off as against that balance was not admissible. Struthers *v.* Brown, 44 Pa. 469.

In an action by the receivers of a bank, appointed under the statute of 1825, to "prevent fraudulent bankruptcies by incorporated companies," etc., to recover a note discounted at the bank, and falling due after the receivers are appointed, the notes of the same bank, received by the defendant before his note fell due, can not be set off, though he reasonably tendered them in payment. Haxton *v.* Bishop (N. Y.), 3 Wend. 13.

62. Bills purchased at discount.—Debtors of an insolvent bank in the hands of a receiver will be allowed to set off debts due to them by the bank while it is doing business against the debts due from them to the bank, but not even the bills of the bank, purchased by them after an injunction has issued against it preliminary to its winding up, and especially if the debtor be a director of the bank, and has purchased in the bills at a discount; the allowance of a set-off of bills so purchased being in derogation of the rule of equality in payment, established by statute as between the bill holders of an insolvent bank. Clarke *v.* Hawkins, 5 R. I. 219.

63. Liability of bank officers to note holders.—A bank officer, through whose mismanagement the bank has become insolvent, is not liable to the holders of its notes, though he is liable to the bank. Hinsdale *v.* Larned, 16 Mass. 65.

Proceedings in equity by note holders.—The note holders of a foreign banking corporation, which has suspended payment, and become insolvent, may, without first obtaining a judgment at law, proceed in equity against the bank, its directors, stockholders, and agents, charging them with fraud and misapplication of the assets, and seeking a discovery and account. Such a bill may be maintained under the general powers and jurisdiction of the court, which regard the capital stock of the company and all its assets as a trust fund for the payment of its creditors, and the directors, stockholders, and agents as trustees. Bank *v.* St. John, etc., Co., 25 Ala. 566.

64. Proof of execution of bills.—Where a bill holder sues the assignee of a bank upon its notes, and no plea of non est factum is filed, the plaintiff need not prove the execution of the bills. Bethune *v.* Dougherty, 30 Ga. 770.

which have not been appropriated, without specifying what they are, is demurrable for uncertainty.[65]

§ 80. Presentation and Payment of Claims[66]—§ 80 (1) Claims Provable and Estoppel to Claim[67]—§ 80 (1a) Claims Provable—§ 80 (1aa) In General.—Of course, only the obligations of the bank are provable claims against it.[68] But a claim for rent service which became due after the appointment of a receiver,[69] for damages for breach of a lease by the bank,[70] for expenses in winding up the affairs of the bank,[71] and even the claims of bank officers[72] are provable claims against the bank,

65. Lane *v.* Morris, 8 Ga. 468.

66. Holding bank as trustee with regard to moneys collected, see post, § 166 (1).

On dissolution of bank, see post, "Payment of Forged or Altered Paper," § 147.

Payment of debts from safety fund, see ante, "Reports and Statements," § 16.

Right of depositor of check or draft on insolvency of bank, see post, "Forfeiture of Charter and Dissolution," § 308.

67. Rights of holders of circulating notes, see post, "Restrictions upon Issue or Circulation," § 198.

68. Claims provable.—In proceedings to establish a claim against an insolvent bank, it appeared that claimant sold to the president of the bank certain securities, and in payment took certificates of deposit. The president testified that the transaction was his individual venture. The claimant denied. The certificates were never entered on the books as liabilities of the bank, but four were afterwards paid by the bank and charged to the president's account. Held, that the certificates were prima facie those of the bank. State *v.* Farmers', etc., Bank, 36 Neb. 675, 54 N. W. 974.

What law governs.—In a suit in the federal courts praying for the appointment of a receiver of an insolvent bank organized under the state laws, the winding up of its affairs, and the distribution of its assets, the question as to what are and are not provable claims must be governed by the laws of the state. New York Security, etc., Co. *v.* Lombard Invest. Co., 73 Fed. 537.

69. Claim for rent.—Where a bank broke its covenant in a lease of its banking house on its becoming insolvent, and the lessor re-entered and relet the premises in accordance with the terms of the lease, at a loss, the lessor was entitled to have his claim for damages for the loss so sustained allowed by the bank's receiver as a claim against the bank's estate in insolvency. McGraw *v.* Union Trust Co., 135 Mich. 609, 98 N. W. 390.

Where an insolvent banking corporation is proceeded against under Gen. St. 1894, c. 76, § 5900, and is restrained from exercising any of its corporate functions, and its executory contract of leasing for a term of years is repudiated by its receiver, and the leased premises are abandoned, there is a final breach of such contract, for which the lessor is entitled to damages. Minneapolis Baseball Co. *v.* City Bank, 74 Minn. 98, 76 N. W. 1024.

Where an executory contract of leasing for a term of years is repudiated by a receiver of an insolvent banking corporation, and there is a final breach of such contract, the lessor should immediately declare the breach to be total, and in the insolvency proceedings must be allowed to establish his claim for damages against the estate. Minneapolis Baseball Co. *v.* City Bank, 74 Minn. 98, 76 N. W. 1024.

70. Damages for breach of lease.—Where a bank operated a savings and commercial department in its banking house, which it held under a lease, a claim for damages for breach of the lease on the bank's insolvency was chargeable pro rata against the assets of each department. McGraw *v.* Union Trust Co., 135 Mich. 609, 98 N. W. 390.

71. All reasonable and proper expenditures incurred by a receiver or other agent, in winding up the affairs of an insolvent bank, are legitimate charges against the trust fund, and should be allowed, unless shown to be overcharged or wrongfully charged. Robinson *v.* Bank, 18 Ga. 65.

72. Claims of bank officers.—An officer of an insolvent bank is entitled to participate as a creditor in the distribution of its assets, when he has been guilty of no fraud. In re Insurance Co. (Pa.), 9 Lanc. Bar. 119.

although it did not mature until after the appointment of the receiver.[73]

Claims of Individual Creditor of Private Banker.—Creditors of an individual doing business as a private banker may participate in the distribution of the assets of the bank in the hands of a receiver.[74]

§ 80 (1bb) Claims for Taxes.—If before the liability for a tax on capital stock of a bank has attached the bank becomes insolvent, the tax on the stock can not be collected from the receiver, because the stockholders are primarily liable for the tax and the liability of the bank is secondary. And manifestly if its capital stock becomes valueless there is nothing belonging to the stockholder upon which a lien could attach in the bank's favor.[75] But taxes assessed against the receiver upon all personal property in its possession, and all of the assets of the insolvent bank, must be paid by the receiver from the assets in his possession.[76]

§ 80 (1cc) Claims of Depositary.—Where a bank which has money on deposit with another becomes insolvent, being at the time indebted to the depositary upon promissory notes, the depositary may, after crediting the deposit upon the notes it holds against the failing bank, share in the balance still due, pro rata with the depositors of that bank, in a general distribution of its assets in the hands of a receiver appointed to take charge of and administer the same.[77]

73. **A claim against a bank maturing after the date of the receivership** will nevertheless be allowed, provided it has sufficiently matured before any order of distribution is made. New York Security, etc., Co. *v.* Lombard Invest. Co., 73 Fed. 537; Hussey *v.* Crawford, 152 Mass. 596, 26 N. E. 424; Hoyle *v.* Scudder, 32 Mo. App. 372.

74. **Individual creditors of private banker.**—Under Laws 1891, c. 43, § 35, providing that any individual receiving money on deposit shall be considered as doing a banking business, and § 26, making it the duty of the bank commissioner, on insolvency of a bank, to have a receiver appointed to wind up its business for the benefit of its depositors, creditors, and stockholders, a creditor holding notes given by the sole owner and manager of a bank for individual indebtedness, the bank being conducted in the owner's personal name, is not prevented from sharing in the distribution of the assets of the bank after insolvency equally with its depositors and other creditors. McDermott *v.* Halleck, 61 Kan. 486, 59 Pac. 1074.

75. **Tax on capital stock.**—Laws 1893, p. 333, § 22, provides that, if the tax on capital stock of a bank is not paid, the bank shall be liable for it, and § 25 provides that the corporation shall have a lien on the shares in the corporation, and in the rights and property of the shareholders, for the payment of the taxes. Held, that the receiver of an insolvent bank is not liable for taxes assessed against its capital stock before it became insolvent. Hewitt *v.* Traders' Bank, 18 Wash. 326, 51 Pac. 468, following Baker *v.* King, 17 Wash. 622, 50 Pac. 481.

76. **Tax on personalty.**—Hewitt *v.* Traders' Bank, 18 Wash. 326, 51 Pac. 468.

The receiver of an insolvent bank is liable for taxes on the full amount of personal property and assets of the bank, and can not deduct therefrom the amount of debts owing by the bank. Hewitt *v.* Traders' Bank, 18 Wash. 326, 51 Pac. 468.

77. **Claims of depositary.**—Georgia Seed Co. *v.* Talmadge & Co., 96 Ga. 254, 22 S. E. 1001.

A bank which applied a deposit belonging to another bank on notes due it by the latter, on the latter's suspension, could share with the depositors of the suspended bank in the general distribution of the latter's assets, on the balance due on the notes. Georgia Seed Co. *v.* Talmadge & Co., 96 Ga. 254, 22 S. E. 1001.

§ 80 (1dd) Paid-Up Stockholders.—On the distribution of the assets of an insolvent bank, the personal liability of stockholders to depositors under the statute, being in the nature of a guarantee, can not be set up to prevent paid-up stockholders from participating, as creditors, in the distribution.[78]

§ 80 (1ee) Incidental Expenses in General.—The rent for the bank and clerk's hire may be allowed by the receiver.[79]

Expenses of Collecting Assets.—And the reasonable and necessary cost and expense incurred by a creditor in collecting collateral security held by the bank also may be allowed by the receiver.[80]

§ 80 (1b) Estoppel to Claim.—Creditors, of course, are only entitled to a single satisfaction of their claims.[81] But a receipt of part of his claim by a creditor does not preclude him from recovering the balance.[82]

Claims of Accommodation Makers.—Persons lending their credit to a bank by making an accommodation note payable to the bank, thereby enabling the bank to obtain money, can only claim reimbursement on the subsequent insolvency of the institution; they can not also claim a credit in their favor on the books of the bank for that same debt.[83]

78. In re Humboldt Safe-Deposit, etc., Co., 3 Pa. Co. Ct. R. 621.

79. **Incidental expenses such as rent, etc.**—The receiver is authorized to allow such sum for the use of the banking room, and to the clerk for attending to demand payment, and protest notes which fall due, as he may deem reasonable. Bruyn *v.* Middle Dist. Bank (N. Y.), 9 Cow. 413, 1 Paige 584.

80. **Expenses incurred in collecting collateral.**—Hanover Nat. Bank *v.* Brown (Tenn.), 53 S. W. 206 (may recover attorney fees).

In a receivership proceeding to wind up the affairs of an insolvent bank, a creditor of a bank holding collateral security was entitled to an allowance, for his reasonable and necessary costs and expenses of collecting the collateral. Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289.

81. **Estoppel to present claims.—A depositor in a bank** who recovers a judgment, which is satisfied, against one who held himself out as its president, can not afterwards prove his debt against the bank's assets. Dobson *v.* Simonton, 95 N. C. 312.

82. **Receipt of part of claim by creditor of bank.**—Receiving a portion of his claim against an insolvent bank, by a creditor thereof, does not impair his right to seek the entire satisfaction of his claim by legal or equitable proceedings against the assets of the bank or the stockholders, though he has previously ratified the deed of assignment by the bank. City Bank *v.* Crossland, 65 Ga. 734.

A creditor of an insolvent bank, who recovers a portion of his debt from stockholders on their personal liability, is not thereby prevented from sharing with other creditors on the basis of his entire debt in the assets of the corporation, to the extent of the balance due. Sacramento Bank *v.* Pacific Bank, 124 Cal. 147, 56 Pac. 787, 45 L. R. A. 863, 71 Am. St. Rep. 36.

The receipt by a person of a dividend from the assignee of an insolvent bank does not estop him from demanding payment in full of his claim against the bank, on the ground that a trust was imposed on the assets in his favor as against the general creditors. Wallace *v.* Stone, 107 Mich. 190, 65 N. W. 113.

83. **Claims of accommodation makers of notes.**—Complainants, on the request of a national bank needing funds, signed an accommodation note for $10,000, payable to its order, with the understanding that it would discount the same, and use the proceeds in its business. The bank at the same time agreed to place to the credit of complainants on its books an amount equal to the proceeds of the note, complainants stipulating that they would

§ 80 (2) Presentation and Proof—§ 80 (2a) Presentation—§ 80 (2aa) In General.—The statutes in most jurisdictions require creditors, desiring to share in a distribution of the shares of an insolvent bank, to bring in and prove their claims,[84] within a prescribed time.[85]

§ 80 (2bb) Notice to Creditors to Present Claims.—By statute in most jurisdictions, it is provided that upon the appointment of a receiver notice shall be given, usually by advertisement, calling on all persons who may have claims against the bank to present the same to the receiver and make legal proof thereof.[86]

§ 80 (2cc) Time for Presentation or Filing of Claim.—The time within which a creditor must file or deposit his claim is usually prescribed

not check against this credit except to pay the note or to reimburse themselves for paying it. The credit was accordingly made, and the bank, after continuing business for some time, failed, and complainants were compelled to pay the note. They thereafter recovered a judgment at law against the bank's receiver for the amount paid to take up the note, and then sued in equity for the amount placed to their credit according to the agreement. Held, that they were not entitled to two judgments for the same debt, and to dividends on both judgments until one of them was satisfied, and that the bill must, therefore, be dismissed. Latimer *v.* Wood, 20 C. C. A. 251, 73 Fed. 1001.

84. The mere service of a copy of the writ, in a suit then pending, upon the receivers of the effects of an insolvent bank, is not a compliance with the provisions of Act April 16, 1841, that creditors must bring in and prove their claims if they would receive their share of the effects. Read *v.* Frankfort Bank, 23 Me. 318.

Under the New York General Corporation Law, § 261, creditors of a bank, who after due notice failed to assert their claims forfeited their right to share in the distribution. People *v.* German Bank (Sup.), 136 N. Y. S. 311.

It is unquestionably the practice in New York that as to an application by a depositor or other creditor for leave to prove a claim against a bank, or in any other aspect in which the fund in the receiver's hands is sought to be charged, it is essential that the application be made in the action in which the receiver is appointed. In re Ziegler, 98 App. Div. 117, 90 N. Y. S. 681.

Application for claim.—Where a receivership of a bank was extended over a fund recovered in an action to enforce a stockholders' statutory liability, and a notice to creditors of such action stated that an order would be applied for, directing the receiver of the bank to apply to the applicant's claim dividends out of the funds in his hands accruing from such stockholders' actions, which designation of the receiver was the same as in the judgment appointing him receiver in the action, and disclosed that it had relation to the fund held by him as such receiver, the application should be regarded as having been properly made in the stockholders' action. In re Ziegler, 98 App. Div. 117, 90 N. Y. S. 681.

85. **Time for presentation of claims.**—See post, "Time for Presentation or Filing of Claim," § 80 (2cc).

86. **Notice to creditors to present claims.**—McGraw *v.* Union Trust Co., 135 Mich. 609, 98 N. W. 390.

In pursuance of a decree to distribute the assets of an insolvent bank, advertisement was made for creditors to prove their claims by a certain day, on pain of being thereafter barred. Held, that a creditor who had no information of the advertisement, and who was not guilty of laches in presenting his claim, was entitled to prove after the day named. Glenn *v.* Farmers' Bank, 80 N. C. 97.

The banking Act of 1887, § 56, which requires the receiver of an insolvent bank to give twelve weeks' notice by publication for presentation of claims by creditors, is for their benefit, and does not prevent the receiver from passing on a claim presented to him on a briefer notice. Bissell *v.* Heath, 98 Mich. 472, 57 N. W. 585.

by statute.[87] But a court may, in its discretion, permit a creditor to share in the assets of an insolvent bank, though his claim was not filed with the receiver within the time which was by a general order limited for the presentation of claims.[88]

§ 80 (2b) Proof.—Where a creditor claims expenses for collecting the bank's assets, he must produce proof thereof.[89] The manner of proving claims against the bank is largely in the court's discretion.[90]

87. Time for presentation or filing of claim.—The Act of December 12, 1866, entitled, "An act to expedite the distribution of the effects of banks which have made or may make assignments among their creditors," is not a statute of limitations. The statute is unconstitutional and void. Fogg *v.* Union Bank, 60 Tenn. (1 Baxt.) 435.

"This statute makes the trustee both legislator and judge. To him it is given to prescribe the time within which the creditor shall file or deposit his claim, and to him it is given to determine whether he has brought himself within the time, creating branches to the legislature and judicial departments unknown to the constitution. The act is an attempt on the part of the legislature to delegate its law-making power to individuals, and is prohibited by the constitution, of which the legislature is the creature. It is as competent for the legislature to enact that each court in the state shall declare that time shall bar the collection of a debt after a given period, as it was to have enacted this statute. To do either is to create as many new legislatures, with limited powers as there are trustees or courts. The statute is unconstitutional and void." Fogg *v.* Union Bank, 60 Tenn. (1 Baxt.) 435.

88. Discretion of court as to time of filing.—State *v.* Bank, 61 Neb. 22, 84 N. W. 406.

A creditor of an insolvent bank, whose assets are in custodia legis under decree of court, will be let in to prove his debt after the day fixed for proofs, if he is not guilty of laches; but if he fail to make application to do so until after the fund is distributed, having full knowledge of the proceeding, he will be barred of his right. Glenn *v.* Farmers' Bank, 84 N. C. 631.

Excuses for failure to file in time.—A stockholder in a bank, with the help of its president, obtained, as he supposed, assets in full payment of his claim in preference to other creditors, who afterwards received only ninety per cent of their claims. He afterwards found the assets which he received were not collectible, and asks to file his claim with the receiver, though the time for such filing has expired. Held not an abuse of discretion to deny the motion. Howe *v.* Bankers' Exch. Bank, 75 Minn. 286, 77 N. W. 967.

The penalty which attaches to a failure to prove the claim does not operate to deprive a creditor of all benefits derived from the judgment unless there has been a final distribution of the fund, based upon claims proven thereunder. At any time before such distribution a creditor may come in and be permitted to prove his claim, even though a schedule of those who are entitled to share in the fund and the amounts has been made up for distribution. Under such circumstances, the court has the power to open the proceeding for the purpose of establishing the claim; and the applicant, in moving the court to its exercise, is required to show an excuse, by satisfactory proof, for failing to prove her claim before the referee within the prescribed period. In re Ziegler, 98 App. Div. 117, 90 N. S. 681.

89. Proof of expenditures by creditors.—It could not be claimed, by the receiver in such case, that the creditor failed to introduce proof as to his expenditures in the collection of such collateral security, where he had presented a complete statement of the account, including such expenses, and the court might have examined the account, and allowed such of the items as were proper. Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289.

90. Manner of proving claims.—Code, §§ 669, 670, providing that in winding up the affairs of insolvent corporations the court shall make such orders as justice and equity shall require, and direct how claims shall be proved, apply to the adjustment of the claim of an insolvent bank and its

The burden of proof is on the bank to show the invalidity of the claims of depositors.[91]

§ 80 (3) Allowance and Payment—§ 80 (3a) By Whom Allowed.—The court and not the receiver is the proper party to allow or disallow claims, nor is it necessary to appeal from the action of the receiver in the premises.[92]

§ 80 (3b) To Whom Allowed.—Money deposited by a husband in the wife's name belongs to the wife and will be allowed her upon presentation of a proper claim, and no promise or agreement which the husband makes in her absence will bind her.[93]

§ 80 (3c) Rights and Liabilities of Creditors Holding Collateral.—Although there is irreconcilable conflict in the cases, the better rule, and that sustained by the great weight of authority is that collateral security, by mortgage or otherwise, held by the claimant, does not affect the claimant's right to prove up for the full amount of his claim; nor does the fact that he has realized a part of his claim from the subjection of such collateral, since the date of the receivership; but he is entitled in such case to receive distributions or dividends from the general estate, until such dividends,

debtor, who is also a depositor. Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

Necessity for verification.—In the absence of a statute requiring that a claim against the receiver of a bank should be verified by affidavit, the failure to make such proof will not bar the right to sue on the claim. Arnold *v.* Penn, 11 Tex. Civ. App. 325, 32 S. W. 353.

91. Burden of proving invalidity of claims.—Act Feb. 16, 1866, providing for the appointment of directors to put the Bank of Tennessee in liquidation, required them to collect the debts due the bank, and receive in payment United States currency or notes of such bank issued prior to May 6, 1861, but to refuse all issues of such bank made after May 9, 1861, etc., and also to cause an assignment of all the property in trust to secure $1,500,000 of the school fund deposited in such bank pursuant to prior acts of the legislature, with interest from May 6, 1861, and to secure all just creditors, excluding all claims of date after May 6, 1861, as null and void; and directed the attorney general to file a bill in chancery to execute such deed of trust, enjoin all creditors from suing, make all persons interested parties by publication, etc., to "come in under one decree, and equal justice be done to all." Held, in an action in the name of the state and the assignee brought pursuant to such statute, that defendants, showing themselves to be depositors in such bank, were prima facie creditors of the bank, and the burden of proof was on the bank or trustee to show the invalidity of their claims. State *v.* Bank, 64 Tenn. (5 Baxt.) 1.

92. By whom claims to be allowed.—The receiver appointed to sequester the assets has no authority to allow or disallow the claims of creditors, such power resting with the court. Palmer *v.* Bank, 72 Minn. 266, 75 N. W. 380.

93. Claims by wife.—In proceedings for the allowance of a claim against an insolvent bank, based on a deposit in claimant's name, the cashier stated that claimant's husband, when he deposited the money, stated that it was the proceeds of land claimed by his wife. The testimony of claimant showed that it was her money. The husband deposited the money in claimant's name, and in her absence told the cashier that it would be used as a credit on a debt due by him and her, and the deposit was entered as a credit thereon. When claimant saw the entry, her husband told her that the credit was not to be made. Held, that no agreement made by the husband in the wife's absence would bind her, and the claim of the wife was properly allowed. Peach *v.* Grubbs, 145 Ala. 685, 40 So. 110.

added to the amount realized from the collateral, are equal to or sufficient to satisfy his debt.[94]

§ 80 (3d) Hearing and Determination—§ 80 (3aa) In General.—The report of the auditor appointed to distribute the funds is conclusive on a finding of facts, unless plain error is shown.[94a] If a claim is dis-

94. Rights of creditors holding collateral.—Lewis *v.* United States, 92 U. S. 618, 23 L. Ed. 513; Tod *v.* Kentucky Union Land Co., 57 Fed. 47; Chemical Nat. Bank *v.* Armstrong, 8 C. C. A. 155, 59 Fed. 372, 28 L. R. A. 231; New York Security, etc., Co. *v.* Lombard Invest. Co., 73 Fed. 537; Findlay *v.* Hosmer, 2 Conn. 350; In re Bates, 118 Ill. 524, 9 N. E. 257, 59 Am. Rep. 383; Logan *v.* Anderson (Ky.), 18 B. Mon. 114; Bank *v.* Patterson, 78 Ky. 291; Southern Michigan Nat. Bank *v.* Byles, 67 Mich. 296, 34 N. W. 702; Third Nat. Bank *v.* Haug, 82 Mich. 607, 47 N. W. 33; Fifth Nat. Bank *v.* Clinton Circuit Judge, 100 Mich. 67, 58 N. W. 648; People *v.* Remington & Sons, 121 N. Y. 328, 24 N. E. 793, 8 L. R. A. 458; Brown *v.* Bank, 79 N. C. 244; Kellogg *v.* Miller, 22 Ore. 406, 30 Pac. 229, 29 Am. St. Rep. 618; Miller's Appeal, 35 Pa. 481; In re Patten's Appeal, 45 Pa. 151, 84 Am. Dec. 479; Graeff's Appeal, 79 Pa. 146; In re Miller's Estate, 82 Pa. 113, 22 Am. Rep. 754; Allen *v.* Danielson, 15 R. I. 480, 8 Atl. 705; Citizens' Bank *v.* Kendrick, 92 Tenn. 437, 21 S. W. 1070; West *v.* Bank, 19 Vt. 403; Walker, etc., Co. *v.* Baxter, 26 Vt. 710. Compare, also, Kortlander *v.* Elston, 2 C. C. A. 657, 52 Fed. 180; Bank *v.* Cases, 92 Tenn. 437, 21 S. W. 1070, 36 Am. St. Rep. 96.

The great weight of authority in England and this country is strongly opposed to the view that a creditor with collateral shall be thereby deprived of the right to prove for his full claim against an insolvent estate. Greenwood *v.* Taylor, 1 Russ. & M. 185, was questioned by Lord Cottenham in Mason *v.* Bogg, 2 Mylne & C. 443, 448, and was expressly repudiated as authority in the court of chancery appeals in Kellock's Case, 3 Ch. App. 769—a case which, upon this point, is cited with approval in Lewis *v.* United States, 92 U. S. 618, 23 L. Ed. 513. In this country, the Massachusetts doctrine was dissented from by the supreme court of New Hampshire in the early case of Moses *v.* Hanlet, 2 N. H. 488.

In Massachusetts, Amory *v.* Francis, 16 Mass. 308, in Iowa, Wurtz *v.* Hart, 13 Iowa 515, in South Carolina, Wheat *v.* Dingle, 32 S. C. 473, 11 S. E. 394, 8 L. R. A. 375, and in Washington, In re Frasch, 5 Wash. 344, 31 Pac. 755, it was held that the rule in equity is the same as the rule in bankruptcy, and that the secured creditor can prove only for the balance of his debt after the collateral shall have been applied. It was so held by Sir John Leach, master of the rolls, in Greenwood *v.* Taylor, 1 Russ. & M. 185.

There is one authority, and only one, which upholds the view that a creditor who has once proved his claim shall reduce that claim by all collections made before the declaration of each dividend, on the theory that he is entitled to a ratable distribution on his debt as it is at the time of distribution, and the collections made after proof of claim and before each dividend must reduce the debt pro tanto. This authority is Third Nat. Bank *v.* Lanahan, 66 Md. 461, 7 Atl. 615.

94a. Conclusiveness of auditor's report.—A depositor of an insolvent bank, whose pass book, as well as the books of the bank, showed an overdraft, presented a claim to the auditor appointed to distribute the funds, and testified that the books did not show the true state of the accounts; that, in order to apparently swell the assets of the bank in anticipation of an examination by the auditing committee, the president had induced claimant to draw several checks for large amounts on another bank, and in favor of the insolvent bank, to be offset by checks to an equal amount to be drawn on the insolvent bank, and deposited with such other bank for collection; that the checks drawn in favor of the insolvent bank were not credited to claimant, but that one of those drawn on it was charged to him. Held, that a report by the auditor that he was not able to say as a matter of fact that the check had been improperly charged, or that claimant had not received credits to balance it, was a finding of fact, which, unless shown to be plain error, was conclusive of the case. In re Penn Bank, 152 Pa. St. 65, 25 Atl. 310.

allowed by a receiver, the court appointing him will frame an issue between the receiver and the creditor to determine the validity of the claim.[95]

§ 80 (3bb) Raising and Waiving Objections to Allowance of Claims.—Who May Interpose.—In some jurisdictions any creditor, whether preferred or not, may object to the allowance of a claim against an insolvent bank.[96]

Waiver of Objections.—But a creditor who appears at the hearing and makes no objections to the allowance of claims is thereafter precluded by the order of allowance.[97] Nor can the question of the insufficiency of objections to the allowance of a claim against an insolvent bank be raised for the first time on appeal.[98]

§ 80 (3e) Payment.—What Constitutes Payment.—Where a bank surrenders the original collateral given to secure a loan and takes a different kind of security in its place, this surrender will not be considered a payment, upon failure to collect the substituted security.[99]

Demand for Payment.—Where a bank is in the hands of a receiver, a demand for payment of a deposit due by the bank is properly made by drawing a check on the bank and demanding payment thereof of the re-

95. **Issues to the jury.**—The receiver of an insolvent state bank, appointed by the circuit court on petition of the commissioner of banking, as provided in the general banking Act of 1887 (§§ 55-57), who is in express terms placed under the direction of the court in taking possession of the bank's assets and administering its affairs, is an officer of the court; and hence, on the disallowance of a claim by the receiver, the court appointing him should permit an issue to be framed between him and the creditor, in which the validity of the claim may be determined, and not remit the creditor to an action against the insolvent bank. Citizens' Sav. Bank *v.* Ingham Circuit Judge, 98 Mich. 173, 57 N. W. 121.

96. **Objections to allowance of claims.**—Taylor *v.* Hutchinson, 145 Ala. 202, 40 So. 108.

A creditor who has not been deprived of any legal right by the allowance of a belated claim against an insolvent bank can not complain of the order of the court allowing such claim. State *v.* Bank, 61 Neb. 22, 84 N. W. 406.

97. **Waiver of objections to allowance of claims.**—The receiver of an insolvent bank advertised for presentation of claims, and for the filing of objections thereto, and afterwards made a report recommending the allowance of certain claims. On the hearing of the report one creditor appeared, but no objections were filed, and the claims were allowed. Held, that the creditor appearing was precluded by the order then made from afterwards contending that certain of the claims allowed were invalid, as representing an unauthorized and illegal deposit of public funds. Baker *v.* Williams, etc., Banking Co., 42 Or. 213, 70 Pac. 711.

98. **Raising objections on appeal.**—Taylor *v.* Hutchinson, 145 Ala. 202, 40 So. 108.

99. **Novation.**—A bank held several notes as collateral security for a note given it by a second bank, which afterwards failed, and the maker of one of the pledged notes immediately conveyed his property to a bona fide creditor, and the pledgee then surrendered this maker's note and took in exchange therefor a note for an equal sum from the cashier of the insolvent bank, it appearing that such note was of more value than the one surrendered. It afterwards transpired that the cashier's note could not be collected, while the note exchanged therefor was paid in full. Held, there was no negligence by the holder as against other creditors of the insolvent bank, and it could not be charged with having received payment of the note surrendered. Hanover Nat. Bank *v.* Brown (Tenn.), 53 S. W. 206.

ceiver.[1]

Estoppel.—A creditor assenting to the mode of payment prescribed in the dissolution proceedings is thereafter estopped to object.[2]

§ 80 (4) Preferences and Priorities in General—§ 80 (4a) Order of Liability of Assets.—When a bank becomes insolvent the distribution of its assets in the hands of a receiver is to be made in the same order as prescribed in the case of administration of insolvent estates, except when special preference or postponement is provided by law.[3]

§ 80 (4b) Claims Preferred—§ 80 (4aa) In General.—The creditors have the first claim against the bank's assets.[4] And this right is superior to those of the stockholders, or the assignee of an insolvent stockholder.[5] The mere fact that the security given a creditor is annulled does not destroy his privileges as creditor.[6] But as between the creditors themselves, the statutes in most jurisdictions require that the assets be ratably distributed.[7]

1. **Demand for payment.**—Wylie *v.* Commercial, etc., Bank, 63 S. C. 406, 41 S. E. 504.

But the appointment of the temporary receiver under the N. Y. laws and the taking possession of the assets by him operates to prevent the bank from paying the claims of the creditors, and thereby obviates the necessity of a formal demand for payment on their part. People *v.* Merchants' Trust Co., 187 N. Y. 293, 79 N. E. 1004; Richmond *v.* Irons, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788; Sickles *v.* Herold, 149 N. Y. 332, 43 N. E. 852.

2. **Estoppel to object to mode of payment.**—By Act Ill. Jan. 24, 1843, the Bank of Illinois was dissolved, and its assets directed to be divided among its creditors. Section 2 provided that a large portion of the bank's specie should be paid to its creditors pro rata, and that, for the balance of their claims, they should receive certificates "receivable by the bank in payment of any debt due it, or for any property which the bank might sell, and entitling the holder to the proper proportion of all dividends made to creditors." Held, that a creditor, though residing in another state, who had accepted the benefits of the act, and received his proportion of the bank's specie, together with partial payments on such certificates issued to him, thereby assented to the mode of payment prescribed by the act, and could not thereafter maintain an action against the bank on the certificates. State Bank *v.* Corwith, 6 Wis. 551.

3. **Order of liability of assets.**—Georgia Seed Co. *v.* Talmadge & Co., 96 Ga. 254, 22 S. E. 1001, citing Belcher *v.* Willcox, 40 Ga. 391.

4. **Creditors have first claim on assets.**—A receiver of a state bank, appointed in proceedings under Comp. St. c. 8, § 34, takes possession and holds the assets of a bank in favor of, and to assert and guard the claims of, the depositors and other creditors, as the paramount and superior claims against the assets. State *v.* Bank, 58 Neb. 818, 80 N. W. 50.

5. State *v.* Commercial State Bank, 28 Neb. 677, 44 N. W. 998.

The assets of an insolvent banking corporation are always liable for its debts, and, if distributed among stockholders, or transferred to others than bona fide creditors or purchasers, such holders take them charged with the trust in favor of creditors, and a court of equity will follow the assets, and compel their application to the corporation debts. Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471.

6. Where the stock and other assets of one bank had been transferred to another bank, to secure it against existing liabilities, and such transfer was set aside as fraudulent, it was held, that the debt was not thereby rendered void. It lost the benefit of the security, but was entitled to the privileges of other creditors. Johnston *v.* South Western R. Bank (S. C.), 3 Strob. Eq. 263.

7. **Creditors share ratably.**—Richards *v.* Osceola Bank, 79 Iowa 707, 45 N. W.

Creditors of Branch Bank.—Since the relation existing between a principal bank and its agency or branch is that of principal and agent, and all the assets of the agency belong to the principal, and all the debts of the agency are debts of the principal, it follows that the depositors and creditors of the branch bank may share equally and ratably with the depositors and creditors of the principal bank.[8]

Crediting Amount of Note to Owner without His Consent.—The delivery of notes to a bank in payment for land, and the crediting of the

294; St. Mary's Church *v.* National Bank, 23 Misc. Rep. 588, 52 N. Y. S. 802; Union Nat. Bank *v.* Lyons, 220 Mo. 538, 119 S. W. 540; Robinson *v.* Gardiner, 59 Va. (18 Gratt.) 509; Exchange Bank *v.* Knox, 60 Va. (19 Gratt.) 739.

The provisions of the Act of 1841, for the surrender of the charter of the Washington County Bank, that the assets of the bank should be distributed among all creditors pro rata, did not prevent a creditor from bringing a suit to ascertain the amount due on a disputed claim. Emerson *v.* Washington County Bank, 24 Me. 445.

Construction of order of court.—An order of court directing a receiver to make a pro rata distribution of the money of an insolvent bank among the creditors, does not entitle the creditors, who fails to avail himself of the order, to a preferred lien upon the remaining assets of the bank. Rockwell *v.* Portland Sav. Bank, 31 Or. 431, 50 Pac. 566.

When creditors are preferred over one another.—In the adjustment and settlement of claims, those of depositors and other general creditors who trusted the bank in the course and transaction of its legitimate business may be preferred over claims which originated in the pursuit and conduct of a business by the bank in which it had no legal authority or power to engage. State *v.* Bank, 58 Neb. 818, 80 N. W. 50.

An incorporated bank went into liquidation, being solvent, and turned over its assets to another incorporated bank to pay the creditors and stockholders. Before the liabilities of the liquidating bank were paid, the purchasing bank became insolvent. Held, that a creditor of the liquidating bank has a prior lien over the assets in the possession of the receiver of the purchasing bank belonging to the liquidating bank as against creditors of the purchasing bank. Ex parte Sav. Bank, 73 S. C. 393, 53 S. E. 614, 5 L. R. A., N. S., 520.

8. **Rights of creditors of branch bank.**—Prince *v.* Bank, 3 App. Cases, (Eng.) 325; Garnett *v.* McKewan, L. R. 8 Exch. (Eng.) 10; Irvin *v.* Bank, 38 U. C. Q. B. (Eng.) 375; Webb *v.* Bank, 50 N. C. 288.

A bank chartered by an act of the general assembly, with the usual powers of a banking corporation, establishing a branch bank thereof, stands to such branch bank in the relation of principal to agent, and all assets and debts of the branch bank are assets and debts of the principal bank. So an assignment by the principal bank of all its property of every description, wherever situated, including all that belongs to the branch bank, forces the depositors and creditors of the branch bank to share equally and ratably with the depositors and creditors of the principal bank. Worth *v.* Bank, 122 N. C. 397, 29 S. E. 775.

A bank chartered by an act of the general assembly ratified January 12, 1872, with the usual powers of a banking corporation, establishing a branch bank under section 9 thereof, stands to such branch bank in the relation of principal to agent, and all assets and debts of the branch bank are assets and debts of the principal bank. So an assignment by the principal bank of all its property of every description, wherever suited, including all that belongs to the branch bank, forces the depositors and creditors of the branch bank to share equally and ratably with the depositors and creditors of the principal bank. Worth *v.* Bank, 122 N. C. 397, 29 S. E. 775.

An estoppel, if there could be one, on a principal bank, from dealings with its branch bank, could not affect the creditors of the principal bank, since they are entitled to have its property of every description applied ratably to the payment of their claims. Worth *v.* Bank, 122 N. C. 397, 29 S. E. 775.

amount thereof to the owner, without his knowledge or consent, held to render the notes a trust, which could be followed as a preference into the hands of a receiver.[9]

§ 80 (4bb) Expenses of Insolvency Proceedings.—As a general rule, the costs and expenses of the proceeding to winding up and dissolving the bank are to be first paid from the assets.[10]

§ 80 (4cc) Claim for Taxes.—A claim for taxes is usually preferred.[11]

§ 80 (4dd) Pre-Existing Liens and Equities.—Of course liens and equities arising before the assets of the bank became subject to the jurisdiction of the court are not prejudiced or affected by the insolvency proceeding.[12]

§ 80 (4ee) Debts Lawfully and Unlawfully Contracted.—In the settlement of claims against an insolvent bank, the claims of depositors and other general creditors who trusted the bank in the transaction of its legitimate business may be preferred over claims which originated in the conduct of a business, by the bank, in which it had no legal authority to engage, and it makes no difference that amounts claimed by the latter creditors are shown by the books of the bank to have come to it, as a bank, from the unauthorized business it conducted.[13]

§ 80 (4ff) Claims of Firm and Individual Creditors.—Social or

9. **Crediting amount of note to owner without his consent.**—Covey *v.* Cannon (Ark.), 149 S. W. 514.

10. **Expenses of insolvency proceeding.**—Complied Laws of Mich., § 6146.

Attorneys' fees.—For the prosecution of the bill and amended bill filed to wind up the affairs of a banking corporation, and for valuable services rendered in the general litigation, counsel should be paid out of the aggregate recovery—all petitioning creditors who have come in to claim the benefit of the suit to contribute pro rata; while counsel who represent or perform services only for petitioning creditors, must be paid by their own clients out of the funds recovered for them. Moses *v.* Ocoee Bank, 69 Tenn. (1 Lea) 398.

Construction of Nebraska statute.—By the execution of a bond to the state, as provided by Cobbey's Ann. St. 1903, § 3735, conditioned on the full settlement of all the liabilities of such bank, the officers and sureties assume the burdens of the bank's liquidation, and can not use the assets in paying the expenses thereof, to the prejudice of the creditors. Hume *v.* Miller, 75 Neb. 800, 106 N. W. 1006.

11. **Claim for taxes.**—The assets of a bank being in the hands of a receiver, the court ordered all claims against it to be filed by a certain date, or be barred. After that time the collector of taxes intervened, and asked the court for an order for the receiver to pay the same. Held, that the state having, under Sess. Acts 1881, p. 180, § 7, a paramount right to be paid out of those assets, it was error for the court not to issue the order as requested. Greeley *v.* Provident Sav. Bank, 98 Mo. 458, 11 S. W. 980.

12. **Pre-existing liens and equities.**—Richards *v.* Osceola Bank, 79 Iowa 707, 45 N. W. 294.

13. State *v.* Bank, 58 Neb. 818, 80 N. W. 50.

Between legal and ultra vires contracts.—As between the creditors of an insolvent bank, those whose debts were created under the lawful power given by the charter must be preferred to those who claim under a contract that the bank, under its charter, had no power to make. Bank *v.* Bank, 56 Tenn. (9 Heisk.) 408.

firm liabilities are to participate in the distribution of the assets before individual liabilities.[14]

§ 80 (4gg) Claims of State and County.—While the state, on account of its prerogative right, has a preference over other creditors and depositors in the distribution of the assets of an insolvent bank,[15] this right does not apply to the counties of the state in the absence of statute, but the county must stand upon an equal footing with other depositors.[16] But though the stock of a bank is altogether owned by a state, if the bank is insolvent, its assets can not be appropriated by legislative act or otherwise to pay the debts of the state, as distinguished from the debts of the bank. Those assets are a trust fund first applicable to the payment of the debts of the bank.[17] Any preference, however, over general creditors of an insol-

14. Claims of firm and individual creditors.—Laws 1897, c. 47, § 42, providing that the assets of any private bank shall be exempt from execution by any creditor of the individual or firm doing business as such bank until after the liabilities of the bank have been paid in full, does not apply to the individual debt of such a banker contracted before the passage of the act. McDermott *v.* Halleck, 61 Kan. 486, 59 Pac. 1074.

15. Preferences allowed state and county.—Robinson *v.* Bank, 18 Ga. 65; Seay *v.* Bank, 66 Ga. 609.

There is nothing in the acts establishing state depositories, and providing for bonds and rules for regulating such depositories, that abrogates or modifies the sovereign right of the state to priority in the assets of an insolvent bank which is a state depository. Booth *v.* State, 131 Ga. 750, 63 S. E. 502.

Custodian of public funds.—Under Code 1906, § 3845, making money deposited by or for a custodian of public funds prima facie a trust fund, not liable to be taken by the custodian's or the depositary's creditors, a custodian of public funds deposited in a bank which has become insolvent is entitled to priority of payment, as against general creditors, out of assets acquired before such deposit. Green *v.* Cole, 98 Miss. 67, 54 So. 65.

And in Metcalfe *v.* Merchants', etc., Bank, 89 Miss. 649, 41 So. 377, it was held that under this statute public moneys deposited by a tax collector were entitled to priority of payment over general creditors, in case of an assignment by the bank for the benefit of creditors.

16. Preferences allowed counties.—County of Glynn *v.* Brunswick Terminal Co., 101 Ga. 244, 28 S. E. 604.

Where a bank in which county funds are deposited fails, the county is not entitled to a lien on the assets in preference to the individual depositors. County of Glynn *v.* Brunswick Terminal Co., 101 Ga. 244, 28 S. E. 604.

17. Effect where state is sole owner.—Baring *v.* Dabney (U. S.), 19 Wall. 1, 22 L. Ed. 90.

Although the capital of a bank is furnished by the state under the laws of which it was incorporated, and the profits thereof inure to the benefit of that state, and the faith of that state is pledged to its support, yet such bank is a distinct corporation, having the ordinary powers and rights, and subject to the ordinary obligations, of banking corporations, with liability to suits by creditors, and holding its property subject to the claims of these in preference to the claims of the state as the only stockholder. State *v.* State Bank, 1 S. C. 63.

The state, being the owner and sole stockholder of the Bank of the State of South Carolina, a moneyed corporation with usual banking powers, and wishing to borrow money, passed an act for that purpose, and thereby directed the money when borrowed to be deposited in the bank as so much additional capital, and directed the bank to keep a separate account of the annual profits thereof, to constitute a fund "solemnly pledged and set apart" for the payment of the interest and principal of the loan. The other profits of the bank were also pledged for the same purpose, after specified claims, afterward paid, should be satisfied. A portion of the money was bor-

vent bank which the state has at common law as successor to the sovereignty is lost by a valid assignment for the benefit of creditors, executed before action is taken to enforce the priority.[18]

§ 80 (4hh) Claims of Forwarding or Collecting Banks.—Where a collecting bank forwards a check to the bank on which it was drawn with directions as to the application of the proceeds, but before the drawee bank has assented to the directions of the collecting bank in reference to its dealing with the check, the drawee bank ceases to do business and passes into the hands of a receiver, the refusal of the latter bank to accept and pay the check will give only a right of action against it on the instrument.[19] But a correspondent is entitled to a preference in any security held to protect overdrafts.[20]

§ 80 (4c) Effect of Fraud.—Fraud does not alone create equities superior to those of general creditors. Hence the fraudulent receipt of deposits in a bank, or the fraudulent acquirement of goods, does not give the depositor or the vendor a lien upon the entire estate or entitle him to a preference.[21] Accordingly, a creditor of an insolvent national bank, whose

rowed on bonds of the state, guaranteed by the bank, known as the "Fire Loan bonds," and the residue on stock of the state known as the "Fire Loan stock." The bank neglected to keep a separate account of the profits, and afterwards became insolvent; its debts being evidenced principally by its guaranty of the bonds, its bills, and its deposits. Held, that the assets, not being sufficient to pay the debts, were not subject to the lien created by the act in favor of the holders of the fire loan bonds and fire loan stock, but were subject to equitable distribution among all the creditors of the bank. Dabney *v.* Bank, 3 S. C. 124.

18. Effect of assignments for creditors on state's priority.—State *v.* Foster, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47.

19. Rule where drawee bank becomes insolvent before collection.—A check was forwarded by a collecting bank to the bank on which it was drawn, with directions to collect, and apply the proceeds to a debt owing to the drawee bank by the collecting bank. Held that, where the drawee bank failed on the day it received the check, and before it had assented to the direction of the collecting bank, the refusal to accept and pay the check out of the funds of the drawer then to his credit gives only a right of action against the drawee bank on the check, and does not enable the drawer, who subsequently paid the check, either to sue the collecting bank, or entitle him to priority over the other creditors of the drawee bank. Romanski *v.* Thompson (Miss.), 11 So. 828.

20. A bank, by agreement with the agent of its foreign correspondent, pledged to the latter certain state bonds as security for its overdrafts. Subsequently, in 1861, it drew bills on the correspondent on the faith of its entire credit and cash deposit. The business relations between them were closed in 1863, the bank having become insolvent, indebted to the correspondent. The bills of 1861 were not presented until 1864. Held, that the correspondent was entitled to payment, out of the bonds, of the balance due it, in preference to the holders of such bills. Garvin *v.* State Bank, 7 S. C. 266.

A bank pledged to its foreign correspondent certain state bonds to secure any overdrafts arising, and subsequently became insolvent, indebted to the correspondent. Held, that the holders of bills drawn by the bank on such correspondent prior to the insolvency, but not presented for acceptance until afterwards, were entitled to a lien on the bonds in preference to the general creditors of the bank. Garvin *v.* State Bank, 7 S. C. 266.

21. Effect of fraud.—Cadwell *v.* King, 84 Iowa 228, 50 N. W. 975; McHenry *v.* King, 85 Iowa 717, 50 N. W. 977; Elwell *v.* Kimball, 102 Iowa 720,

demand grows out of a fraudulent transaction perpetrated by the officers of the bank in contemplation of the immediate wrecking of their corporation, does not thereby become entitled to a preference over the general creditors of the bank.[22]

§ 80 (4d) Transfer of Right to Priority.—A person entitled to priority in the distribution of the assets of a bank may sell and assign this privilege to another, thereby substituting such other in his place; nor is it necessary for such authority to be given by a statute, for under the common law one may transfer whatever right he has which is the subject of sale and transfer whether acquired by virtue of the statute or common law.[23]

§ 80 (4e) Allowance of Preferences—§ 80 (4aa) In General.—Where there are a large number of depositors and general creditors who have a common interest in the allowance of preferences by a bank, one or

69 N. W. 286; Seeley *v.* Seeley-Howe-Le Van Co., 128 Iowa 294, 103 N. W. 961; Stilson *v.* First State Bank, 149 Iowa 662, 129 N. W. 70.

Fraud in receiving a deposit of checks or drafts after bank officials know that it is insolvent, will not give the depositor a preferential claim against assets in the hands of the receiver of the bank if the bank before its failure, had received the proceeds of such paper, or credit therefor from a correspondent, although the bank had no hand when it failed, and always after the deposits were made then the amount thereof in cash. Bruner *v.* First Nat. Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532.

Accordingly, where a general depositor presented his check to a bank, accompanied with a demand for payment, but, by reason of the false representations of the president as to the solvency of the bank, was induced to withdraw said check, and to allow his money to remain in the bank, he can not, as a preferred creditor, maintain a bill to recover the amount of said check, against a receiver appointed after the bank was declared insolvent. Venner *v.* Cox (Tenn.), 35 S. W. 769.

22. Fraud alone does not give a preference.—Plaintiff, having received in the course of business checks on a bank, took in payment checks of the latter on a bank in New York. The president of the bank knew when he signed such checks that they would not be honored, and was making preparations to abscond with the assets of his bank. Held, that plaintiff is not entitled to any preference over other unsecured creditors. Citizens' Nat. Bank *v.* Dowd, 35 Fed. 340.

23. Transfer of right to priority.—Commercial Bank *v.* Hardy, 97 Miss. 755, 53 So. 395.

The preference which the tax collector and treasurer of a county have, on insolvency of a bank in which they have deposited county funds, under Code 1906, § 3485, declaring them trust funds and not liable to be taken by general creditors of the bank, is assignable by them to one who, in consideration thereof, pays the indebtedness due them by the bank; it not being necessary that there be any statutory authority therefor. Commercial Bank *v.* Hardy, 97 Miss. 755, 53 So. 395.

In Fogg *v.* Bank, 80 Miss. 750, 32 So. 285, this court held that, under § 3077, Code 1892 (§ 3485, Code 1906), funds deposited in bank by a tax collector were trust funds, and, in case of an assignment by such bank for the benefit of creditors, the tax collector had a preference over other creditors to be paid in full, although he had settled with the state and county, and the preference sought to be enforced was for his individual benefit, and that, by virtue of his having made settlement out of his own funds, entitled him to be subrogated, as an individual, to his right as tax collector to the preference, and that he was required to settle monthly, and if by such settlement his right to the preference was destroyed the statute would be practically valueless, and that it was presumed that the bank as trustee did its duty by preserving the trust fund until all the other assets were exhausted, and "the trust moneys, so far as possible, are represented in the remaining assets of the bank."

more may appear for the benefit of the whole.[24]

Burden on Person Seeking Preference.—A person seeking to have a preference in funds of an insolvent bank held bound to show that the receiver has in his possession trust funds or property obtained therewith.[25]

§ 80 (4bb) Funds or Assets Available to Preferred Creditors.—A preferred creditor is not entitled to a preference in the distribution of a fund raised from assessment on stockholders under the double liability act, more especially where the provisions of the statute are specific that the fund derived from the assessment of stockholders shall be distributed equally among all the creditors of such corporation in proportion to the amount due to each.[26] But, if prior to an order establishing the claim as entitled to preference, assets of the bank which should have been applied to the satisfaction of a preferred claim have been distributed to general creditors, then undoubtedly to that extent the proceeds of the stockholders' double liability, which would otherwise be distributed to general creditors, might be applied to the satisfaction of the preferred claim because no ultimate injustice would thereby be done to general creditors.[27]

24. Where the assets of an insolvent bank are insufficient to meet all the claims of creditors and depositors, though no preference is allowed, the allowance of preference to some creditors is prejudicial to other creditors and depositors who have a common interest in defeating the preference, and, where they are numerous, a few may appear and defend for the whole, as authorized by Code, § 3464, providing that, when the question is one of common interest to many persons, one or more may defend for the benefit of the whole, and those appearing in the trial court, contesting the right to a preference, are proper parties to the proceedings, and may appeal from a judgment awarding a preference. Stilson *v.* First State Bank, 149 Iowa 662, 129 N. W. 70.

25. Burden on persons seeking preference.—Covey *v.* Cannon (Ark.), 149 S. W. 514.

Rule stated as to right to recover trust funds mingled with the bank's own funds, after the reduction of the mingled fund below the amount of the trust fund. Covey *v.* Cannon (Ark.), 149 S. W. 514.

26. Fund derived from assessment on stockholders.—Under Code, §§ 1882, 1883, authorizing a double liability assessment on stockholders of an insolvent bank, and providing that the fund derived from such assessment shall be distributed equally among all the creditors of the corporation in proportion to the amount due each, the holder of a preferred claim is not entitled to have the same paid from such double liability fund to the exclusion of other creditors. Sioux City Stock Yards Co. *v.* Fribourg, 121 Iowa 230, 96 N. W. 747.

Where an order establishing a claim against an insolvent bank directed that it should be treated as a preferred claim, and should be paid "out of any funds of said estate remaining in the receiver's hands applicable thereto," and at the time of the allowance the entire assets of the estate had been distributed among creditors, or applied to receivership expenses, such order did not entitle the preferred creditor to have the claim paid out of the stockholders' liability fund subsequently accumulated, to the exclusion of other creditors. Sioux City Stock Yards Co. *v.* Fribourg, 121 Iowa 230, 96 N. W. 747.

27. Sioux City Stock Yards Co. *v.* Fribourg, 121 Iowa 230, 96 N. W. 747, citing Standard Oil Co. *v.* Hawkins, 20 C. C. A. 468, 74 Fed. 395, 33 L. R. A. 739.

Where a claim of a creditor of a bank was entitled to preference from the general assets, and a large portion thereof had been used to enforce a stockholders' double liability assessment for the benefit of general creditors, without any part of such preferred claim being paid, such claim is entitled to a preference out of such

Money Paid to Cover Protested Draft.—A return of a portion of money paid by an insolvent bank to cover a protested draft held not to entitle owners of a trust fund to a preference therein over general creditors.[28]

Proceeds of Return Pledges.—A receiver of a bank, who collected return pledges made by the bank to secure a loan, must prorate the proceeds between depositors according to the amount of their several deposits.[29]

§ 80 (4f) Estoppel and Election.—An equitable estoppel can not be interposed against the claim to a preference by the cestui que trust, because an essential element to constitute such an estoppel is wanting, namely, that of prejudice to the creditors.[30] But where a creditor in one state makes himself a party to the dissolution proceedings in another under which no preferences are given, and shares in the distribution of assets, he is estopped to claim a preference as to assets in his own state.[31]

Election of Remedies.—The allowance, however, in favor of the plaintiffs of their claim as a debt against the general assets of the bank, estops them to claim in equity for the conversion of a trust fund, because the two remedies are inconsistent.[32] Hence if a depositor of a trust fund, through its proper officials, presents its claim for allowance on account of the deposit as a general creditor, and obtains an allowance of any part thereof, he is estopped to maintain an action against the assignee or receiver to subject all of such assets to the payment of the trust fund, because of the well-settled

double liability fund to the extent that the general assets were so used. Sioux City Stock Yards Co. *v.* Fribourg, 121 Iowa 230, 96 N. W. 747.

28. Money paid to cover protested draft.—Covey *v.* Cannon (Ark.), 149 S. W. 514.

29. Hall *v.* Burrell (Colo.), 124 Pac. 751; Hall *v.* McIntosh (Colo.), 124 Pac. 753; Hall *v.* Hardy (Colo.), 124 Pac. 753; Hall *v.* Rocky Ford, etc., Co. (Colo.), 124 Pac. 754.

30. Estoppel to claim preference.—A county whose funds have been unlawfully deposited in a bank is not estopped from claiming such funds as a trust fund after the appointment of a receiver for such bank, by reason of its treasurer having received a pro rata payment on such deposits in common with general creditors. First Nat. Bank *v.* Bunting & Co., 7 Idaho 27, 59 Pac. 929, rehearing denied, 59 Pac. 1106.

Where a guardian wrongfully deposits his ward's money in a bank which becomes insolvent, his acceptance of a dividend from the assignee does not estop the ward from demanding a return of the full amount as a preferred claim. In re Knapp, 101 Iowa 488, 70 N. W. 626.

The fact that a tax collector required by Code 1892, § 3840, to settle monthly, has accounted for public funds deposited in a bank, which has become insolvent, does not preclude him from afterwards maintaining a suit to establish such deposit as a trust fund. Fogg *v.* Hebdon, 80 Miss. 750, 32 So. 285.

31. Rights of foreign creditors.—A proceeding was begun in North Carolina to wind up the affairs of an insolvent bank in that state, under which no creditors were to be preferred. Its creditors in South Carolina appeared, a receiver was appointed to collect and disburse its assets, and they shared in a partial distribution. Held, that they were estopped from claiming, in preference to foreign creditors, the proceeds of a real-estate mortgage belonging to the bank, on which the receiver had obtained judgment in South Carolina. Wilson *v.* Keels, 54 S. C. 545, 32 S. E. 702, 71 Am. St. Rep. 816.

32. Stoller *v.* Coates, 88 Mo. 514, distinguishing and explaining First Nat. Bank *v.* Coates, 8 Fed. 540, 3 McCrary 9.

general rule that an election between two inconsistent remedies, if knowingly made, is an estoppel to claim the other.[33]

§ 80 (5) Deposits—§ 80 (5a) In General.[34]—A general depositor is merely a general creditor of a bank, and is not entitled to a preferred claim against the assets in the hands of the receiver,[35] unless equitable con-

33. Larned *v.* Jordan, 55 Kan. 124, 39 Pac. 1030; Plow Co. *v.* Rodgers, 53 Kan. 743, 37 Pac. 111.

Where a bank having possession of a trust fund belonging to a city, which it had received on deposit from the city treasurer, makes an assignment of all of its property for the benefit of its creditors, and subsequently the city demands of the city treasurer the payment of the money, which he deposited in the insolvent bank, and when this is refused also makes a demand upon the bondsmen of such treasurer, and thereupon one of the bondsmen presents to the assignee of the bank a demand for the amount of the deposit, and alleges therein "that the bank is justly indebted to this affiant as bondsman for the amount of the deposit upon the following claim, to wit: Upon the deposit account as above stated, in the sum of $4,645.18, which this affiant claims as bondsman of F. J. Mathias, city treasurer aforesaid;" and further alleges: "This certificate of proof being made in behalf of G. Krouch and the other bondsmen of said F. J. Mathias, city treasurer;" and the assignee allows to the bondsman the full amount of the demand presented by him, and thereafter issues to such bondsman a check for the amount of the first dividend made upon the claim, and the bondsman turns this over to the city treasurer, and it is credited upon the account of the defaulting treasurer—held, that the city thereby does not become a general creditor of the insolvent bank, nor is it estopped from pursuing the trust fund in the hands of the assignee of such bank. Larned *v.* Jordan, 55 Kan. 124, 39 Pac. 1030.

In an action by the draftholders against such assignee to enforce payment of their drafts in full, held, that they had not barred themselves from recovering in this action by presenting their drafts to the assignee as claims against the estate, having them allowed, and accepting dividends thereon. First Nat. Bank *v.* Coates, 8 Fed. 540, 3 McCrary 9.

34. See, also, post, "Special or Segregated Deposits," § 80 (6).

Preference of depositors in savings banks, see post, "Insolvency and Receivers," § 309.

35. Right of general depositors to preferences.—Otis *v.* Gross, 96 Ill. 612, 36 Am. Rep. 157; Wetherell *v.* O'Brien, 140 Ill. 146, 29 N. E. 904, 33 Am. St. Rep. 221; McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911; Fletcher *v.* Sharpe, 108 Ind. 276, 9 N. E. 142; Schmelling *v.* State, 57 Neb. 562, 78 N. W. 279; Bruyn *v.* Middle Dist. Bank (N. Y.), 9 Cow. 413, 1 Paige 584, note; Bank *v.* Dean, 9 Okl. 626, 60 Pac. 226; Moseby *v.* Williamson, 52 Tenn. (5 Heisk.) 278.

The depositors of money in a bank, unless in case of a special deposit of money in a box or bag, or otherwise identified, which the bank has no right to sue, are general creditors, and, in case of insolvency of the bank, are not entitled to be preferred to other creditors. In re Franklin Bank (N. Y.), 1 Paige 249, 19 Am. Dec. 413.

A cotton buyer shipped cotton to New York, receiving a draft on the consignees in payment, and delivered the draft to defendant bank, which obligated itself to pay his checks in favor of the vendor. Complainant bank acquired the buyer's check in favor of the vendor, and, on presentation to defendant, accepted in lieu of cash a bill of exchange on defendant's New York correspondent, and thereafter defendant failed. Held not to impress defendant's assets with a trust to the amount of the bill of exchange, nor to charge defendant's correspondent as trustee for the amount thereof. Citizens' Bank *v.* Bank, 71 Miss. 271, 14 So. 456.

The P. bank complied with a request of the S. bank to place a certain amount of money to the credit of the S. bank, and in pursuance thereof the S. bank delivered to the P. bank certificates, reciting that the "P. bank has deposited in the S. bank" a certain sum, "payable to the order of itself 3 months after date with interest at 6 per cent." Thereafter the P. bank honored the checks of the S. bank to the amount of the certificates. Held, that the transaction amounted to a loan by the P. bank to the S. bank, and the P. bank did not stand in the relation of

siderations justify it.[36] And a cashier's check, payable to the order of a depositor for the amount of his funds on deposit, is merely evidence of an indebtedness of the bank to the depositor, and does not entitle the depositor to any preference over other creditors of the bank at the hands of a receiver.[37] But by express statute in some jurisdictions depositors are given a preference over all other creditors in the distribution of assets of an insolvent bank[38] unless they are liable to the bank, in which case they must

a depositor to the S. bank, so as to give the P. bank a preference on the distribution of the funds of the S. bank on its insolvency. Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289.

One who acquiesced in the entry of money paid to a bank to discharge an unmatured note held elsewhere, to his credit until the note should be procured, has no standing in equity on a liquidation other than that of a general depositor. Peterson *v.* Grapser (Iowa), 118 N. W. 411.

Where a bank for its own accommodation ships currency to another bank, and makes a draft against such shipment, the transaction will be, in the absence of an express stipulation to the contrary, deemed a general deposit of the currency, and in event of the failure of the correspondent the first-mentioned bank will share in the assets on the same footing as other general creditors. Bank *v.* Dean, 9 Okl. 626, 60 Pac. 226.

Construction of New York statute.—The relation which the depositors of an insolvent bank bear to the funds which have been or are to be distributed by order of court is fixed as of the time when the superintendent of banks closed the bank and took possession of its assets. People *v.* Bank, 70 Misc. Rep. 633, 127 N. Y. S. 908.

Deposit by court of funds in court.—Where a court deposits funds with a bank, and the bank assigns for the benefit of its creditors, the court can not order the assignee to pay into court the balance due on its claim under the penalties of contempt, as the court is simply a creditor, with no greater rights than other creditors. In re Western Marine, etc., Ins. Co., 38 Ill. 289.

36. A preferential trust can not be established, in favor of a depositor, because just prior to the failure of the bank the claimant demanded payment, and was told by the cashier to indorse his certificates, and had already indorsed two when payment was forbidden by the president, although there was more than enough money in the bank at the time to pay the claim. St. Mary's Church *v.* National Bank, 23 Misc. Rep. 588, 52 N. Y. S. 802.

37. Effect of cashier's check.—Clark *v.* Chicago Trust, etc., Co., 85 Ill. App. 293, judgment affirmed in 186 Ill. 440, 57 N. E. 1061, 53 L. R. A. 232, 78 Am. St. Rep. 294.

38. Depositors preferred in some states.—Taylor *v.* Hutchinson, 145 Ala. 202, 40 So. 108.

Code, § 1877, provides that on the insolvency of a bank a receiver shall be appointed at the instance of the state auditor, and the bank's assets ratably distributed "among the creditors thereof, giving preference in payment to depositors," and §§ 1878-1883 declare that, in case a deficiency still remains, a ratable assessment may be made, on stockholders, the sum realized to be distributed equally "among all the creditors in proportion to the several sums due them." Held, that on the insolvency of a bank the depositors were entitled to be first paid in full before other creditors were entitled to share in the general assets. State *v.* Corning State Sav. Bank, 127 Iowa 198, 103 N. W. 97.

Where a bond with sureties has been given to secure a deposit on which judgment has been obtained, and a receiver appointed for the bank, the sureties, as to assets of the bank in the hands of the receiver other than securities assigned to the depositor as additional security before the failure, have no prior rights over other creditors; since Code, § 1572, declares that the assets in such case shall be "ratably distributed among the creditors, * * * giving preference in payment to depositors." Richards *v.* Osceola Bank, 79 Iowa 707, 45 N. W. 294.

A bank, having solicited accounts from banks in other cities, received checks and drafts for collection, which were credited to them upon their collection. Cash was also frequently sent to it, and interest was allowed upon balances exceeding $1,000. These bal-

discharge this liability before they can claim the preference.[39] And a bank which by its charter is authorized to receive deposits, and give security therefor, may provide a system for securing loans and deposits generally, by establishing an investment department, in which certificates issued therefor are secured by a transfer to a trustee of negotiable paper, to be held by him solely for the benefit of depositors and others dealing with the bank, and thereby give them precedence over its general creditors, not so secured.[40]

Where checks on another bank are deposited the bank is, until collection, a mere bailee of the checks deposited or agent of its customer's depositor. Accordingly, the proceeds of the check must be paid to the

ances were used by the bank in the course of its business, and were not remitted except upon checks or draft. Held, on failure of the bank, that such remitting banks were depositors, within Act April 16, 1850, which provides that the assignees of insolvent banks shall pay liabilities in the following order: (1) Note holders; (2) depositors; and (3) other creditors. Foulker *v.* Union Banking Co. (Pa.), 6 Wkly. Notes Cas. 109.

Who are depositors.—A depositor, within the meaning of Act April 16, 1850, providing preferences in the distribution of the assets of banks in the hands of assignees, is one who places his money on deposit for safekeeping, to be paid out on demand, upon his checks or drafts. Appeal of Parkesburg Bank, 6 Wkly. Notes Cas. 394.

A bank, being in need of funds, borrowed securities to be used as collateral in securing money. It borrowed the money, giving the securities, and entered the amount so borrowed as a deposit to the credit of the owner of the securities, who, upon subsequent failure of the bank, paid the indebtedness, and took the securities, and then claimed preference as a depositor. Held, that he was not a depositor. Appeal of Parkesburg Bank, 6 Wkly. Notes Cas. 394.

Where bills are forwarded by one bank to another for collection, and the proceeds are credited to the remitter, the usual mode of settlement of such proceeds being by weekly drafts for the balance due, such remitter is not a depositor, within Act April 16, 1850, which provides that, upon insolvency of a bank, the assignee shall pay (1) note holders, (2) depositors, and (3) other creditors, in the order named. Appeal of Parkesburg Bank, 6 Wkly. Notes Cas. 394.

A corporation which makes a deposit to be used in paying maturing interest coupons, and for no other purpose, when the bank assigns is a general creditor, and not a "depositor," within the meaning of Act April 16, 1850, § 39 (P. L. 492), making depositors preferred creditors. In re Brandywine Bank (Pa.), 1 Chest. Co. Rep. 431.

A holder of a bank's certificate of deposit, payable on a fixed date with interest, is a creditor of the bank on a loan made to it for a fixed period on which interest is stipulated for, and is not a depositor, within Const., § 250, giving depositors who have not stipulated for interest a preference in case of the bank's insolvency. Taylor *v.* Hutchinson, 145 Ala. 262, 40 So. 108.

What are deposits.—Under Banking Act May 13, 1876, providing that in case of insolvency of a bank its deposits are to be paid first, balances due banks as the result of mutual accounts with the insolvent bank are not deposits. In re State Bank, 13 Pa. Co. Ct. Rep. 433.

An interest-bearing time deposit is not a deposit, within Banking Act May 13, 1876, providing that in case of insolvency of a bank its deposits shall be paid first, but is a loan to the bank, a deposit being money placed in the bank to be drawn on at pleasure; especially as the act prohibits the payment of interest on deposits, but allows banks to borrow money and pay interest thereon. In re State Bank, 13 Pa. Co. Ct. Rep. 433.

39. Banking Act May 13, 1876, providing that in case of insolvency of a bank deposits shall be paid first, does not authorize the payment of depositors, in any way liable to the bank, till such liability is discharged, nor payment to a stockholder of his deposit, till all other creditors are fully paid. In re State Bank, 13 Pa. Co. Ct. Rep. 433.

40. Ward *v.* Johnson, 95 Ill. 215.

depositor although not collected until after insolvency.[41] But the relation of debtor and creditor is established between a bank and a depositor therein of a check, where such check is delivered to and accepted by the bank as cash, and treated as such, and so charged up to the bank to which it was sent for collection. In such case the depositor can not follow the check or its proceeds where the bank becomes insolvent.[42] And the right to follow

41. Checks deposited for collection.—Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940; Showalter *v.* Cox, 97 Tenn. 547, 37 S. W. 286.

The title to a check does not pass to a bank to which it is delivered by the holder, without any special agreement, express or implied, in regard thereto, when it is not entered up to the latter's credit, and the bank, at the time of receiving it, was hopelessly insolvent, to the knowledge of its officers; and a receiver of such bank subsequently appointed, who forwards such check to the drawee, and collects the amount, will be compelled to refund same to the depositor. Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940; Showalter *v.* Cox, 97 Tenn. 547, 37 S. W. 286.

Indorsement for collection.—"In the case of Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921, the general rule is held to be that an indorsement for collection vests no title to the paper in the bank, etc., and it 'may be recovered in specie before collection made; * * * but, if the bank made collection before it makes an assignment, even though it be in fact insolvent, it simply becomes as ordinary contract debtor of the owner, and he can not impress any trust character upon the proceeds.' Citing Morse on Banking, vol. 1, p. 248." Sayles *v.* Cox, 95 Tenn. 578, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940.

Indorsement "for deposit."—In Beal *v.* Somerville, 1 C. C. A. 598, 50 Fed. 647, 17 L. R. A. 291, the circuit court of appeals, first circuit, laid down the following proposition: "A city treasurer deposited checks in a bank, indorsed by him 'for deposit,' and the checks were immediately credited to him on his bank book, though not in pursuance of any agreement to that effect. He had been a depositor in the bank for some years, but had no agreement that his checks should be treated as cash, or that he should draw against them before collection. The bank became insolvent before the checks were collected, and their proceeds passed into the hands of a receiver. Held, that no title passed to the bank except as a bailee, and that the depositor was entitled to the proceeds."

42. When check deposited for collection a general deposit.—Friberg *v.* Cox, 97 Tenn. 550, 37 S. W. 283.

"In such case, in the absence of anything more, the customer can not follow up the check or its proceeds as his own property, but the relation of debtor and creditor is established by such transaction, and the customer and his assignee have merely demands against the bank upon their certificates of deposit and credit on the books. Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940; Williams *v.* Cox, 97 Tenn. 555, 37 S. W. 282; Morse on Banking, § 568, and subsections." Friberg *v.* Cox, 97 Tenn. 550, 37 S. W. 283.

"The check having been treated and received and credited as cash, the relation of creditor and debtor between the customer and bank arose out of the deposit, and the customer is not, therefore, entitled to recover the proceeds of the check as his own money. Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940; Morse on Banking, § 568, and subsections." Williams *v.* Cox, 97 Tenn. 555, 37 S. W. 282.

"In Morse on Banking, § 583, it is said that, when there is no usage, or course of dealing between the parties to decide the matter, and a check is received without instructions, the bank may elect to receive it for collection or as cash, and the depositor is the owner until the bank makes it its own by crediting it as cash. There is an evident difference between a deposit of money without instructions, and of

and reclaim a check received for deposit by a bank after it is insolvent to the knowledge of its officers, is lost where, before the bank fails, another bank, to which it is sent for collection, credits the check to the former bank.[43] And a credit, for a draft given by one bank to another on the same day that the latter failed, will not be presumed, in the absence of proof, to have been given after the failure, in order to entitle one who deposited the draft in the insolvent bank after its officers knew it was insolvent, to reclaim the proceeds of the draft out of the assets in preference to other

paper, such as checks, drafts, etc., without such instructions. Morse on Banking, §§ 186, 187. When the check came to the hands of the bank examiner it was still the property of complainant, and when its proceeds were sent to the receiver he took them for complainant as the owner, and not as assets or property of the bank." Showalter *v.* Cox, 97 Tenn. 547, 37 S. W. 286.

A customer for whom a bank makes a collection and remits the funds collected by check upon another bank, which is not paid upon presentation, becomes a mere creditor of the collecting bank for the amount of such fund, and entitled to share only pro rata with other general creditors under a general assignment subsequently made by the bank, unless, by special contract, express or implied, the bank was constituted trustee of such fund for its customer, and the fund remains susceptible of identification. Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921.

And the collecting bank, not its assignee, has, as between itself and customer, effected the collection of the latter's debt, and become debtor for the fund, where the bank, before making a general assignment, accepted, in absolute payment of the debt, the check of its customer's debtor upon itself, overdrawing his deposit, and this overdraft was subsequently collected of the drawee by the assignee of the bank, for benefit of all its creditors. Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921.

"In his work on commercial paper Mr. Randolph says: 'If the holder of a bill directs that it be paid to a certain banker, procuring credit with such banker will amount to a payment of the bill. So if the amount of a note is credited to a bank holding it for collection (according to the custom of dealing between the banks), it will be a payment, although the bank making the note and giving the credit failed on the day it was so credited.' Randolph on Com. Paper, vol. 3, §§ 1395, 1456. The doctrine has been extended, and collecting banks have been recognized as authorized to receive their own certificates of deposit in payment, and the debtor is discharged, even though the bank fails before remitting. See Howard *v.* Walker, 92 Tenn. 452, 21 S. W. 897." Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921.

Check with unrestricted indorsement.—The deposit with a bank of a check with an unrestricted indorsement, which the depositor directs to have placed to his credit, will be treated as a cash deposit which the depositor is not entitled to reclaim otherwise than as a general liability on the bank becoming insolvent, where the bank treated it as credited, and immediately advised the depositor of such fact, and the latter's check, drawn on same day for part of the amount, was paid by the bank. Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940; Williams *v.* Cox, 97 Tenn. 555, 37 S. W. 282.

43. Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940; Klepper *v.* Cox, 97 Tenn. 534, 37 S. W. 284, 34 L. R. A. 536, 56 Am. St. Rep. 823; Friberg *v.* Cox, 97 Tenn. 550, 37 S. W. 283.

In the absence of proof to the contrary, it will be presumed in favor of the creditors of an insolvent bank that its failure occurred after the entry of a credit by its correspondent for a deposited check sent for collection and credit, where both the entry of the credit and the failure occurred on the same day. Friberg *v.* Cox, 97 Tenn. 550, 37 S. W. 283.

creditors who seek to have them distributed pro rata.[44] But if the identity of the check is lost, and the bank, at the time its doors are closed, has on hand no money or property which represents them or which was received in exchange for them, and simply used the checks in paying its debts, the depositor will not be permitted to take property or the proceeds from it, no part of which was received in exchange for the checks; he will be limited to an unpreferred claim.[45]

§ 80 (5b) Priorities as between Themselves.—Since general depositors are merely general creditors they are only entitled to share pro rata with other general creditors in the distribution of the funds of an insolvent bank.[46] But where the assets of a bank in the hands of a receiver are released upon the false representations of some of the depositors that it is solvent, the nonassenting depositors are entitled to be first paid out of the assets when finally distributed.[47]

44. Klepper *v.* Cox, 97 Tenn. 534, 37 S. W. 284, 34 L. R. A. 536.

"If such credit was entered before the Johnson City bank failed, then the proceeds became mingled with the general funds of the banks, and can not be reclaimed. Aiken *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940. In such case the proceeds can not be followed, separated, or identified." Klepper *v.* Cox, 97 Tenn. 534, 37 S. W. 284, 34 L. R. A. 536, 56 Am. St. Rep. 823.

"There may be special facts in a case which will take it out of the ordinary rule, and create a trust in the funds collected. Such special facts were found in the case of Continental National Bank *v.* Weems, 5 Am. State Reports, page 85, cited by counsel for defendant. In this case the agreement between the two banks in reference to the proceeds was that 'they should be preserved by said bank as the property of the complainant, and returned to it as such.' The court thought these special facts settled the question of trust in favor of the complainant. But the rule undoubtedly is, that unless there is some agreement or course of dealing whereby the funds are to be held separate and the identical proceeds remitted, the owner of the drafts stands upon no higher ground than the other creditors of the bank in a case where the bank collects the drafts prior to making a general assignment." Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Sayles *v.* Cox, 95 Tenn. 579, 32 S. W. 626, 32 L. R. A. 715, 49 Am. St. Rep. 940.

45. Loss of identity of check deposited for collection.—Where a bank accepts checks for deposit when it is in a failing condition, and afterwards fails, the checks may be followed by the depositor and recovered, unless they have passed into the hands of innocent parties; or, if they have been changed for other property, it may be impressed with the equities of the depositor. But if the insolvent bank did not receive other property in lieu of the checks deposited, the depositor will be limited to an unpreferred claim. Willoughby *v.* Weinberger, 15 Okl. 226, 79 Pac. 777. See post, "Special or Segregated Deposits," § 80 (6).

46. Pro rata distribution between general depositors.—McLain *v.* Wallace, 103 Ind. 562, 5 N. E. 911; Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564; Bank *v.* Dean, 9 Okl. 626, 60 Pac. 226.

47. A bank was placed in the hands of a receiver, and filed a motion alleging that it was solvent, set forth the scheme for reorganization, and prayed for the surrender of its assets. The motion was granted, and it proceeded to do business under a different name, but again made an assignment, and was placed in the hands of the receiver. Held, in the distribution of its assets, depositors who were not parties to the agreement for reorganization and the application for a surrender of the assets under the first receivership were entitled to priority over those who were. Rumble *v.* Tyus, 123 Ga. 295, 51 S. E. 420.

§ 80 (5c) Deposits by Savings Banks.—Under the laws of New York deposits made by savings banks have preference over other creditors of an insolvent bank in the distribution of its assets.[48]

§ 80 (6) Special or Segregated Deposits—§ 80 (6a) In General.[49]—A special deposit or deposit that is to be segregated and kept

48. **Savings banks.**—Laws 1875, c. 371, § 48, providing that all the assets of an insolvent bank, after the payment of its circulation, shall be applied to the payment of moneys deposited with it by any savings corporation, applies only to deposits, property so called, and not to any other description of indebtedness. Rosenback *v.* Manufacturers', etc., Bank, 69 N. Y. 358, affirming 10 Hun 148.

The provision of Laws 1875, c. 371, § 48—savings banks shall have a preference for moneys deposited over other creditors of an insolvent bank—only applies to deposits made in the ordinary course of business, and subject to the drafts of the depositors. Loans, whether on time or payable on call, are not deposits, within the meaning of the provision; and a loan can not be changed into a deposit by reason of any want of authority in the managers of the savings bank to make the loan, or for the reason that it may have been made in violation of law. Rosenback *v.* Manufacturers', etc., Bank, 69 N. Y. 358.

The provision of Laws 1875, c. 371, § 48, directing assets of insolvent banks to be applied to refund deposits by savings banks, applies to deposits made before, as well as since, the passage of the act, and extends to moneys received under a general agreement and course of business for the savings bank to pay in funds from day to day, by pass book, like a depositor, the same to be repayable, on call, with interest. Upton *v.* New York, etc., Bank (N. Y.), 13 Hun 269.

What a deposit is.—Money paid by a savings bank to the M. Bank in pursuance of an agreement to deposit with the M. Bank one-fourth of all moneys received, the M. Bank to pay interest on the daily balance at 4 per cent per annum, and at the end of three years pay over to the savings bank all money belonging to it, and also pay at sight any checks or drafts drawn upon it, held to be a "deposit," within the meaning of Laws N. Y. 1875, c. 37, § 48, and thereby entitled to priority over other claims. In re Patterson, 18 Hun 221, affirmed in 78 N. Y. 608.

A savings bank had $50,000 on deposit with defendant. The latter applied to the savings bank for a loan, on call, of $40,000. The loan was agreed upon, a formal agreement prepared, and defendant gave securities for repayment of the loan. The president of the savings bank borrowed $65,000 on its own securities, and deposited $40,000 to defendant's credit in the C. Bank, which was defendant's correspondent, and where its account was overdrawn. The amount bore interest from the time of this deposit. It was entered in the cash book of the savings bank as a "deposit," but was thereafter entered in the journal as a call loan; and $5,000, paid on the day of such entry, was entered as made on account of the loan. In defendant's books it was entered to the credit of the call-loan account of the savings bank. Held, that the transaction was a loan, not a deposit (Laws 1875, c. 371, § 48), and that the savings bank was not entitled to a preference. Rosenback *v.* Manufacturers', etc., Bank, 69 N. Y. 358.

Conflict between state and federal statute.—The question whether a savings bank should be paid in full by an insolvent national bank, pursuant to the state law, Laws N. Y. 1882, c. 409, § 282; Elmira Sav. Bank *v.* Davis, 73 Hun 357, 26 N. Y. S. 200, or pro rata, as provided by the Revised Statutes (§§ 5236, 5242), held, upon a motion to remand, to be a controversy "arising under the laws of the United States." Tehan *v.* First Nat. Bank, 39 Fed. 577, distinguished. Auburn Sav. Bank *v.* Hayes, 61 Fed. 911.

Laws N. Y. 1853, c. 257, and Laws N. Y. 1858, c. 136, which provide that, after paying the circulating notes of an insolvent bank of deposit, its assets shall be first applied to the payment of deposits made with it by savings banks, do not entitle a savings bank to be preferred to other creditors in the distribution of the estate of a bank of deposit under the federal bankrupt law. Sixpenny Sav. Bank *v.* Stuyvesant's Bank, Fed. Cas. No. 12,919, 12 Blatchf. 179, 49 How. Prac. 133.

49. **Special or segregated deposits.**—Whether deposit is special so as to

separate from the other property or funds in the bank, will be entitled to priority of payment on a distribution of the bank's assets upon its insolvency. But a deposit is presumed to be general and the burden is on the person claiming the contrary to prove it.[50] It is, however, a well-established

entitle depositor to preference, see post, "Special Deposits." § 153.

50. Special or segregated deposits. —Minard *v.* Watts, 186 Fed. 245; Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564; Bank *v.* Dean, 9 Okl. 626, 60 Pac. 226.

A deposit of money in a bank by one who sustains fiduciary relations to the funds, and who deposits the money for the benefit of another with the knowledge of the banker, was not entitled to any priority at the distribution of the assets on the bank's insolvency, where there was no understanding that the deposit should be treated as a special deposit. Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564.

What constitutes special deposit.— The complainant, a corporation, had a large deposit in the defendant bank, it being in a sense a depositary of the complainant. There was an understanding or agreement between the bank officials and the officers of the complainant that the latter would not draw out all of its money at once, but would do so only as it needed it in its current business. The president of the bank believing that the complainant was not observing its agreement about not checking on its deposit except as it needed its money in its current business, saw the secretary of the complainant, about it, and told him that a number of his stockholders were borrowers from his bank, that they had deposited their certificates of stock as collaterals to secure these notes, and that the complainant ought to have enough money on deposit to protect its stock thus deposited. The directors passed a resolution to the effect that they would keep enough money on deposit to protect their stock hypotheticated by their stockholders to secure the payment of notes given by them to the bank, and the bank officials were notified of this action. "There is not the slightest evidence that the deposit was to be changed from a general to a special deposit, or that the bank was not to use it as it did its other funds in its current business. Under these facts, we are aware of no well-considered authority that would hold it to be a special deposit, or that it was impressed with a trust which entitled it to be preferentially paid out of the funds of the assigning insolvent bank. We think the decided weight of authority is to the contrary. The cases of Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; First Nat. Bank *v.* Hummel, 14 Colo. 259, 23 Pac. 986, and Roca *v.* Byrne, 145 N. Y. 182, 39 N. E. 812, 45 Am. St. Rep. 599, are leading cases upholding the doctrine of trusts with respect to funds deposited or placed with parties for designated purposes. But this case, in its facts, is covered by the principle announced in the cases of Mutual Acci. Ass'n *v.* Jacobs, 141 Ill. 261, 31 N. E. 414, 16 L. R. A. 516, 33 Am. St. Rep. 302, and authorities cited. Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669; Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921, and Howard *v.* Walker, 92 Tenn. 452, 21 S. W. 897; 1 Morse, Banks, § 248." State Bldg., etc., Ass'n *v.* Mechanics' Sav., etc., Trust Co. (Tenn.), 36 S. W. 967.

A railroad company, being required by the court to give security for the payment of certain outstanding bonds, gave an undertaking, signed by the president of a bank, in which it was a depositor, as security. At the same time it gave him a check on the bank for the amount of the bonds, taking from him a certificate, signed by him for the bank, that it had deposited such sum in his name as trustee to secure him as surety. The bank then charged complainant with the check, and credited the amount to the president as trustee. Held, that the bank did not become a trustee, and on its insolvency the company was only entitled to the same dividend as other creditors. Cleveland, etc., R. Co. *v.* Hawkins, 79 Fed. 29, reversed. Hawkins *v.* Cleveland, etc., R. Co., 32 C. C. A. 198, 89 Fed 266, motion to modify mandate denied, 39 C. C. A. 538, 99 Fed. 322.

Deposit to abide event of suit.— Complainants being in litigation concerning the title to certain lands in the possession of a tenant, it was agreed that the landlord's share of the rentals accruing pendente lite should be de-

rule that moneys received by a bank to be applied to a particular purpose, or to be remitted to some creditor of the person paying such sums, are regarded as trust funds, and a claim therefor is ordinarily entitled to preference over the claims of general creditors in the distribution of the assets of the insolvent bank.[51] Thus, where money is deposited with a bank, to be applied

posited in a bank to abide the final determination of the controversy, pursuant to which agreement various sums were so deposited, there being at no time any agreement or understanding between any of the parties and the bank that the deposits were to be held or kept separate from the general funds of the bank. Held, that such deposit was general in its nature, and did not constitute a trust fund, so that, on the failure of the bank, complainants were only entitled to share in the bank's assets as general creditors. Minard *v.* Watts, 186 Fed. 245.

Package of money placed in separate box.—A bank teller, knowing the bank to be insolvent, received from plaintiff, as a deposit, a package of money, which he put into a box by itself, entering the amount in plaintiff's pass book. On the same day the bank failed. Held, that the title to the package of money never vested in the bank, and that plaintiff could maintain replevin therefor. In re Assignment, 1 N. P. 358, 2 O. Dec. 304.

Securities deposited for safe-keeping.—Where a banker has sold bonds deposited with him for safe-keeping, the proceeds of which were applied to his general banking business, and came into the hands of his assignee for benefit of creditors, the depositor has a paramount right to be first paid out of the assets. Bowers *v.* Evans, 71 Wis. 133, 36 N. W. 629, following Francis *v.* Evans, 69 Wis. 115, 33 N. W. 93; overruled in Nonotuck Silk Co. *v.* Flanders, 87 Wis. 237, 58 N. W. 383.

Waiver.—The fact that a special depositor, on being falsely told that there were not sufficient funds in bank to pay the amount held in trust by the bank for him, receives in part payment a draft, which is never paid, is not a waiver of his right to impress on the assets of the bank a trust in his favor. In re Johnson, 103 Mich. 109, 61 N. W. 352.

51. Deposits received for a special or designated purpose.—Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693; Boone County Nat. Bank *v.* Latimer, 67 Fed. 27, 30; Anderson *v.* Pacific Bank, 112 Cal. 598, 44 Pac. 1063, 32 L. R. A. 479, 53 Am. St. Rep. 228; Davenport Plow Co. *v.* Lamp, 80 Iowa 722, 45 N. W. 1049, 20 Am. St. Rep. 442; Nurse *v.* Satterlee, 81 Iowa 491, 46 N. W. 1102; Brooke *v.* King, 104 Iowa 713, 74 N. W. 683; Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365; Officer *v.* Officer, 127 Iowa 347, 101 N. W. 484; Whitcomb *v.* Carpenter (Iowa), 111 N. W. 825, 10 L. R. A., N. S., 928; Peak *v.* Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; Sherwood *v.* Milford State Bank, 94 Mich. 78, 53 N. W. 923; Sherwood *v.* Central Michigan Sav. Bank, 103 Mich. 109, 61 N. W. 352; Anheuser-Busch Brew. Ass'n *v.* Morris, 36 Neb. 31, 53 N. W. 1037; Capital Nat. Bank *v.* Coldwater Nat. Bank, 49 Neb. 786, 69 N. W. 115, 59 Am. St. Rep. 572; Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; McLeod *v.* Evans, 66 Wis. 401, 28 N. W. 173; Francis *v.* Evans, 69 Wis. 115, 33 N. W. 93; Foster *v.* Rincker, 4 Wyo. 484, 35 Pac. 470.

Where a town supervisor deposited town funds with a private banker without any agreement that he should hold and keep the money separate from his other funds or that he should not use them in the usual course of his banking business, the relation was that of debtor and creditor only, so that on the insolvency of the banker the supervisor had no preference over other creditors. In re Nichols, 166 Fed. 603.

Deposit for special purpose.—Where money was deposited in a bank to secure payment of compensation under a well drilling contract, and, while the depositor had no right to check against the deposit, there was no agreement that the money should be kept separate from the other funds of the bank, it was a general and not a special deposit, though the transaction was called a "trust fund account" on the bank's books, and hence, on the insolvency of the bank, the depositor was not entitled to a priority over general creditors. Butcher *v.* Butler, 134 Mo. App. 61, 114 S. W. 564.

A depositor drew a check on his bank, requesting it to place proceeds

in the payment of a note on which the depositor is liable, the bank holds it as a trust fund and not as the assets of the bank and it may be followed and reclaimed from the assignee or receiver.[52] The reason of the rule is that the relation between the depositor and the bank as to such deposits is that of principal and agent, or trustee and cestui que trust and not simply that of depositor and depositary. Nor will the mere fact that the bank credits to the plaintiff the amount received change this relationship and create simply that of debtor and creditor.[53] But the mere unperformed agree-

in its correspondent bank to the credit of a third person, which the bank agreed to do. The bank then drew a memorandum draft to the correspondent bank, stating that its account had been credited with the amount of the check to the use of the third person, but, before the memorandum reached the correspondent, the bank assigned for creditors, after which the correspondent refused to accept the credit. Held, that the amount of the check remained in the bank in trust for the depositor, and not as general assets for creditors. Stoller *v.* Coates, 88 Mo. 514.

52. Money deposited to meet a note.—In re West of England, 11 Ch. Div. 772; Knatchbull *v.* Hallett, 13 Ch. Div. 696; St. Louis *v.* Johnson, Fed. Cas. No. 12,235, 5 Dill. 241; National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Peak *v.* Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90.

One who gives the cashier of a bank a sum of money to pay his note made to the bank, the cashier saying that he will send for the note, and return it to the maker, and who, notwithstanding, is sued by one holding the note, and judgment recovered, may follow the amount given to the cashier as a trust fund into the hands of an assignee for creditors of the bank. Ellicott *v.* Barnes, 31 Kan. 170, 1 Pac. 767.

A banker receiving money from the maker of a note to be applied on the note made payable to the banker, and failing to make the proper indorsement, if holding the note, or to turn over the payment to the person holding it, but mingling the money with the funds of his bank, is a trustee of the money received, and the maker is entitled, on the insolvency of the banker, to a preference for the amount paid. Whitcomb *v.* Carpenter (Iowa), 111 N. W. 825, 10 L. R. A., N. S., 928.

Where an indorser pays a note to a bank, and takes a receipt containing an order for a surrender of the note on return of the receipt, the relation between the bank and the indorser is not that of debtor and creditor, but is a fiduciary relation, entitling the indorser, on the bank becoming insolvent without applying the money on the note, or procuring its surrender, to have the assets in the hands of its receiver applied in payment thereof. Massey *v.* Fisher, 62 Fed. 958, following People *v.* City Bank, 96 N. Y. 32; Peak *v.* Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90.

Where one indebted to a bank on a note before the insolvency of the bank deposits with it a part of the amount of his indebtedness, that it may be applied on the note when due, the "debt" taken by the receiver of the bank is the difference between the amount of the note and the amount of the deposit. Clots *v.* Dickson (N. Y.), 5 Alb. L. J. 286.

A, before the maturity of a note, delivered money to a bank cashier to pay the note which was held by another bank. The cashier gave A a special receipt, but the note was not paid, and the bank failed, and assigned its property in trust for creditors. Held, that A could reclaim the amount as impressed with a trust. Peak *v.* Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90.

When money is paid to and accepted by a bank for the purpose of transmission to the holder of the note made by the person so paying, and is mingled by the bank with its assets, and is not transmitted, and the bank thereafter assigns for the benefit of its creditors, if the holder of the note adopts the trust thereby created in his favor, and no other rights thereto intervene, he may maintain an action to compel the execution of the trust by the assignee of the bank. Ryan *v.* Phillips, 3 Kan. App. 704, 44 Pac. 909.

53. Reason of rule making special deposits a trust fund.—Harrison *v.* Smith, 83 Mo. 210, 53 Am. Rep. 571; State *v.* State Bank, 42 Neb. 896, 61 N. W. 252.

In Anheuser-Busch Brew. Ass'n *v.*

ment on the part of the bank to create a specific fund which shall possess a separate identity, and to hold the same in trust does not entitle the depositor to any preference where such promise was never complied with and the money never separated from the general funds of the bank by either placing the deposit in a distinct parcel or by making any entry upon the books of the bank indicating the withdrawal from the general funds of the firm, or by giving a receipt containing even an intimation of a special deposit.[54] This rule, however, may well be doubted, because to make one depositor of a bank and in case of its insolvency to limit such person's rights against the assets thereof to those of an ordinary creditor, it must appear that such person became a depositor of such bank voluntarily.[55]

Morris, 36 Neb. 31, 53 N. W. 1037, this court held that "where a bank collects money for another, it holds the same as trustee of the owner; and, on the making of an assignment by the bank for the benefit of its creditors, the trust character still adheres to the fund in the hands of the assignee, and the owner is entitled to have his claim allowed as a preferred claim."

In McLeod *v.* Evans, 66 Wis. 401, 28 N. W. 173, 214, it was held that a banker who accepts for collection a draft, and in fact collects the money thereon, holds the same as trustee of the owner; and after his assignment for the benefit of creditors the trust character still adheres to the fund in the hands of the assignee, irrespective of other creditors.

These cases were decided upon the correct principle that to make one a depositor, as such, of a bank, and, in case of its insolvency, to limit his rights against the assets thereof to those of an ordinary creditor, it must appear that such person became a depositor of such bank voluntarily. See State *v.* State Bank, 42 Neb. 896, 61 N. W. 252.

54. Effect of agreement to separate deposit.—A depositor who receives an ordinary certificate of deposit, and whose money is mingled with the other funds of a bank, is not entitled, on the insolvency of the bank, to any preference over other creditors, even though the banker promised him to keep his money separate from the other funds. Bayor *v.* American, etc., Sav. Bank, 157 Ill. 62, 41 N. E. 622.

55. State *v.* State Bank, 42 Neb. 896, 61 N. W. 252.

One may involuntarily become the creditor of another, but, from the very nature of things, the relation of banker and depositor can be credited only by consent of both parties. If A, without the knowledge or consent of B, deposits a sum of money in a bank to the latter's credit, then, until B shall be informed thereof, and expressly or by implication recognize the deposit as such, the bank will hold such money in trust for B, and not as his banker. State *v.* State Bank, 42 Neb. 896, 61 N. W. 252.

Plaintiff, by arrangement with defendant's assignor, a banking house, was accustomed, on receipt from it of a statement that a certain amount of money could be advantageously loaned to a specified person on described security, to send a check for the amount, payable to the bank, to be turned over on completion of the negotiation. A check thus sent had been collected of plaintiff's bank, and the banking house, having led plaintiff to believe that the loan had been perfected, made as assignment for benefit of creditors. Held, that the money so received was on special trust, and plaintiff entitled to preference over general creditors. Harrison *v.* Smith, 83 Mo. 210, 53 Am. Rep. 571.

Where one makes a loan to a purchaser of land of the amount necessary to pay therefor, receiving a mortgage to secure it, and deposits the money in a bank, to be paid over to the vendor, and the cashier of the bank falsely states to the vendor that he has the right to hold the money until a defect in the title can be cured, and sends the vendor a certificate of deposit payable when the title is straightened, and in a few days the bank becomes insolvent, the vendor is not a voluntary creditor of the bank, and the money is held in trust for him, and the title thereto does not pass to the receiver. State *v.* State Bank, 42 Neb. 896, 61 N. W. 252.

§ 80 (6b) Checks Deposited for Collection.—Where there are circumstances of a special nature indicating an intention to make money received upon a collection a special deposit, such money has sometimes been held to be a trust fund, and the trust attaches to any actual fund into which the money received can be traced; and there have been cases which seem to go so far as to hold that this extends to all of the property of the bank, although it be evident that the actual fund into which the money was traced has been exhausted, and notwithstanding the fact that what remains could not, by reason of its different nature, by any possibility, include it.[56] And if a check is deposited with a banker for collection only and he collects it, and the money so collected by him passes into the hands of his assignee or receiver, the plaintiff may reclaim it, nor is this right affected by any unauthorized act of the trustee in destroying its identity by intermingling it with his own funds.[57] But where a check is sent for collection by a bank to the bank on which it is drawn, and the latter bank charges it upon its books against the drawer, but no money is received by the bank, no trust fund is thereby created.[58]

§ 80 (6c) Identification of Fund Deposited.—See post, "Deposit of Trust Funds," § 80 (7).

§ 80 (7) Deposit of Trust Funds—§ 80 (7a) In General.[59]—The general rule is that when a bank, in which trust funds have been de-

56. Checks deposited for collection.—Sherwood *v.* Central Michigan Sav. Bank, 103 Mich. 109, 61 N. W. 352; Sunderlin *v.* Mecosta County Sav. Bank, 116 Mich. 281, 74 N. W. 478; People *v.* Merchants, etc., Bank, 78 N. Y. 269, 34 Am. Rep. 532.

Proceeds of notes sent for collection.—Where, for two years, the general agent of a corporation had been accustomed to send notes due the corporation to a bank for collection, and the bank, as it collected the notes at different times, gave the agent credit on its books, sometimes retaining the collections as long as two months before remitting the balance due the corporation, the corporation was merely a creditor of the bank, and the proceeds of collections made by it could not be regarded as trust funds. McCormick Harvesting Mach. Co. *v.* Yankton Sav. Bank, 15 S. Dak. 196, 87 N. W. 974.

57. Check deposited for collection.—Meldrum *v.* Henderson, 7 Colo. App. 256, 43 Pac. 148; First Nat. Bank *v.* Hummel, 14 Colo. 259, 23 Pac. 986.

Checks sent for collection.—The F. bank, which sent to the M. bank, for collection, a number of checks on the latter, is not entitled to preference, on the M. bank becoming insolvent; the M. bank having received no money on the checks, but merely charged them on its books against the drawers. Because the mere sending by one bank to another, in payment of a collection, of a draft on a third, is not an equitable assignment of part of the fund standing to the drawer's credit in such third bank. Sunderlin *v.* Mecosta County Sav. Bank, 116 Mich. 281, 74 N. W. 478.

But other cases hold that it is not necessary to show that there was an actual receipt of money, but that it is sufficient if, through a charge against a depositor, the bank takes credit for the amount, where the depositor has a credit equal to his check, a fact by the way which does not appear in this case. McLeod *v.* Evans, 66 Wis. 401, 28 N. W. 173, 214.

58. Sherwood *v.* Milford State Bank, 94 Mich. 78, 53 N. W. 923.

59. Deposit of trust funds.—Holding bank as trustee with regard to money collected, see ante, "Special or Segregated Deposits," § 80 (6); post, "Holding Bank as Trustee," § 166 (1).

posited, becomes insolvent, the cestui que trust can recover such funds to the prejudice of other general creditors of the bank. But, as will be seen later on, in some jurisdictions this right of recovery is contingent on the claimant's ability to trace and identify the deposit.[60] Thus, if a deposit of trust funds is wrongful and the bank has notice of the character of the funds, the claim should be given a preference.[61] But the mere fact that the

60. **Deposit of trust funds.**—Davenport Plow Co. *v.* Lamp, 80 Iowa 722, 45 N. W. 1049, 20 Am. St. Rep. 442; In re Knapp, 101 Iowa 488, 70 N. W. 626 (deposit of ward's money); Dowie *v.* Humphrey, 91 Wis. 98, 64 N. W. 315.

An insolvent banker sold a draft on his correspondent bank, though he knew that he had no funds there. The draft was dishonored, and the banker failed to return the money received from the buyer, but mingled the same with his own funds. Held, that the buyer, on the insolvency of the banker, was entitled to a preference for the amount of his claim. Whitcomb *v.* Carpenter (Iowa), 111 N. W. 825, 10 L. R. A., N. S., 928.

A banking partnership, being insolvent, executed a number of deeds and mortgages to secure different creditors, and a trust deed to secure depositors. Held, construing the deeds as an assignment for the benefit of creditors, that the claims of the depositors were not trust obligations, entitling them to priority over the general creditors. Elwell *v.* Kimball, 102 Iowa 720, 69 N. W. 286.

Where an administrator mixes the money of the estate with his own and makes a general deposit in a bank, where it remains on an assignment by the bank, the fund will be impressed with a lien in favor of the estate. Judgment, 56 P. 412, affirmed on rehearing. Shute *v.* Hinman, 34 Or. 578, 56 Pac. 412, 58 Pac. 882, 47 L. R. A. 265.

A payment to a bank by draft is within the rule that, when trust money is paid into a bank for deposit without authority, it becomes a preferred claim on the bank's subsequent insolvency. Brooke *v.* King, 104 Iowa 713, 74 N. W. 683.

A bank collected a draft sent to it by a correspondent, and remitted to the correspondent by a draft on a third bank, and the proceeds of the collection passed into the hands of the receiver of the collecting bank. The correspondent bank, within a reasonable time, presented the draft drawn on such third bank, and payment was refused for want of funds. Held, that the proceeds of the draft constituted a trust fund, and the correspondent bank was entitled to a preferred claim, against the assets in the hands of the receiver, to the amount thereof. Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289.

Payment of a debt due a trust estate, whose collecting agent was a banker, was made by the banker's charging the sum against the debtor's account and crediting it to the estate. Held that, in the absence of proof that there were funds of the debtor to make the payment, the estate could not, on the banker's subsequent insolvency, collect the amount of the payment as a preferred claim, on the ground that it had become impressed with the trust. Brooke *v.* King, 104 Iowa 713, 74 N. W. 683.

61. **Notice by bank of charter of deposit.**—Independent Dist. *v.* King, 80 Iowa 497, 45 N. W. 908; Davenport Plow Co. *v.* Lamp, 80 Iowa 722, 45 N. W. 1049, 20 Am. St. Rep. 442; District Tp. *v.* Farmers' Bank, 88 Iowa 194, 55 N. W. 342; In re Knapp, 101 Iowa 488, 70 N. W. 626; Jones *v.* Chesebrough, 105 Iowa 303, 75 N. W. 97; Bradley *v.* Chesebrough, 111 Iowa 126, 82 N. W. 472; Page County *v.* Rose, 130 Iowa 296, 106 N. W. 744, 5 L. R. A., N. S., 886; Wiggins *v.* Stevens, 33 App. Div. 83, 53 N. Y. S. 90.

If a bank receiving a deposit from a trustee has notice that such trustee has no right to make such deposit—that is to say, to lend the trust moneys to a bank—then such deposit would be a wrongful conversion, and the bank, having notice, could be treated as constructively a trustee. Hawkins *v.* Cleveland, etc., R. Co., 32 C. C. A. 198, 89 Fed. 266.

A woman engaged to marry the cashier of an insolvent bank, who is told by him that the bank is in trouble and needs money or securities immediately, and is induced by him to furnish securities for a loan to the bank, but is not told that the bank's capital is gone, and more, as a result of defalcations by the cashier and others, is entitled to recover from the re-

deposit is of a trust fund, and known to the bank to be such, will not of itself make the bank a trustee of the fund for the benefit of the cestui que trust, so as to give him a preference over other creditors. In order to have that effect, there must be something in the circumstances of the deposit to constitute it a special, as contradistinguished from a general, deposit, into which two classes all deposits in commercial banks may be divided. If the deposit belongs to the former class, the fiduciary relation might well arise; if to the latter, in the absence of mala fides, it could not do so, for by a general deposit in good faith the title to the fund deposited passed. The bank became the owner thereof. The relation of debtor and creditor, and not that of trustee and cestui que trust, was created.[62] In other words by a general

ceiver, as a preferred creditor, the amount of the loan paid by her to save her securities. Hallett *v.* Fish, 120 Fed. 986.

A sold land to B, and forwarded the deed and abstract of title to a banker, to be delivered to B on payment of $2,000, which was to be immediately remitted to him. The banker delivered the deed to B on payment by him of four $100 bills and certain certificates of deposit which the banker had previously issued to him and others. The banker failed the same night, and before the $2,000 had been remitted to A. Held, that it was a fraud on A for the banker to receive certificates instead of cash, and that the assets in the hands of his assignee were impressed with a trust in favor of A to the extent of $2,000, and that his claim for that amount should be paid in preference to all other claims. Francis *v.* Evans, 69 Wis. 115, 33 N. W. 93; Bowers *v.* Evans, 71 Wis. 133, 36 N. W. 629.

Wrongful act of bank.—"While we have held that where a bank receives money wrongfully, 'a trust arises as between it and the true owner of the money' (Smith *v.* Des Moines Nat. Bank, 107 Iowa 620, 78 N. W. 238) we have never held that the wrongful act of the bank will alone create a preference as against general creditors." Stilson *v.* First State Bank, 149 Iowa 662, 129 N. W. 70, 73.

Some cases, however, seem to deny the necessity for any wrongdoing, and hold that the right to this preference is based on a right in the particular fund or property and the manner of acquiring it is immaterial. Stilson *v.* First State Bank, 149 Iowa 662, 129 N. W. 70.

"Whether the disposition of the fund be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693." Thuemmler *v.* Barth, 89 Wis. 381, 62 N. W. 94.

A fraudulent receipt of deposits by a bank, or the fraudulent acquisition of property by it, does not give the depositor or seller a lien on the entire estate or entitle him to a preference, nor can a preference be based on the supposed greater sacredness of one debt, or the fact that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than in another, unless there is some specific recognized equity, founded on agreement, or the relation of the debt to the property, which entitles the claimant to an equitable preference. Stilson *v.* First State Bank, 149 Iowa 662, 129 N. W. 70.

62. Mere deposit of trust funds gives no preference.—Morse on Banks (3rd Ed.), §§ 187, 567, 568, 573; Marine Bank *v.* Fulton Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785; Thompson *v.* Riggs (U. S.), 5 Wall. 663, 18 L. Ed. 704; National Bank *v.* Millard, 10 Wall. 152, 153, 19 L. Ed. 897; Central Nat. Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 54, 26 L. Ed. 693; Ringo *v.* Field, 6 Ark. 43; American Trust, etc., Co. *v.* Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250; Wetherell *v.* O'Brien, 140 Ill. 146, 29 N. E. 904, 33 Am. St. Rep. 221; Fletcher *v.* Sharpe, 108 Ind. 276, 9 N. E. 142; McAfee *v.* Bland, 11 Ky. L. Rep. 1, 11 S. W. 439; Little *v.* Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570; State *v.* Powell, 67 Mo. 395, 29 Am. Rep. 512; State *v.* Moore, 74 Mo. 413, 41 Am. Rep. 322; Ayres *v.* Farmers', etc., Bank, 79 Mo. 421; Phillips *v.* Overfield, 100 Mo. 466, 13 S. W. 705; Paul *v.* Draper, 158 Mo. 197, 59 S. W. 77, 78, 81 Am. Rep. 296; Cavin *v.* Gleason,

deposit of the trust fund, whereby no misappropriation is intended or accomplished, the owner of the fund becomes a creditor of the bank and stands upon precisely the same footing as the other general creditors in the bank who are creditors thereof, and who is entitled to no preference over them.[63] The reason for this rule is found in the fact that upon a general

105 N. Y. 256, 11 N. E. 504; O'Connor *v.* Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816; Shaw *v.* Bauman, 34 O. St. 25; Nonotuck Silk Co. *v.* Flanders, 87 Wis. 237, 58 N. W. 383.

Trust funds may often be properly put into a bank as a deposit, that being in such instances a prudent disposition of such funds by the trustee; but the bank becomes simply a borrower, and the trustee a depositor, like any other depositor, and in case the bank does become insolvent the trustee has no preference over other creditors. He and those beneficially interested must take simply a distributive share of the assets. Hawkins *v.* Cleveland, etc., R. Co., 32 C. C. A. 198, 89 Fed. 266.

Where a general deposit of a trust fund is rightfully made in bank as part of the trust estate, the relation of debtor and creditor is created between the bank and the trustees, and the latter are not entitled to be preferred over other creditors on the bank becoming insolvent. Fletcher *v.* Sharpe, 108 Ind. 276, 9 N. E. 142.

Deposits of school funds made by the treasurer of a school district in a private bank are not wrongful, and the banker does not become a trustee ex maleficio as to such deposits so as to give the school district a preferential claim against the assets of the bank on the death insolvent of the owner of the bank. Hansen *v.* Roush, 139 Iowa 58, 116 N. W. 1061.

Since it is not unlawful for the treasurer of a school township to deposit the school funds in a bank in his name as treasurer, a general deposit of such funds in the name of the treasurer does not constitute a trust fund; and on the failure of the bank neither the treasurer, nor the school township, has any claim, on the assets of the bank in the hands of a receiver, superior to that of other general depositors. Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289.

Where a trust fund is left with a banking firm as a general deposit, the fact that the bank knew that it was a trust fund can not give to the claim against it for such fund priority over the claims of other depositors on assignments by the bank for the benefit of creditors. McAfee *v.* Bland, 11 Ky. L. Rep. 1, 11 S. W. 439.

Deposits by agent in his own name. —When an agent, in accordance with a long course of business, deposits in his own name as agent moneys of his principal, with his knowledge and consent, in a bank which becomes insolvent, such moneys will not be declared a trust fund in favor of the latter, and established as a preferred claim. State *v.* Midland State Bank, 53 Neb. 464, 73 N. W. 922, distinguishing State *v.* State Bank, 42 Neb. 896, 61 N. W. 252, on the ground that in that case the money was deposited without the knowledge or consent of the owner, and there was no subsequent ratification.

The mere fact that an agent deposits money in a bank in another than his own name, with notice to the bank that it is the money of third parties, does not, on the insolvency of the bank, impress on its assets a trust in favor of the principal, thereby giving him a preference over its other creditors. Henry *v.* Martin, 88 Wis. 367, 60 N. W. 263.

The funds of a receivership were deposited in a bank, and subsequently in litigation between the bank and another creditor of the insolvent it was decreed that the bank, upon execution of a bond, should be paid the amount decreed to it, the bond to be conditioned that the bank would pay any party who might be found entitled to the fund on appeal, but the bank did not avail itself of the privilege, and the money continued on deposit as before, and the bank became insolvent, and thereafter the other creditor obtained a reversal and a judgment. Held, that there was no ground for declaring a preference against the bank in favor of such creditor or the receiver. State *v.* Corning State Sav. Bank, 128 Iowa 597, 105 N. W. 159.

63. Paul *v.* Draper, 158 Mo. 197, 59 S. W. 77, 81 Am. St. Rep. 296, citing Cavin *v.* Gleason, 105 N. Y. 256, 11 N. E. 504; Fletcher *v.* Sharpe, 108 Ind. 276, 9 N. E. 142.

Where a guardian deposited a trust fund with a bank as an ordinary de-

deposit of money in a bank it becomes the property of the latter, and, when indiscriminately mixed and mingled with the other money of the bank which becomes insolvent, its identity is wholly lost when any portion of it is checked out, in which case it is impossible to trace the fund into the hands of the bank's assignee or receiver.[64] The mere fact that the trustee and the bank officer are one and the same person, so that the bank must have known the character of the fund so deposited, affords no reason for changing the rule that a general deposit can not be impressed with a trust after the bank in which it is placed has become insolvent.[65]

Thus, where an executor deposits the trust fund of an estate in a bank to the account of such estate and subject to check, without any promise on the bank to keep the identical money and return it to the executor, such deposit is a general and not a special deposit, and therefore the executor or his cestui que trust can not recover the fund as a preferred claim. He is simply a creditor of the bank, and has no peculiar claim or right over other creditors.[66] And if a fund was never paid or received upon trust conditions, it is not entitled to a priority.[67] Any agreement or understanding or

posit, and it was mingled with the other funds of the bank, on the insolvency of the bank the cestui que trust was not entitled to a preference over other creditors merely because the bank was aware that the fund was a trust fund, but, in order to entitle the cestui que trust to a preference, it must have been a special deposit creating a trust relation, and not merely the relation of creditor and debtor. Paul *v.* Draper, 158 Mo. 197, 59 S. W. 77, 81 Am. St. Rep. 296.

64. Reason for rule.—Shute *v.* Hinman, 34 Or. 578, 56 Pac. 412, 58 Pac. 882, 47 L. R. A. 265.

65. Effect of identity between trustee and bank officer.—Shute *v.* Hinman, 34 Or. 578, 56 Pac. 412, 58 Pac. 882, 47 L. R. A. 265, citing Shields *v.* Thomas, 71 Miss. 260, 14 So. 84, 42 Am. St. Rep. 458.

66. Deposit by executor of funds of estate.—Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365.

Where an executor makes a general deposit of money belonging to the estate in an apparently solvent bank, neither he nor his cestui que trust is entitled to any preference over the other creditors of the bank merely because the deposit was a trust fund to the knowledge of the bank. Officer *v.* Officer, 120 Iowa 389, 94 N. W. 947, 98 Am. St. Rep. 365.

Where trustee is also officer of bank. —But in a New York case the assignee of an insolvent estate, who had a deposit as such in a bank of which he was cashier, drew a check, as assignee, for the amount of the deposit, and placed it on the spindle where paid checks were placed by the paying teller, and the check was entered in the bank's books. Held, that the cashier knew, and the bank had notice from the check itself, that the attempted payment by the check, if such payment were intended, was a payment of trust funds; and the cestui que trust may follow trust funds into the assets of the bank, and reclaim them, as against the general creditors of the bank. Wiggins *v.* Stevens, 33 App. Div. 83, 53 N. Y. S. 90, citing Kirch *v.* Tozier, 143 N. Y. 390, 38 N. E. 375; Le Marchant *v.* Moore, 150 N. Y. 209, 44 N. E. 770; Roca *v.* Byrne, 145 N. Y. 182, 39 N. E. 812, 45 Am. St. Rep. 599; Deobold *v.* Oppermann, 111 N. Y. 684, 19 N. E. 94; Importers', etc., Nat. Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319; Suarez *v.* De Montigny, 1 App. Div. 494, 37 N. Y. S. 503, 73 N. Y. St. Rep. 95, affirmed in 153 N. Y. 678, 48 N. E. 1107.

67. A deposit of money to purchase a letter of credit, the depositor's name being entered on a signature card on which is written, "Guaranty for a Letter of Credit," does not constitute a trust fund for the benefit of other bankers honoring drafts drawn against the letter of credit, the entry on the card being explained as not giving the depositor any peculiar rights; and hence a bank honoring such a draft is

course of dealing whereby a bank is not to use the identical money, and is to substitute its own obligation in its stead, destroys all idea of a trust, and simply establishes the relation of debtor and creditor between the bank and its patron.[68]

§ 80 (7b) Deposits of Public Moneys.—Public money deposited by its custodian is so impressed with the character of a trust fund that it can be followed and the trust enforced against the bank's assets in the hands of the assignee or receiver to the prejudice of other general creditors, provided the bank had notice of the character of the funds and the deposits have increased the funds in the hands of the receiver. And in some jurisdictions the fact that the funds are mingled with other money so that the identity of that deposited is lost, will not destroy the trust character of the deposits, nor prevent the enforcement of the trust against property to which they have contributed,[69] though in a few jurisdictions the failure to

not entitled to priority over other creditors of the issuing bank. Kuehne *v.* Union Trust Co., 133 Mich. 602, 95 N. W. 715.

68. Effect of stipulations or customs.—Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921.

Plaintiff requested a bank to purchase for him certain stock on margins. The bank purchased it, through brokers, and made a draft on plaintiff for the margins, which was paid. The bank remitted the amount by draft to its correspondent, and sent a check on such correspondent to the brokers, but, by reason of the bank's failure, the brokers did not obtain the money, and resold the stock. The amount remitted was eventually recovered back by defendant, as the banker's assignee. Held, that the transaction between plaintiff and the bank did not contemplate the purchase of the stock with plaintiff's own money, but by the bank with its own funds, and created the relation of creditor and debtor between them, and not of principal and agent, and that plaintiff could not recover the amount paid from the defendant assignee as a trust fund, though traced into his hands. Downing *v.* Lellyett (Tenn.), 36 S. W. 890.

69. Deposits of public money.—Myers *v.* Board, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263; Board *v.* Wilkinson, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493.

Since Code, § 1457, expressly forbids the deposit of public funds by a county treasurer in a bank, unless authorized to do so by the board of supervisors, and a bond has been given by the bank, a deposit, made by a county treasurer without such authority, is unlawful, and, as between the county and the bank, the deposit constitutes a trust fund, and the county is entitled to a preference over other general depositors, in the distribution of the assets of the bank in the hands of a receiver. Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289.

Where an insolvent bank gives a bondsman for a city treasurer a check for the amount of the first dividend made on the claim of the city for a deposit of city funds by such treasurer, which check is turned over to the city treasurer and credited on his account with the city, the amount of the check is a trust fund which the city may recover from the assignee of the bank. City *v.* Jordan, 55 Kan. 124, 39 Pac. 1030.

Limitations of general rule.—Public moneys deposited in a bank in violation of law are trust funds, do not become the property or assets of such bank, and remain trust funds, with the title in the true owner, in which the creditors of the bank are not entitled to share, after the appointment of a receiver and insolvency of the bank. First Nat. Bank *v.* Bunting & Co., 7 Idaho 27, 59 Pac. 929, rehearing denied, 7 Idaho 27, 59 Pac. 1106.

A deposit of public funds on which, under the law, interest must be paid, can not be special or in trust, and, in case of insolvency of the depositary, stands on the same footing with other deposits. McNulta *v.* West Chicago Park Comm'rs, 40 C. C. A. 155, 99 Fed. 900.

A bank accepting deposits of county money, made by a county treasurer in violation of Code, § 1457, forbidding

identify the funds or its equivalent in other property into which it has been converted is fatal to the preference.[70] On the other hand, deposits of public funds by officers to whom they are intrusted by law, where the fact that

such deposits without the order of the board of supervisors, does not stand in the position of a trustee as far as the county treasurer is concerned, and where such treasurer is compelled, by the county, to make good the loss resulting from the failure of the bank, such treasurer can not claim that the deposit constitutes a trust fund, and that he is entitled to preference over other general depositors of the bank. Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289.

Deposit of school funds.—Where the treasurer of a school district without authority deposited its moneys in a bank in his own name, but with notice to the banker that they were school funds, the banker became a trustee of the school district, and his insolvent estate in the hands of an assignee is subject to the repayment of such moneys to the prejudice of all other creditors. Independent Dist. *v.* King, 80 Iowa 497, 45 N. W. 908.

A banker, by receiving on deposit from a school-district treasurer funds known to be held by the latter in his official capacity, becomes thereby a trustee for the beneficial owner with respect to such funds; and the same may, upon his insolvency, be recovered by the owner as a preferred claim against his estate. State *v.* Midland State Bank, 52 Neb. 1, 71 N. W. 1011, 66 Am. St. Rep. 484.

The funds of a township can be recovered from the assignee of an insolvent bank, in which they were deposited by the township clerk in his own name, though known to the bank to be township funds. Bunton *v.* King, 80 Iowa 506, 45 N. W. 1050.

Public moneys deposited by sheriff.—Under Ann. Code 1892, § 3077, making moneys deposited in bank by any officer having the custody of public funds a trust fund, and not liable to the claims of general creditors of the bank, public moneys deposited by a sheriff have priority of payment on an assignment for the benefit of creditors. Metcalfe *v.* Merchants', etc., Bank, 89 Miss. 649, 41 So. 377.

Deposit of tax receipts for collection.—Where a county treasurer, without legal authority, deposited tax receipts with a private bank for collection, and the bank collected the same from the taxpayers, either in cash or by charging them to the accounts of depositors, and credited the proceeds to the county treasurer's account in his representative capacity, knowing that the funds belonged to the county, it was chargeable as a trustee thereof, entitling the county to a preferred claim for the amount due against the bank's estate in insolvency. Page County *v.* Rose, 130 Iowa 296, 106 N. W. 744, 5 L. R. A., N. S., 886.

The bank was equally chargeable as a trustee of the proceeds of such collections, which were made with knowledge of the county's right thereto, though the deposit of the receipts by the treasurer with the bank for collection was rightful. Page County *v.* Rose, 130 Iowa 296, 106 N. W. 744, 5 L. R. A., N. S., 886.

Tracing the fund.—Where money has been deposited by a treasurer of a township in a bank which subsequently makes an assignment for the benefit of its creditors, it is not necessary, in order to follow the money as a trust fund, to trace the deposit into specific property; but it has no greater interest than an ordinary creditor in land purchased before any money was deposited by its treasurer, and to which its deposits in no way contributed. District Tp. *v.* Farmers' Bank, 88 Iowa 194, 55 N. W. 342.

The word "municipal," in Code 1906, § 3485, providing that deposit in banks of public funds may not be taken by the general creditors of the bank, embraces only municipal corporations, represented by cities, towns, and villages, and does not apply to the board of drainage commissioners. United States Fidelity, etc., Co. *v.* First State Bank (Miss.), 60 So. 47.

70. **Necessity for identifying deposit of public money.**—State *v.* Foster, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47.

A county treasurer is a trustee of moneys which come into his hands by virtue of his office; and if he wrongfully deposits them to his own credit in a bank aware of their character, which afterwards becomes insolvent, the county is entitled to have its claim decreed a first lien upon any asset of the insolvent bank which it shows is the product of its moneys, though it has no such lien on the other assets of the bank. State *v.* Bank, 54 Neb. 725, 75 N. W. 28.

the deposits are of public funds is not known to the bank, creates the relation of debtor and creditor and gives the sovereign no right of priority in a distribution of the assets.[71]

§ 80 (7c) Right to Follow and Reclaim Fund—§ 80 (7aa) In General.—The rule in equity is well established that, so long as trust property can be traced and followed into other property into which it has been converted, it remains subject to the trust,[72] and may be recovered provided the fund has come to the hands of the assignee or receiver and the assets in his hands have been increased by the funds so received.[73] To illustrate: If

71. Long *v.* Emsley, 57 Iowa 11, 10 N. W. 280; Lowry *v.* Polk Co., 51 Iowa 50, 49 N. W. 1049, 33 Am. Rep. 114; School Dist. *v.* First Nat. Bank, 102 Mass. 174.

72. **Right to follow and reclaim trust property.**—McLeod *v.* Evans, 66 Wis. 401, 28 N. W. 173. See, also, People *v.* City Bank, 96 N. Y. 32; Third Nat. Bank *v.* Stillwater Gas Co., 36 Minn. 75, 30 N. W. 440.

73. **Fund must come to receiver's hands and increase the assets.**—Philadelphia Nat. Bank *v.* Dowd, 38 Fed. 172; 2 Am. & Eng. Dec. in Equity 558, 659; In re Hallett's Estate, 13 Ch. Div. 696; Oswego Milling Co. *v.* Skillern, 73 Ark. 324, 84 S. W. 475; Hill *v.* Miles, 83 Ark. 486, 104 S. W. 198; Jones *v.* Chesebrough, 105 Iowa 303, 75 N. W. 97; Bradley *v.* Chesebrough, 111 Iowa 126, 82 N. W. 472; Whitcomb *v.* Carpenter (Iowa), 111 N. W. 825, 10 L. R. A., N. S., 928; Stilson *v.* First State Bank, 149 Iowa 662, 129 N. W. 70; Hubbard *v.* Alamo, etc., Mfg. Co., 53 Kan. 637, 36 Pac. 1053, 37 Pac. 625; Insurance Co. *v.* Caldwell, 59 Kan. 156, 52 Pac. 440; Little *v.* Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570; In re Irish-American Bank, 70 Minn. 238, 73 N. W. 6; State *v.* Bank, 54 Neb. 725, 75 N. W. 28; Cavin *v.* Gleason, 105 N. Y. 256, 11 N. E. 504; Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178.

Before such a preference can be sustained, it must appear that the estate has been so benefited by the misappropriation of the trust fund that its removal or its equivalent from the estate will be without prejudice to creditors; in other words, that the conditions must be such that the creditors have the same protection as if the trust money had been retained in the bank in a way that it could be identified and taken, which latter would be the right of a cestui que trust under all authorities. Jones *v.* Chesebrough, 105 Iowa 303, 75 N. W. 97.

The fact that the assets which passed into the hands of an assignee of an insolvent banker are less than those which the banker had on hand when he wrongfully obtained money from another, and mingled the same with his own funds, does not overcome the presumption that the money passed into the hands of the assignee and the person paying the same is entitled to a preference for the amount thereof. Whitcomb *v.* Carpenter (Iowa), 111 N. W. 825, 10 L. R. A., N. S., 928.

Where assets not augmented by deposit.—Where money was delivered to a bank, to be transmitted by it to the depositor's creditors for payment of his obligations, the use of such money by the bank in the payment of its debts, and failure to transmit it as directed, does not entitle such depositor to preference over the bank's other creditors on insolvency, where the assets of such bank were not in any way augmented thereby. Moore *v.* Chesebrough (Iowa), 81 N. W. 469.

Where a bank takes a chattel mortgage on merchandise to secure a loan on the day the mortgage is executed, but does not record the same until after four months, and it is agreed that the mortgage can retain possession of the merchandise and sell it at retail, applying the proceeds on the mortgage, and before record another creditor without notice takes a mortgage to secure a bona fide debt on the same goods, and takes possession, and the bank brings replevin against the second mortgage, and judgment is rendered for defendant, and the value of the property is fixed, and an appeal is taken to the district court and dismissed, and the bank retains possession under the replevin writ and collects the proceeds, and shortly thereafter becomes insolvent and a receiver is appointed, unless it is shown that the property or the proceeds thereof went into the hands of the receiver, such creditor is not a preferred creditor as

A., as trustee, wrongfully places trust funds in a bank, regularly doing business, and that money—say, $1,000—is paid out in the usual course of business to discharge a debt of the bank, when, had it not been so paid out, other money of the bank would have been so used, and that is the last business transaction of the bank before assignment, it is clear that the assets of the bank are $1,000 more than if the trust money had not been placed there, and that, when $1,000 of other money is used to replace it with the

to the general assets of the bank. In re Bank, 17 Okl. 605, 89 Pac. 196.

Where plaintiff deposited checks with an insolvent bank a few hours before it closed its doors, and these checks were used by it in settling its accounts with the clearing house, and after such settlement there was still a balance due the clearing house, which was settled in another way, as the bank, before it closed its doors, used the checks to pay a debt, and such checks did not come into the hands of a receiver, or any property received in exchange for them, plaintiff would be denied preference as to them, but his rights as to such checks were on equality with the general creditors. Willoughby *v.* Weinberger, 15 Okl. 226, 79 Pac. 777.

In Nonotuck Silk Co. *v.* Flanders, 87 Wis. 237, 58 N. W. 383, it was held that one for whom a banker had collected a draft before making a voluntary assignment, was not entitled to a preference over other creditors of the proceeds of such collection were disposed of by the banker prior to the assignment, so that no part thereof came in any form to the hands of the assignee, and, in substance, that the right of tracing trust funds has its basis in the right of property, and never was based upon the theory of preference by reason of an unlawful conversion, and that the complainant had in that case no legal right to a preference over the assignor's other creditors, in the distribution of his estate in the hands of the assignee, and into which no part of the complainant's money could be traced. To the same effect is In re Plankinton Bank, 87 Wis. 378, 58 N. W. 784; Thuemmler *v.* Barth, 89 Wis. 381, 62 N. W. 94.

Plaintiff bank sent a New York draft to the C. Bank, to be deposited to plaintiff's credit; and the C. Bank, which was insolvent, sent the draft to the N. Bank, in New York, to be deposited to its credit. The N. Bank applied the draft to reduce a debt due it by the C. Bank, the draft being paid by the drawees, after some delay, under express directions from plaintiff. Held, that plaintiff was not entitled to payment of the amount of the draft by the receiver of the C. Bank as a preferred claim, the amount of the assets for distribution among creditors not having been increased in that amount by the deposit of the draft. City Bank *v.* Blackmore, 21 C. C. A. 514, 75 Fed. 771.

A county treasurer is not entitled to recover school warrants of the receiver of a bank on the ground that they were purchased with public funds in the receiver's hands, where it not only is not shown that any of the public funds came into the hands of the receiver, but is shown that the bank at the time of its failure was without funds, nor what became of the public funds, or that such funds came back into the hands of the receiver. Hill *v.* Miles, 83 Ark. 486, 104 S. W. 198.

An executor deposited estate funds with a bank in 1893. The officers of the bank had knowledge of the nature of the deposit, but used the money so received in payment of the bank's debt. The bank made a general assignment in 1896. It had not increased its assets after the deposit, and no property had been acquired with such funds. Held not sufficient to impress a trust on such, as it does not appear that the deposit has been preserved, and came to the assignees in such a form that it could be taken therefrom without injuring the rights of creditors. Bradley *v.* Chesebrough, 111 Iowa 126, 82 N. W. 472.

The reason for the rule of the text is that trust funds deposited in a bank do not constitute a general lien on assets superior to that of general creditors. Hill *v.* Miles, 83 Ark. 486, 104 S. W. 198.

"A creditor who is given a preference in the distribution of the assets of a bank, on the ground that the fund which he claims as a trust fund was wrongfully received by the officers of the bank, and should be returned to him before the assets are used in the payment of general creditors, is given such preference because the trust fund

owner, the creditors are in no sense prejudiced.[74] And a creditor claiming a preference must prove that his contribution to the bank has increased the assets of the estate and may be taken therefrom without impairing the rights of general creditors.[75]

§ 80 (7bb) Notice of Character of Deposit.—If the cashier or other officer of the bank has notice that the money was received as a trust fund, this knowledge is imputable to the bank.[76]

§ 80 (7cc) Effect of Beneficiary Taking Collateral Security.—The fact that the beneficial owner of the fund has taken collateral security for the payment of the deposit after insolvency and before it is known whether the trust money can be recovered, does not prevent the complainant from following and recovering the trust fund, especially where the rights of no creditor of the bank have been prejudiced by the taking of the security.[77]

§ 80 (7dd) Identification of Fund or Deposit.—Although there is considerable conflict in the decisions of the courts, yet according to the better rule the plaintiff may follow and reclaim a deposit which is impressed with the character of a trust fund, even though it has been mingled with other funds of the bank so that the identity of that deposited is lost, provided it has passed into and swelled the funds of the bank. And the doc-

has swelled the general assets, and the creditors of the bank will not be deprived of anything to which they are entitled, if, to the extent to which the general assets have been increased by including the trust fund, they are in turn diminished by the return of such fund to the beneficiary entitled thereto." Sioux City Stock Yards Co. *v.* Fribourg, 121 Iowa 230, 96 N. W. 747.

"But where the trust fund has been diverted or squandered, and the assets have been in any way derived from or swelled by it, then a beneficiary is in no situation to ask that the funds of the bank be diverted from the payment of general creditors and applied to the return of the trust fund." Sioux City Stock Yards Co. *v.* Fribourg, 121 Iowa 230, 96 N. W. 747; Jones *v.* Chesebrough, 105 Iowa 303, 75 N. W. 97; Bradley *v.* Chesebrough, 111 Iowa 126, 82 N. W. 472.

74. Jones *v.* Chesebrough, 105 Iowa 303, 75 N. W. 97.

75. **Trust fund must come to receiver's hands.**—Stilson *v.* First State Bank, 149 Iowa 662, 129 N. W. 70.

Proof that fund came to assignee's hands.—Where a check for a trust fund was deposited in bank, and the proceeds thereof were mingled with the bank's funds nearly nine months before the bank went into the hands of a receiver, the affidavit of the plaintiff's attorney, stating that the fund in question "has passed into the hands of said receiver, and he now has possession of same as such receiver,' is not sufficient to show that the trust fund came into the hands of the receiver, so as to entitle plaintiff to a preference over other creditors, even conceding that a trust relation existed between plaintiff and the bank. In re Irish-American Bank, 70 Minn. 238, 73 N. W. 6.

76. Peak *v.* Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90.

The cashier of a bank which became insolvent forged notes payable to the bank, and delivered them to another bank for rediscount, and stole from his own bank the money so received. He had full charge of the affairs of the bank, and none of its officers knew of the forgery or the misconduct. Held, that the creditor bank was not entitled to a preference based on its claim for rediscounting the forged notes. Stilson *v.* First State Bank, 149 Iowa 662, 129 N. W. 70.

77. **Effect of beneficiary taking collateral security.**—Myers *v.* Board, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263.

trine that one can not follow trust money mixed with other money in an indistinguishable mass, because of its having no ear-mark, must be taken subject to the application of this rule.[78] And it is not material whether the

78. **Identification of fund or deposit.** —Pennell *v.* Deffell, 23 Eng. L. & Eq. 460; Foley *v.* Hill, 2 H. L. Cas. 28; Sims *v.* Bond, 5 Barn. & Adol. 389; Tassell *v.* Cooper, 9 C. B. 509; Knatchbull *v.* Hallett, 13 Ch. Div. 696; Marine Bank *v.* Fulton Bank (U. S.), 2 Wall. 252, 17 L. Ed. 785; Thompson *v.* Riggs (U. S.), 5 Wall. 663, 18 L. Ed. 704; Bank *v.* Millard, 10 Wall. 152, 19 L. Ed. 897; National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693; San Diego County *v.* California Nat. Bank, 52 Fed. 59; First Nat. Bank *v.* Hummel, 14 Col. 259, 23 Pac. 986, 20 Am. St. Rep. 257; Independent Dist. *v.* King, 80 Iowa 497, 45 N. W. 908; Davenport Plow Co. *v.* Lamp, 80 Iowa 722, 45 N. W. 1049, 20 Am. St. Rep. 442; Officer *v.* Officer (Iowa), 90 N. W. 826; Peak *v.* Ellicott, 30 Kan. 156, 161, 1 Pac. 499, 46 Am. Rep. 90; Myers *v.* Board, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263; In re Johnson, 103 Mich. 109, 61 N. W. 352; Pomeroy *v.* Benton, 57 Mo. 531; Harrison *v.* Smith, 83 Mo. 210, 53 Am. Rep. 571, overruling Mills *v.* Post, 76 Mo. 426; Smith *v.* Combs, 49 N. J. Eq. 420, 24 Atl. 9; In re Franklin Bank (N. Y.), 1 Paige Ch. 249, 19 Am. Dec. 413; Aetna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; People *v.* City Bank, 96 N. Y. 32; Frazier *v.* Bank, 8 Watts & S. (Pa.) 18; Bank *v.* Jones, 42 Pa. 536; Stair *v.* York Nat. Bank, 55 Pa. 364; Farmers', etc., Nat. Bank *v.* King, 57 Pa 202; Knight *v.* Fisher, 58 Fed. 991; Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; Frith *v.* Cartland, 12 Va. (2 Hen. & M.) 417; McLeod *v.* Evans, 66 Wis. 401, 28 N. W. 173.

In Downing *v.* Lellyett (Tenn.), 36 S. W. 890, the court said: "The cases of Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; First Nat. Bank *v.* Hummel, 14 Colo. 259, 23 Pac. 986, and Roca *v.* Byrne, 145 N. Y. 182, 39 N. E. 812, 45 Am. St. Rep. 599, on the one side, and Wetherell *v.* O'Brien, 140 Ill. 146, 29 N. E. 904, 33 Am. St. Rep. 221, and cases there cited, on the other, present a somewhat conflicting phase of judicial thought on this multiform subject."

The same subject has been discussed in an exhaustive and elaborate opinion of the supreme court of the United States in the case of National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693, decided in 1881, where it is held that as long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust, and if a man mixes trust funds with his own money the whole will be treated as trust property, except so far as he may be able to distinguish what is his.

It would seem to be immaterial whether the property with which the trust funds were mingled was moneys or whether it was bills, notes, securities, lands, or other assets. Myers *v.* Board, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263.

The fact that a bank, which receives money as the agent of another, mingles it with its own funds, does not prevent the imposition of a trust therefor on the insolvency of the bank, if the money on hand at no time prior to the bank's failure is reduced below the amount so received in trust by the bank. In re Johnson, 103 Mich. 109, 61 N. W. 352.

An indorser paid the amount of a note to a bank, and received a receipt containing an order for a surrender of the note upon return of the receipt. The bank subsequently failed, without taking up the note. There was at all times more than enough money in the vaults of the bank to pay the note. Held, that the fact that the money was not marked, and, by a mingling with other funds of the bank, lost its identity, did not affect the indorser's right to recover the amount from the receiver of the bank. Massey *v.* Fisher, 62 Fed. 958.

The fact that public moneys deposited with a bank by the tax collector are intermingled with its funds, and incapable of identification, does not prevent its collection as a trust fund from the assets of the bank, on its insolvency before the judgment of unpreferred debts; such deposit being a trust fund from its nature and by the express provision of Code 1892, § 3077. Fogg *v.* Hebdon, 80 Miss. 750, 32 So. 285.

What is the Michigan rule.—The receiver of an insolvent bank can not be required to repay the beneficiary in a trust deposit in preference to general creditors, unless the claimant can show, by a clear preponderance of the

balance was preserved in the form of money or other property. It is only necessary that it appear by presumption of law, or otherwise, that it has been preserved in the hands of the defendant.[79] The reason for this rule is that the creditors are deprived of no right, for the bank never acquired any title to the property and therefore it was never subject to the claims of its creditors.[80] Hence where trust money of the depositor is mingled

evidence, that there remains in the hands of the receiver either the specific deposit, or specific funds or property into which the deposit can be traced. Board *v.* Wilkinson, 119 Mich. 655, 78 N. W. 893, 44 L. R. A. 493, reviewing and attempting to distinguish many cases. The court seems to return to the Wisconsin rule.

Rule in Oregon.—Where a trustee deposited the trust funds to his credit in his own bank, and such funds were commingled with, and used as a part of, the general funds of the bank, in the ordinary course of its business, so that the identity of the trust fund was wholly lost, the trust creditor is not entitled to a preference over other creditors in respect to money left in the bank upon an assignment by the trustee for creditors, unless he can show that it has been mingled into a common mass, and forms a part thereof. Shute *v.* Hinman, 34 Or. 578, 56 Pac. 412, affirmed 58 Pac. 882, 47 L. R. A. 265.

Where money bears no ear mark, it is sufficient in such cases to show that the assets of the bank have been increased thereby. Knight *v.* Fisher, 58 Fed. 991.

It is not important that the plaintiffs' money bore no mark, and can not be identified. It is sufficient to trace it into the bank's vaults, and find that a sum equal to it (and presumably representing it), continuously remained there until the receiver took it. The modern rules of equity require no more. Knatchbull *v.* Hallett, 13 Ch. Div. 696; National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Farmers', etc., Nat. Bank *v.* King, 57 Pa. 202; Stoller *v.* Coates, 88 Mo. 514; McLeod *v.* Evans, 66 Wis. 401, 28 N. W. 173, 214; People *v.* City Bank, 96 N. Y. 32; Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85; Harrison *v.* Smith, 83 Mo. 210, 53 Am. Rep. 571; Beech, Eq. Jur., § 285; Fisher *v.* Knight, 9 C. C. A. 582, 61 Fed. 491; Massey *v.* Fisher, 62 Fed. 958; Compare Philadelphia Nat. Bank *v.* Dowd, 38 Fed. 172, and see criticism of case in Massey *v.* Fisher, 62 Fed. 958.

79. Story, Ag., § 231; Thompson *v.* Perkins, 3 Mason, 232, Fed. Cas. No. 13,972; Robson *v.* Wilson (Ky.), 1 Marsh. Ins. 295; Independent Dist. *v.* King, 80 Iowa 497, 45 N. W. 908; Van Allen *v.* American Nat. Bank, 52 N. Y. 1; Importers', etc., Nat. Bank *v.* Peters, 123 N. Y. 272, 25 N. E. 319; Roca *v.* Byrne, 145 N. Y. 182, 39 N. E. 812, 45 Am. St. Rep. 599.

To give a deposit in a bank trust character so as to render the deposit a preferred claim against the assets of the bank on its insolvency, it must appear, by presumption or otherwise, that the deposit has been preserved in the assets of the bank; and, while it is not necessary to identify the particular money deposited, it must appear that the assets of the bank have been increased by the deposit, and that such deposit may be withdrawn without prejudice to the rights of the other creditors. Hansen *v.* Roush, 139 Iowa 58, 116 N. W. 1061.

80. Reason of rule.—National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Lowry *v.* Polk Co., 51 Iowa 50, 49 N. W. 1049, 33 Am. Rep. 114; Long *v.* Emsley, 57 Iowa 11, 10 N. W. 280; Davenport Plow Co. *v.* Lamp, 80 Iowa 722, 45 N. W. 1049, 20 Am. St. Rep. 442; Peak *v.* Ellicott, 30 Kan. 156, 1 Pac. 499, 46 Am. Rep. 90; Thompson *v.* Gloucester Sav. Inst. (N. J.), 8 Atl. 97; People *v.* City Bank, 96 N. Y. 32; Farmers', etc., Nat. Bank *v.* King, 57 Pa. 202; McLeod *v.* Evans, 66 Wis. 401, 28 N. W. 173, 214; Francis *v.* Evans, 69 Wis. 115, 33 N. W. 93; Bowers *v.* Evans, 71 Wis. 133, 36 N. W. 629.

A reason on which the rights of the cestui que trust are preserved in the first instance is that by the wrongful act the assets of the bank have been enhanced to the amount of the wrongful deposit, and to deny the preference is to permit the creditors to profit to the extent of the deposit at the expense of one who has never assented to the relationship of creditor of the insolvent bank; and hence the rights of the other creditors are limited to the assets of the bank, less the amount of the unlawful deposit, to no part of

wrongfully, if not fraudulently, with funds of the bank and goes into its business operations a very short time previous to the assignment of its effects, and while not clearly traceable to any particular asset of the bank, yet the fact remains that it went into its assets and to the extent of the deposit increased and swelled the volume of its assets, such sum will be decreed by a court of equity to be a lien on the assets to be paid out of such assets before the same or any part thereof is used for the benefit of the general creditors.[81] But in other jurisdictions, in order to impress a trust upon moneys deposited in a bank so that they may be reclaimed as against the general funds of the bank, they must be susceptible of identification as distinct from other funds, and must not be so mixed up or mingled with other moneys as to be incapable of specific separation; otherwise the plaintiff will occupy the position of a general creditor. In other words, the court will go as far as it can in tracing and following trust

which they have a right. The acceptance of the dividend in no way affected or prejudiced their interests. It was but a partial payment or restoration of the trust fund. In re Knapp, 101 Iowa 488, 70 N. W. 626. See Independent Dist. *v.* King, 80 Iowa 497, 45 N. W. 908; Davenport Plow Co. *v.* Lamp, 80 Iowa 722, 45 N. W. 1049, 20 Am. St. Rep. 442.

81. Harrison *v.* Smith, 83 Mo. 210, 53 Am. Rep. 571.

"If A, holding $1,000 in coin in trust for B, place it in a bag or box and mingle with it $1,000 in coin of his own, whereby the particular $1,000 of coin of trust money can not be distinguished from the $1,000 of private money, it is more consonant with equity for the chancellor to say he will put his hand in the bag and take from it and restore to B his $1,000 of trust money, than for him to say because of the fact that the money is not ear marked and the fact that because of A's wrongful act in thus mixing the funds one can not be distinguished from the other, that B can take nothing in virtue of the trust, but must take his chances with the general creditors of A." Harrison *v.* Smith, 83 Mo. 210, 53 Am. Rep. 571.

"While it may be impossible to follow the fund in its diverted uses, it is always possible to make it a charge upon the estate or assets, to the increase or benefit of which it has been appropriated. The general assets of the bank having received the benefit of the unlawful conversion, there is nothing inequitable in charging them with the amount of the converted fund, as a preferred demand." Stoller *v.* Coates, 88 Mo. 514, citing Harrison *v.* Smith, 83 Mo. 210, 53 Am. Rep. 571.

Where one delivered money to a bank to pay his note when presented for payment, and the identity of the money is found in the increased amount of the assets at the time of the failure of the bank by the amount of such money left with it, he is entitled to such sum in preference to the general creditors of the bank. Bergstresser *v.* Lodewick, 37 App. Div. 629, 59 N. Y. S. 630.

School funds.—The treasurer of a board of education without authority placed the school funds in a bank of which he was manager, and the owner of which had knowledge of the character of the funds. They were wrongfully used in the business of the bank, and for the payment of indebtedness against it. Afterwards the owner of the bank became insolvent, and made an assignment of his property for the benefit of creditors. The assets which came into the hands of the assignee consisted of real property, securities, and cash. But the amount of the school money wrongfully converted, and which was impressed with a trust, was largely in excess of the cash on hand at the time of the assignment. The trust fund could not be clearly traced to any particular asset in the hands of the assignee, but it was shown to have gone into and been used for the benefit of the estate. Held, that the trust fund became a charge upon the entire assets with which it was mingled, and that the board of education has a preferred right to the assets over general creditors to the extent of the fund converted. Myers *v.* Board, 51 Kan. 87, 32 Pac. 658, 37 Am. St. Rep. 263.

money, but when, as a matter of fact, it can not be traced, the equitable right of the cestui que trust fails. Hence, when the trust fund has been dissipated, or so confounded and mixed up with the other property of the insolvent that it can not be traced or identified, the owner of the fund or property is not entitled to prove for it as a trust debt, and obtain a preference over the other creditors of the insolvent bank, out of the property to which no part of the trust fund or property or proceeds of it is traceable.[82]

82. Rule requiring identification of deposit.—Mechem, Ag., §§ 780, 781; Ex parte Blane, 2 Q. B. Div. 237, 273; Ex parte Hardcastle, 44 Law T. (N. S.) 524; Whitcomb *v.* Jacob, 1 Salk. 160; National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Peters *v.* Bain, 133 U. S. 670, 33 L. Ed. 696, 10 S. Ct. 354; Illinois, etc., Sav. Bank *v.* First Nat. Bank, 15 Fed. 858, 21 Blatchf. 275; Philadelphia Nat. Bank *v.* Dowd, 38 Fed. 172; Commercial Nat. Bank *v.* Armstrong, 39 Fed. 684; Cecil Nat. Bank *v.* Thurber, 8 C. C. A. 365, 59 Fed. 913; Multnomah *v.* Oregon Nat. Bank, 61 Fed. 912; City Bank *v.* Blackmore, 21 C. C. A. 514, 75 Fed. 771; Beard *v.* Independent Dist., 31 C. C. A. 562, 88 Fed. 375; Case *v.* Beauregard, Fed. Cas. No. 2,487, 1 Woods 125; Trecothick *v.* Austin, Fed. Cas. No. 14,164, 4 Mason 29; In re Coan Mfg. Co., 12 N. B. R. (U. S.) 203; Bank *v.* Russell, 2 Dillon (U. S.) 215; Goldsmith *v.* Stetson & Co., 30 Ala. 164; Maury *v.* Mason, 8 Port. (Ala.) 212; Parker *v.* Jones, 67 Ala. 234; McCall *v.* Rogers, 77 Ala. 349; St. Louis Brewing Ass'n *v.* Austin, 100 Ala. 313, 13 So. 908; First Nat. Bank *v.* Hummel, 14 Colo. 259, 23 Pac. 986; Meldrum *v.* Henderson, 7 Colo. App. 256, 43 Pac. 148; School Trustees *v.* Kirwin, 25 Ill. 73; Bayor *v.* Schaffner & Co., 51 Ill. App. 180; Kneisley *v.* Weir, 81 Ill. App. 251; Union Nat. Bank *v.* Goetz, 138 Ill. 127, 27 N. E. 907, 32 Am. St. Rep. 119; Wetherell *v.* O'Brien, 140 Ill. 146, 29 N. E. 904, 33 Am. St. Rep. 221; Mutual Acci. Ass'n *v.* Jacobs, 141 Ill. 261, 31 N. E. 414, 16 L. R. A. 516, 33 Am. St. Rep. 302; Bayor *v.* American, etc., Sav. Bank, 157 Ill. 62, 41 N. E. 622; Lanterman *v.* Travous, 174 Ill. 459, 51 N. E. 805; Little *v.* Chadwick, 151 Mass. 109, 23 N. E. 1005, 7 L. R. A. 570; Sherwood *v.* Milford State Bank, 94 Mich. 78, 53 N. W. 923; Westfall *v.* Mullen, 58 Minn. 5, 59 N. W. 633; Shields *v.* Thomas, 71 Miss. 260, 14 So. 84, 42 Am. St. Rep. 458; Mills *v.* Post, 7 Mo. App. 519; S. C., 76 Mo. 426; Midland Nat. Bank *v.* Brightwell, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608; Paul *v.* Draper, 158 Mo. 197, 59 S. W. 77, 81 Am. St. Rep. 296; Perth Amboy Gaslight Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704; Kip *v.* Bank (N. Y.), 10 Johns 62; People *v.* Merchants, etc., Bank, 78 N. Y. 269; Cavin *v.* Gleason, 105 N. Y. 256, 11 N. E. 504; Roca *v.* Byrne, 39 N. E. 812, 145 N. Y. 182, 39 Am. St. Rep. 599; Willoughby *v.* Weinberger, 15 Okla. 226, 79 Pac. 777; Ferchen *v.* Arndt, 26 Or. 121, 37 Pac. 161, 29 L. R. A. 664, 46 Am. St. Rep. 603; Muhlenberg *v.* Northwest, etc., Trust Co., 26 Or. 132, 38 Pac. 932, 29 L. R. A. 667; In re Thompson's Appeal, 22 Pa. 16; Freiberg *v.* Stoddard, 161 Pa. 259, 28 Atl. 1111; In re Lebannon Trust, etc., Bank, 166 Pa. 622, 31 Atl. 334; Slater *v.* Oriental Mills, 18 R. I. 352, 27 Atl. 443; State *v.* Bank, 64 Tenn. (5 Baxt.) 1; Downing *v.* Lellyett (Tenn.), 36 S. W. 890; Nonotuck Silk Co. *v.* Flanders, 87 Wis. 237, 58 N. W. 383; In re Plankinton Bank, 87 Wis. 378, 58 N. W. 784; Thuemmler *v.* Barth, 89 Wis. 381, 62 N. W. 94; Burnham *v.* Barth, 89 Wis. 362, 62 N. W. 96; Dowie *v.* Humphrey, 91 Wis. 98, 64 N. W. 315; State *v.* Foster, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47. Compare Shute *v.* Hinman, 34 Or. 578, 56 Pac. 412, 58 Pac. 882, 47 L. R. A. 265.

When money which is delivered to a bank, even though it be for some specified purpose, as, for instance, investment in a mortgage security, has been mingled with the funds of the bank, there is no reason why the depositor should be preferred above any other creditor. Wetherell *v.* O'Brien, 140 Ill. 146, 29 N. E. 904, 33 Am. St. Rep. 221.

A depositor in a bank drew a certified check thereon to the order of the president, and the amount of the check was credited to a special account, its proceeds being used to pay semi-monthly charges which the depositor was bound to pay for the hire of a ship. Before this money was all paid out, the bank went into the hands of receivers, and on the day when the receivers were appointed there ap-

Effect of Confusion of Trust Fund.—In other words when the trust fund can not be identified or traced into some specific estate or substituted

peared on the books of the bank to be in other banks and on hand less than $5,000, of which amount only about $2,000 was received by the receivers in currency and checks. This latter amount was deposited on the day that the receivers were appointed, and nothing was ever realized from the balances in other banks. Held that, since the special trust fund created by the drawing of the certified check had not been kept separate by the bank, but the only money on hand at the time it stopped business did not belong to that fund, so that the money belonging thereto could not be traced or identified, the depositor was not entitled to receive the balance belonging to such fund in preference to other creditors of the bank. Italian Fruit, etc., Co., *v.* Penniman, 100 Md. 698, 1 L. R. A., N. S., 252, 61 Atl. 694.

D employed A, a private banker, to look after property in Lansing, giving him a draft on Boston for $1,000, out of which to pay for certain repairs. A credited D for $1,000, and sent the draft to a New York bank, in the usual course, for collection, and the proceeds were placed to A's general credit. The drafts and deposits between the two banks were constantly changing. Held, that D, on the insolvency of A, was not entitled to full payment as a trust fund, but must share pro rata with other creditors. Edson *v.* Angell, 58 Mich. 336, 25 N. W. 307.

Where a receiver was appointed for an insolvent bank pendente lite, and funds ordered to be distributed were, on dismissal of the suit, returned to the bank, and expended by it in the usual course of its business, and the bank itself afterwards declared other dividends in favor of the same creditors, which were not claimed, and were also expended, all such dividends lost their identity as a trust fund, and did not pass to a subsequent receiver of the bank as a particular fund. Rockwell *v.* Portland Sav. Bank, 31 Or. 431, 50 Pac. 566.

Where a fund held by a bank as trustee has been mingled with the general assets of the bank, the beneficiaries of the fund have no lien upon the assets of the bank therefor, and under a general assignment by the bank for the benefit of its creditors prior to the Act of March, 1894, regulating voluntary assignments, such beneficiaries are not entitled to priority in the distribution of the assigned estate. New Farmers' Bank's Trustee *v.* Cockrell, 106 Ky. 578, 21 Ky. L. Rep. 177, 51 S. W. 2.

Where a banker received a check to take up a mortgage, and thereafter informed the holder that the maker of the check desired to pay the mortgage, whereupon the holder sent it to the bank for collection and received the banker's receipt therefor, without knowledge that he had already received the amount of the mortgage, and three days thereafter the banker failed, having made no distinction between the money so received and other moneys paid in in the course of his business, all of which the banker deposited to the credit of a general deposit account in another bank, the amount so received, though a trust fund, was thereby so mingled that it could not be identified; and hence the owner of the mortgage was not entitled to be paid as a preferred creditor by the banker's receiver. Moninger *v.* Security Title, etc., Co., 90 Ill. App. 246.

A county whose funds are deposited in a bank that fails has no preference over other depositors, to the bank assets, where the identity of the funds has been lost. San Diego County *v.* California Nat. Bank, 52 Fed. 59, disapproved. Multnoman *v.* Oregon Nat. Bank, 61 Fed. 912.

Deposits by state officers.—Where a check payable to two persons as government officers is indorsed by one of them for both, by indorsement showing their official character, and deposited in a bank to be credited to his individual account, and thereby becomes mingled with the funds of the bank, the fact that the check was intrusted to them as officers can not be urged by the payees to charge the proceeds as a trust fund in the hands of an assignee in insolvency of the bank, in an action to which the government is not a party, and in which the authority of the depositing payee to act for his copayee is not denied. Meldrum *v.* Henderson, 7 Colo. App. 256, 43 Pac. 148.

Rule in Wisconsin.—The better rule, as stated above, was the rule established by a number of cases in the supreme court of Wisconsin until a return to the above rule was announced in Nonotuck Silk Co. *v.* Flanders, 87

property, and the means of ascertainment fail, the trust wholly fails, and

Wis. 237, 58 N. W. 383, and the former cases were overruled.

The rule in Wisconsin now is that where, on failure of a bank, it appears that money deposited in trust has been dispersed, the cestui que trust must prove his claim as a general creditor. Dowie *v.* Humphrey, 91 Wis. 98, 64 N. W. 315; In re Plankinton Bank, 87 Wis. 378, 58 N. W. 784; Henry *v.* Martin, 88 Wis. 367, 60 N. W. 263; Burnham *v.* Barth, 89 Wis. 362, 62 N. W. 96; Thuemmler *v.* Barth, 89 Wis. 381, 62 N. W. 94.

Sufficiency of identification.—While it may not be necessary to point to the particular pieces of money or the particular bank bills that were deposited with the trustee, if the trust property be money, yet there must be a preservation of the distinctiveness of the trust fund. The means of ascertaining the identity of the fund fails where the money has "been mixed and confounded in a general mass of property in the bank of the same description." Doyle *v.* Murphy, 22 Ill. 502, 74 Am. Dec. 165; Trustees *v.* Kirwin, 25 Ill. 73; Wetherell *v.* O'Brien, 140 Ill. 146, 29 N. E. 904, 33 Am. St. Rep. 221; Union Nat. Bank *v.* Goetz, 138 Ill. 127, 27 N. E. 907, 32 Am. St. Rep. 119.

That a banker, who has since assigned for the benefit of creditors, knew that moneys deposited with him by plaintiff were county moneys, and that the assignee came into possession of moneys in the bank at the time of the failure, does not sufficiently identify the moneys in the hands of the assignee, so as to entitle plaintiff to a preference. Stevens *v.* Williams, 91 Wis. 58, 64 N. W. 422.

It makes no difference whether the fund be traced into a bank account, into the hands of an individual, or a firm; if its identity can be established, and no superior rights of innocent parties have intervened, it will be held for the benefit of the cestui que trust. Nor does the fact that it has been changed or altered in its nature or character affect the relation between the cestui que trust and the trustee or those claiming under him. Italian Fruit, etc., Co. *v.* Penniman, 100 Md. 698, 61 Atl. 694, 1 L. R. A., N. S., 252.

A person holding a certificate of a bank, being suspicious of the bank's standing, contemplated withdrawing the money, but only withdrew a part, taking a certificate for the balance; and it was agreed that the balance should be put in a separate package, subject to his order, but this was not done. Held, that the money was not sufficiently distinct from the other funds of the bank to impress a trust in his favor on the insolvency of the bank. Bayor *v.* Schaffner & Co., 51 Ill. App. 180.

Public funds invested in state bonds.—Act Jan. 19, 1838 (chartering the Bank of Tennessee), §§ 2, 3, provided that the capital of such bank should consist in part of the common school fund, "whether the same is vested in stock in the present banks of the state, or in the hands of the superintendent of public instruction, or in the hands of the county agents or other persons;" and that the "money belonging to the common school fund which now may be in the possession of" such superintendent, etc., should be handed over to the officers of such bank. Held that, in the liquidation of such bank pursuant to Act Feb. 16, 1866, such counties as deposited school funds in the bank were entitled to receive from it such state bonds as could be identified as bonds bought with such school funds in pursuance of law, but, as to such of those funds as should not be so traced into state bonds held by the bank, the counties entitled to such funds were creditors of the bank, having no priority over other depositors or general creditors. State *v.* Bank, 64 Tenn. (5 Baxt.) 1.

Presumption as to identity.—Where a bank mingles trust funds with its own, and disperses all the money—part of it by investing in securities or other property, taking the legal title thereto in its own name—and subsequently becomes insolvent, there is no presumption that the trust funds are represented by the securities or property, the legal title to which is in the bank. Burnham *v.* Barth, 89 Wis. 362, 62 N. W. 96.

The identification must be made without the aid of a legal presumption. Cadwell *v.* King, 84 Iowa 228, 50 N. W. 975; Seeley *v.* Seeley-Howe-Le Van Co., 128 Iowa 294, 103 N. W. 961; Bruner *v.* First Nat. Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532, and see note in connection therewith; Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178; Farwell *v.* Kloman, 45 Neb. 424, 63 N. W. 798; Stilson *v.* First State Bank, 149 Iowa 662, 129 N. W. 70.

But where a banker takes on deposit trust funds, knowing their char-

the party can only prove as a general creditor.[83] The beneficial owner, however, always has a remedy against the wrongdoing trustee to hold him personally liable for mingling these funds.[84]

§ 80 (7d) Proceedings to Establish Trust.—In a proceeding against an assignee or receiver to have a deposit in a bank declared a trust fund in the hands of the defendant and paid in full as a preferred claim, the plaintiff need not allege or prove that the assets were transferred to the defendant, as this is a matter of defense.[85] And in such proceeding the general rules as to the relevancy, competency and admissibility obtain.[86]

acter, and, after mingling them with his own funds, draws on the whole in the usual course of business, it will be presumed that the money so withdrawn is that of the banker, and not the trust money. State *v.* Foster, 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226, 63 Am. St. Rep. 47, following Knatchbull *v.* Hallett, 13 Ch. Div. 696.

Where a bank holds funds on deposit for a customer, and likewise trust funds to be used for a particular purpose, the presumption is that payments made by it for the customer are from the deposit and not from the trust funds, and the person entitled to such trust funds has the preference over the general creditors therefor. National Life Ins. Co. *v.* Mather, 118 Ill. App. 491.

Plaintiff deposited $80 with a bank at about 12 o'clock, when the bank was insolvent, and it closed its doors at about 2 o'clock the same day. There was deposited during the day about $12,000 and the bank had on hand in cash when it closed $20,000. Held, in an action by plaintiff against the receiver, in the absence of evidence that the bank had paid out the $80, that it would be presumed that it had used its own money and did not appropriate plaintiff's money, which had been received by fraud, so that he was entitled to have his claim paid in preference to the general creditors. Willoughby *v.* Weinberger, 15 Okl. 226, 79 Pac. 777.

Where the evidence discloses that a fund on hand in a bank showed a balance in excess of the amount of the trust fund each day from the receipt of the money until the doors of the bank were closed, there is no reason for indulging in a presumption that at some time during those days the fund was lower, especially, if such fact were true, the fact would be demonstrable from the books of the bank. In re Johnson, 103 Mich. 109, 61 N. W. 352.

A bank collected the water rates of a city, receiving in payment checks and cash. The treasurer of the water board was the president of the bank, and the deposit of such collections constituted a trust fund. The evidence showed that, from a certain day to the day on which the bank closed its doors, one-third of the amount paid in for the water board was paid by checks, and the balance in cash. The amount of money on hand at the time the bank closed its doors was greater than the amount of cash received for the water board. Held, in the absence of proof to the contrary, that it will be presumed that the amount in cash on hand, to the amount deposited in cash to the credit of the water board, was the trust fund. Board *v.* Wilkinson, 119 Mich. 655, 44 L. R. A. 493, 78 N. W. 893.

83. Effect of confusion of trust funds.—Bank *v.* Smith, 21 Blatchf. 275; Bayor *v.* American, etc., Sav. Bank, 157 Ill. 62, 41 N. E. 622; Burnham *v.* Barth, 89 Wis. 362, 62 N. W. 96.

84. Remedy of beneficial owner.—2 Pom. Eq. Jur., § 1058.

But it does not affect the question of identification that an action may lie against the defaulting trustee for his wrongful act. Moninger *v.* Security Title, etc., Co., 90 Ill. App. 246; Lanterman *v.* Travous, 170 Ill. 459, 51 N. E. 805.

85. Proceeding to impress a trust on deposits.—In a proceeding against an assignee for creditors to have a deposit made with the assignor before the assignment declared a trust fund and established as a preferred claim, it need not appear that the assignee has any of the assets transferred to him by the assignment. In re Knapp, 101 Iowa 488, 70 N. W. 626.

86. Evidence in suit to establish trust.—Where for two years the general agent of a corporation had been accustomed to send notes to a bank for collection, and the bank as it collected the notes at different times gave

§ 80 (8) Holders of Checks or Drafts—§ 80 (8a) In General.—Though there is some conflict in the cases, yet by the great weight of authority, an unaccepted check or sight draft on a bank does not operate as an assignment of the drawer's deposit at law or in equity, and upon the insolvency of the bank the holder of the draft or payee must share pro rata with other creditors, unless he can trace into the hands of the receiver money or property which belongs to the drawer, or which had, before the receivership, been set apart and appropriated to the payment of the check, so as to constitute a trust fund.[87] Nor does the mere charging the check

the agent credit on its books, from time to time remitting all the balance due the corporation, in an action by the corporation, on the insolvency of the bank, to have the proceeds of the notes declared a preferred claim as trust funds, it was not error to refuse to allow a witness to answer a question as to the manner in which the corporation collected its accounts in the state, is not being shown that the bank had any knowledge of the manner in which the corporation did business with other banks, and such question not being material. McCormick Harvesting Mach. Co. *v.* Yankton Sav. Bank, 15 S. Dak. 196, 87 N. W. 974.

In an action against the receiver of a bank to have the proceeds of certain notes collected by the bank declared a preferred claim as a trust fund, the funds in the bank at the time of its insolvency having amounted to less than plaintiff's claim, it was proper to admit the evidence of judgments recovered by certain preferred creditors of the bank, in order to show that there were preferred creditors, entitled to share pro rata in the funds in the bank at the time of its insolvency. McCormick Harvesting Mach. Co. *v.* Yankton Sav. Bank, 15 S. Dak. 196, 87 N. W. 974.

It was not error to sustain an objection to a question as to whether the corporation kept or authorized a general account with any bank outside of certain ones, inasmuch as the question in issue was whether the transaction between the corporation and defendant bank was such that the relation of debtor and creditor existed. McCormick Harvesting Mach. Co. *v.* Yankton Sav. Bank, 15 S. Dak. 196, 87 N. W. 974.

87. Rights of holders of checks and drafts.—Fourth St. Nat. Bank *v.* Yardley, 165 U. S. 634, 41 L. Ed. 855, 17 S. Ct. 439; Sunderlin *v.* Mecosta County Sav. Bank, 116 Mich. 281, 74 N. W. 478; Northern Trust Co. *v.* Rogers, 60 Minn. 208, 62 N. W. 273, 51 Am. St. Rep. 526.

This rule has frequently been enforced in controversies between the holder of a draft and the assignee or receiver of its insolvent drawer. Fourth St. Nat. Bank *v.* Yardley, 165 U. S. 634, 41 L. Ed. 855, 17 S. Ct. 439; Covert *v.* Rhodes, 48 O. St. 66, 27 N. E. 94, and cases cited; Attorney General *v.* Continental Life Ins. Co., 71 N. Y. 325, 27 Am. Rep. 55; Akin *v.* Jones, 93 Tenn. 353, 27 S. W. 669, 25 L. R. A. 523, 42 Am. St. Rep. 921; Harrison *v.* Wright, 100 Ind. 515; Guthrie Nat. Bank *v.* Gill, 6 Okl. 560, 54 Pac. 434; Reviere *v.* Chambliss, 120 Ga. 714, 48 S. E. 122.

Where a depositor in a bank obtains from it two drafts upon another bank, paying therefor by checks against his deposit, the relation between the bank and the depositor with respect to such drafts remains that of debtor and creditor, and is not changed to a fiduciary relation, entitling the depositor, upon the bank becoming insolvent before the drafts are paid, to have the assets in the hands of its receiver applied by preference to the payment of such drafts in full. Jewett *v.* Yardley, 81 Fed. 920.

A banker's draft, drawn and payable within the county, is not in legal effect a check; and where, before presentation to the bank on which it is drawn, and which has funds to meet its payment, the drawer fails, and payment is refused on that account by the drawee, and the funds are paid over to the receiver of the drawer, the payee is not entitled to payment in full out of such funds, but must prorate with the other creditors. Grammel *v.* Carmer, 55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363.

Draft on correspondent bank.—Where a bank fails and passes into the hands of a receiver after it has issued a draft on a correspondent bank, in which it has funds on deposit, and the drawee has notice of the receivership

to the drawer in his account with the bank and returning the check to the drawer as paid, amount to a payment of the check and appropriation of a specific fund or property of the bank or of the drawer for the payment of the check. By charging the check in account, the bank merely reduced its indebtedness to the depositor by the amount of the check, and constituted itself debtor to the holder of the check to a corresponding amount.[88] And it makes no difference whether the check is sent by mail to the bank upon which it is drawn, or is presented over the counter, provided it is sent for payment and not merely for collection.[89]

before the draft is presented for payment, the title to the deposit passes to the receiver, and the holder of the draft has no priority over other creditors of the insolvent bank. Clark *v.* Toronto Bank, 72 Kan. 1, 2 L. R. A., N. S., 83, 115 Am. St. Rep. 173, 82 Pac. 582.

The petitioner bank received a check drawn on defendant bank and mailed it to defendant for payment. Defendant charged and returned the check to the drawer as paid, and sent petitioner a draft on a third bank for the amount of the check. Two days afterwards defendant passed into the hands of a receiver, the draft remaining unpaid. Petitioner prayed an order for the receiver to pay to it the amount of the draft, on the alleged ground that defendant's assets came to the receiver impressed with a trust in favor of petitioner. It was held that the order should be denied, since no separate appropriation of a part of defendant's assets to the payment of the draft was traceable. People *v.* Merchants', etc., Bank, 78 N. Y. 269, 34 Am. Rep. 532, distinguishing In re Le Blanc, 14 Hun 8, 4 Abb. N. C. 221.

The holder of a cashier's check drawn on a bank in another state on no particular fund is not, on the insolvency of the drawee, entitled to preference over general creditors. Harrison *v.* Wright, 100 Ind. 515.

Assignment for creditors—Notice.—A check on a bank, given by a depositor, does not bind the fund against which it is drawn until the bank has notice thereof; and, therefore, where a general assignment is made by such drawer, and notice of the assignment is received by the bank before it has notice of the prior check, it is not liable to the holder for such fund. Laclede Bank *v.* Schuler, 120 U. S. 511, 30 L. Ed. 704, affirming 27 Fed. 424, 7 S. Ct. 644.

Certified checks.—Drawing checks on a bank at the time of making a deposit therein, some of which checks are certified, does not make the deposit a special fund to meet such checks, in the absence of a special agreement to that effect. People *v.* St. Nicholas Bank, 77 Hun 159, 28 N. Y. S. 407, 58 N. Y. St. Rep. 712; S. C., 77 Hun 611, 28 N. Y. S. 421, 423, 59 N. Y. St. Rep. 881.

The certification of a check by a bank is in effect merely an acceptance, and creates no trust in favor of the holder of the check, and gives no lien on any particular portion of the assets of the bank. People *v.* St. Nicholas Bank, 77 Hun 159, 28 N. Y. S. 407, 58 N. Y. St. Rep. 712; S. C., 77 Hun 611, 28 N. Y. S. 421, 423, 59 N. Y. St. Rep. 881.

Conflict in authorities.—It is true that there is great conflict with regard to the question whether or not a check is an assignment of the drawer or his funds. Of late years some text writers and a few courts, while admitting the correctness of the doctrine as applied to drafts or ordinary bills of exchange, have expressed a strong dissent from its applicability to checks. Any one interested in examining the arguments of that side of the question will find them fully presented in 2 Daniel Negotiable Instruments, § 1635, et seq., and Barnes *v.* Coates, 23 Am. Law Reg., N. S., 188.

88. A check drawn on a bank by a depositor who has funds enough on deposit to cover it, when presented is presented for payment, and not for collection, and its payment by draft, and charging the drawer's account with the amount of the check and returning it to him as paid, do not constitute such a setting apart of specific funds that its property will pass into the hands of a receiver impressed with a trust in favor of the payee of the draft, in the event that the draft is dishonored. People *v.* Merchants', etc., Bank, 78 N. Y. 269, 34 Am. Rep. 532.

89. Where the holder of a bank check mails it to the drawee for payment, with instructions to remit the pro-

§ 80 (8b) Rule in Equity.—But in equity a check operates an equitable assignment pro tanto of the fund on which drawn, and hence a receiver or assignee of the bank takes the assets subject to this superior claim.[90]

§ 80 (8c) Holders of Protested Paper.—The holders of protested paper of an insolvent bank, organized under the general banking law, are not entitled to priority in payment of the funds in the hands of the comptroller over the holders of paper not protested.[91]

§ 80 (8d) Drawers of Drafts on Consignment.—Where the plaintiffs make a consignment, and at the same time send their bill to bankers at the point of consignment for collection, upon the insolvency of the bank the complainants may impress a trust on so much of its assets in the hands of the receiver as consist of the debt due from the consignee.[92]

§ 80 (8½) Officers and Stockholders[93]**—§ 80 (8½a) Bank Officers.**—Bank officers to whom the bank is indebted have no other or greater rights than the other creditors of the institution,[94] and they may even be

ceeds, the drawer being in funds, and the check is charged and returned to the drawer as paid, and the bank's assets pass to a receiver before the proceeds of the check are remitted, the holder is not entitled to a preference as to assets in the receiver's hands, unless the drawee had separated from its general assets and placed in the hands of some depositary a sum sufficient to pay the check, for the express purpose of being so applied, and this fund came to the receiver in some form. People *v.* Merchants', etc., Bank, 78 N. Y. 269, 34 Am. Rep. 532.

90. Rule in equity as to draft on a fund.—A bank made an assignment, after drawing a draft on a fund, which the drawee delivered to the assignee before the draft was collected. Held, that the holder of the draft might enforce his lien on such fund in the hands of the assignee, though he had previously presented his draft to such assignee as a claim against the estate, which was allowed, and he had accepted dividends thereon. First Nat. Bank *v.* Coates, 8 Fed. 540, 3 McCrary 9.

91. Shepherd *v.* Guernsey (N. Y.), 9 Paige 357.

92. Plaintiffs consigned some meat to H., and sent the bill to G. & Co., bankers, for collection. H., who had an overdrawn account with G. & Co., gave his check on them for the amount, and they sent exchange on New York to plaintiffs, but failed, and payment thereof was refused by the New York bank. Held, that plaintiffs were entitled to recover from the receiver of G. & Co. the amount of the check drawn by H. out of the assets in the receiver's hands, as against attaching creditors. Ryan *v.* Paine, 66 Miss. 678, 6 So. 320.

A person directed his bank to pay certain debts, which would mature during his absence, and gave a check to cover the amount. The bank paid one creditor with a sight draft on its own correspondent, and failed before the draft was paid. A receiver was appointed, and plaintiff, holder of the draft, filed a bill to have the receiver declared a trustee of the assets for its benefit. Held, that a trust was not created by the mere revocable direction of the debtor, to which plaintiff was not a party. Louisville Banking Co. *v.* Paine, 67 Miss. 678, 7 So. 462, distinguishing Ryan *v.* Paine, 66 Miss. 678, 6 So. 320, on the ground, that there was no trust but a mere direction to the bankers which was revocable citing as authority Van Eaton *v.* Napier, 63 Miss. 220; Trustees *v.* Pace, 15 Ga. 486; Mayer *v.* Chattahoochee Nat. Bank, 51 Ga. 325; Bollies, Banks, § 44; 1 Morse, Banks, § 398.

93. See, also, ante, "Rights of Holders of Circulating Notes," § 79.

Right to participate in distribution, see ante, "Claims Provable and Estoppel to Claim," § 80 (1).

94. No priorities allowed bank officers.—On the insolvency of a bank, the cashier has no lien upon the money

postponed to other creditors, if it appears that the insolvency of the bank is due to their misfeasance or nonfeasance.[95]

§ 80 (8½b) Stockholders.—In the settlement of the affairs of an insolvent bank, nothing is to be repaid to stockholders, until after payment of all the debts of the bank.[96] Even though the capital stock of the bank

in the bank, for the payment of his deposit or salary. Bruyn *v.* Middle Dist. Bank (N. Y.), 9 Cow. 413, 1 Paige 584.

95. In a suit by creditors, who are also directors and officers of an insolvent banking corporation, to marshal and distribute the assets, and to charge the stockholders with their statutory liabilities to creditors for deficiency of assets, where it appears that the insolvency of the bank is due to the gross mismanagement and neglect of such directors and officers, rendering them liable to creditors and stockholders for losses incurred thereby, they may, in a proper case, be postponed as creditors until the debts of all other creditors have been fully paid. Elliott *v.* Farmers' Bank, 61 W. Va. 641, 57 S. E. 242.

96. Stockholders postponed until creditors paid.—New Orleans *v.* Bank, 3 La. Ann. 96; Hollister *v.* Hollister Bank, 41 N. Y. (2 Keyes) 245, 2 Abb. Dec. 367.

"The bill holders, and other creditors, of a bank have the first claim upon its stock and the stockholders have no right, until all the other creditors are satisfied. They have the full benefit of all the profits made by the establishment, and can not take any portion of the fund, until all the other claims on it are extinguished. Their rights are not to the capital stock, but to the residuum, after all demands are paid. In a disposition of the corporation, the bill holders and the stockholders have, each, equitable claims; but those of the bill holders possess, as I conceive, a prior exclusive equity." Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471.

Section 6146, Comp. Laws of Michigan 1897, provides that: "From time to time, under the direction of the commissioner of the banking department, the receiver shall make ratable dividends of the money realized or collected by him on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and the remainder of the proceeds, if any, after the costs and expenses of such proceedings and all debts and obligations of the bank are satisfied, shall be paid over to the stockholders of such bank, or their legal representatives in proportion to the stock by them respectively held." McGraw *v.* Union Trust Co., 135 Mich. 609, 98 N. W. 390.

Where the stockholder is an estate.—The fact that a bank president invests, without authority, in the stock of the bank, money which he holds as executor of an estate, and a few days before the suspension of the bank causes the stock to be resold to the bank at par, and a certificate of deposit to be issued, does not confer upon the estate any greater rights than those of a stockholder, or allow it to recover, as against creditors, the price agreed upon. In re Columbian Bank, 147 Pa. 422, 23 Atl. 626, distinguishing Farmers', etc., Nat. Bank *v.* King, 57 Pa. 202.

Where the stockholder is the state.—A stockholder of an insolvent bank, even though the state itself is a stockholder, can receive, as such, none of the assets until the creditors are fully satisfied. Dabney *v.* Bank, 3 S. C. 124.

Persons lending bank money and receiving a pledge of its stock are creditors.—The board of directors of a bank, by resolution, authorized the president and cashier to issue to the latter 400 shares of stock in consideration of his two notes for $20,000 each, the resolution reciting that the purpose was to enable the cashier to borrow money on the stock as collateral for the use of the bank, and that the bank would "take care to protect him in the transaction." The stock was issued to the cashier and money borrowed by him from E. & Sons, the stock being pledged as collateral. The money thus obtained by him was deposited in the bank to his credit, less the discount, which was restored to him. In an action by the stockholders of the bank for a settlement and distribution of the bank's assets, E. & Sons appeared and sought to make the bank liable as its creditors, and the directors personally liable on the ground of fraud. Held, that whether the stock was sold to enable the cashier to raise money to pay his debt to the bank, or for the purposes of the bank, it is apparent that the bank resorted to this means

is legally reduced, such action does not of itself authorize a distribution of the bank's assets in any form among the stockholders in a sum equal to the difference between the original and the reduced amount of capital. Such a distribution must be limited to the extent that there will still be left with the bank assets equal in value to the reduced capital stock.[97] But stockholders may by subrogation succeed to the priority accorded creditors.[98] And stockholders, after dissolution, may buy up outstanding claims of creditors and become entitled thereby to be substituted in their place in the distribution of the assets, even though they may be officers of the insolvent bank.[99]

§ 80 (9) Dividends and Interest—§ 80 (9a) Dividends—§ 80 (9aa) Right to Dividends—§ 80 (9aaa) In General.[1]—The creditors[2]

of raising money for its own benefit, and, therefore, E. & Sons have the right as creditors of the bank to priority over stockholders. Jones *v.* Johnson, 86 Ky. 530, 9 Ky. L. Rep. 789, 6 S. W. 582.

Necessity for presenting checks.—One to whom the tax collector and treasurer of a county transfer the preference they have, under Code 1906, § 3485, on insolvency of a bank in which they have deposited county funds, loses none of his rights by failure to present to the bank for payment checks on it, which, with the assignment, they have given him; they, with the assignment, operating to transfer the deposits, with the right of priority of payment, and it not being intended they should be presented for payment, according to the usual course of business, as the bank had suspended. Commercial Bank *v.* Hardy, 97 Miss. 755, 53 So. 395.

97. Effect of reducing capital stock.—1 Cook, Stock, Stockh. & Corp. Law (3d Ed.), § 289; Strong *v.* Brooklyn, etc., Co., 93 N. Y. 426; McCann *v.* First Nat. Bank, 112 Ind. 354, 14 N. E. 251; Kassler *v.* Kyle, 28 Colo. 374, 65 Pac. 34.

A stockholders' resolution reducing the capital stock of a bank one-half, and providing that each stockholder should surrender one-half of his stock, and receive long-time certificates of deposit therefor, could only operate to distribute to the stockholders the excess of the bank's assets over its liabilities and stock as reduced; and hence, where the bank was insolvent at the time the resolution was passed, a holder of such certificates of deposit was not entitled to payment in priority over other creditors. Kassler *v.* Kyle, 28 Colo. 374, 65 P. 34.

98. Rights of stockholders to subrogation.—Stockholders who have paid the claims of depositors are subrogated to their right to administer the assets in the hands of the assignee. City Bank *v.* Crossland, 65 Ga. 734.

99. A bank became insolvent, and made an assignment for the benefit of creditors. The charter made stockholders personally liable for an amount equal to the capital stock. After the assignment, the vice president and a director, both stockholders, bought up claims of depositors at a discount of 50 per cent., with a fund raised from contributions of stockholders, and contended that they were entitled to a pro rata distribution, based upon the face value of these claims. This contention was objected to, on the grounds (1) that, at the time of the purchase of the claims, the purchasers were officers of the bank; (2) that the stockholders owning the claims so purchased could not participate in the distribution until all of the depositors should be paid. Held, that neither objection was tenable. Appeal of Craig, 92 Pa. 396.

1. Estoppel to claim preference by acceptance of dividend by depositor of trust funds, see ante. "Deposit of Trust Funds," § 80 (7).

2. Right of creditors to dividends.—National Bank *v.* Mechanics' Nat. Bank, 94 U. S. 437, 24 L. Ed. 176; Chemical Nat. Bank *v.* Armstrong, 8 C. C. A. 155, 59 Fed. 379, 28 L. R. A. 231; In re Ziegler, 98 App. Div. 117, 90 N. Y. S. 681 (effect of failure to prove claim).

A depositor of an insolvent state bank drew its check on the bank on the day the superintendent of banks took possession thereof. On the next business day, a national bank, which was the clearing bank in the clearing

but not the stockholders[3] may be entitled to a dividend on their claims after the principal of the debts allowed is paid. A stockholder in an insolvent bank, with knowledge of its insolvency, can not sell his stock to it, and in the distribution of its assets, claim a dividend on the price or sum the bank agreed to pay him for it, because an allowance of this claim will injure the creditors of the bank by reducing the dividends they would otherwise receive from its assets, and proportionately increase their losses.[4]

house association for the state bank, paid the checks, which were drawn in the ordinary course of business and without anticipation of the insolvency of the state bank. Held that, since the assets of the state bank in the hands of the national bank as clearing house agent were pledged only to save it harmless under its contract to clear, the depositor was only entitled to the same percentage on its whole claim as other depositors who drew no checks received, and the right of the depositor to any dividend on his claim must be postponed until such time as the other creditors have received a percentage on their claims equal in amount to the percentage of the claim of the depositor received by the payment of its checks. People *v.* Bank, 70 Misc. Rep. 633, 127 N. Y. 908.

Payment of dividend.—When a depositor is entitled to dividends from the assignee of the bank, which have not been declared or paid by reason of the controversy in the suit, he will be entitled to be paid out of the fund recovered from his dividends on his deposit equal to those paid to the other depositors with interest on the same from the time the same would have been paid if there had been no controversy or suit. Lamb *v.* Cecil, 28 W. Va. 653, approved and applied in Lamb *v.* Pannell, 28 W. Va. 663.

Rights of holder purchasing bills at discount.—Where the road of a banking and railroad company, on which bill holders had a lien for the payment of their bills, was sold under a decree to raise a fund for the payment of such bills, it was held that the bill holders should be entitled to dividends only on the amount actually paid by them, respectively, for their bills, and not on the amount originally received by the bank. Collins *v.* Central Bank, 1 Ga. 435.

3. It is clearly the law in California that the funds of an insolvent banking corporation are all to be dispensed solely for the benefit of its creditors, and, while the stockholder may be compelled to put a great deal into the funds of such a corporation in the way of assessments, he is not as a stockholder permitted to share in its dividends either by subrogation or otherwise. Civ. Code, § 309. Sacramento Bank *v.* Pacific Bank, 124 Cal. 147, 56 Pac. 787, 45 L. R. A. 863, 71 Am. St. Rep. 36.

Injunction against dividends.—The separation of the banking from the other business of a corporation, for the purpose of winding up the former, can not change the obligations of the company to creditors or stockholders; and an injunction will be granted to arrest a dividend to stockholders if there are any debts created by former banking operations unpaid or unprovided for. New Orleans *v.* Commercial Bank, 3 La. Ann. 96.

4. In re Columbian Bank, 147 Pa. 422, 23 Atl. 626.

Where the director of a bank, after an examination of its affairs, finds it insolvent, and consults with the president in reference to a sale of his stock, and the only persons known to him in the transaction, or mentioned as probable purchasers, are the president and cashier, to whom he delivers the stock, and from whom he receives in exchange the interest-bearing obligation of the bank, the sale must be deemed to have been made to the bank, and the fact that the stock is afterwards formally transferred to the cashier for his worthless note is only confirmatory of this view. In re Columbian Bank, 147 Pa. 422, 23 Atl. 626, 628.

The vice president of a bank, after it had been running several years, made an examination of its affairs, which "startled" him, and caused him to resign his office. He determined also to sell his stock at auction, but was induced, for the sake of the bank's credit, to sell it privately to the bank. Shortly afterwards the bank suspended, with liabilities, exclusive of the capital stock, amounting to $300,000, and assets of about one-third that amount. The bills receivable and other loans appraised as good were

The possession of collateral security does not affect the creditor's right to a dividend upon the full amount of his claim; but if he has proved his claim he can collect his dividends without any deduction from his claim as proven for collections made from collateral after his proof of claim is filed.[5] But a creditor of an insolvent bank is not entitled as against other creditors to receive dividends out of the general funds in the hands of a receiver on notes held as collateral security and indorsed by the debtor, in addition to dividends on the principal debt.[6]

Failure of Creditor to Claim—Notice of Dividends.—Under the New York General Corporation Law, §§ 263, 266, where a receiver of a bank had failed to give notice of prior dividends, creditors' failing to claim the same did not forfeit their right thereto, but the dividends should be paid into court, and notice given of such right.[7]

§ 80 (9bbb) Rights of Purchasers of Claims.—Where the purchaser of a number of the claims of creditors owes no fiduciary relation to the bank or its stockholders, he is entitled to a dividend on the full face

only partially available, as in many instances they were set off by the deposit accounts of the debtors. The cash resources remaining on hand amounted only to $1,285.93. Held, that the bank was insolvent when it bought the stock, and that, as the owner of the stock was chargeable with notice of its insolvency, he was not entitled to claim, with creditors, a dividend on the amount agreed to be paid. In re Columbian Bank, 147 Pa. 422, 23 Atl. 626, 628.

5. **Possession of collateral as affecting right to a dividend.**—Chemical Nat. Bank *v.* Armstrong, 8 C. C. A. 155, 28 L. R. A. 231, 59 Fed. 372; Third Nat. Bank *v.* Eastern R. Co., 122 Mass. 240; Third Nat. Bank *v.* Haug, 82 Mich. 607, 47 N. W. 33, 11 L. R. A. 327; In re Burke, 25 R. I. 302, 55 Atl. 825; First Nat. Bank *v.* Williamson (Tenn.), 35 S. W. 573.

Amount of dividends.—In a special proceeding under Gen. Laws 1896, c. 178, § 42, et seq., to wind up a bank through a receiver, the equity rule, allowing dividends to a secured creditor on the full amount of his claim, obtains, and not the insolvency rule (chapter 274, § 29), allowing dividends only on the part of the claim in excess of the value of the securities; chapter 240, § 1, providing that statutory proceedings shall follow the course of equity so far as it is applicable, and the insolvency law being suspended by the national bankrupt law. In re Burke, 25 R. I. 302, 55 Atl. 825.

But a creditor of an insolvent banking corporation in the hands of a receiver, holding, as collateral to his deposit in the bank, notes negotiated and guaranteed by the corporation, will only be allowed a dividend on the amount remaining unpaid after he has exhausted such securities. Citizens' Bank *v.* State, 8 Kan. App. 468, 54 Pac. 510.

6. First Nat. Bank *v.* Williamson (Tenn.), 35 S. W. 573.

Right to dividends both upon principal indebtedness and collateral.—A creditor of an insolvent bank filed a bill to compel the receiver to pay him ratably with all of the creditors' dividends on its direct indebtedness to him of $25,805.60, principal debt, and also pro rata dividends on all the collateral notes and warrants he holds indorsed by the insolvent bank. The court held, that the creditor was not entitled to dividends out of the general funds in the hands of the receiver on the collateral he held, in addition to the dividends he received on the principal indebtedness. First Nat. Bank *v.* Williamson (Tenn.), 35 S. W. 573.

The debt of a bank to a creditor who holds its note, and, as collateral, notes indorsed by it, as regards the creditor's right to dividends, in a proceeding under Gen. Laws 1896, c. 178, § 42, et seq., is the bank's note only. In re Burke, 25 R. I. 302, 55 Atl. 825.

7. **Failure of creditor to claim—Notice of dividends.**—People *v.* Germen Bank (Sup.), 136 N. Y. S. 311.

of the claims, though he purchased them for fifteen per cent of their face value.[8]

§ 80 (9ccc) Establishment of Right.—Where a creditor of a bank whose claim is secured by a mortgage proves the entire claim, an order of the court allowing the claim, made after execution of the mortgage, is final and conclusive as to the right to participate in the dividends so far as the effect of the mortgage is concerned.[9]

§ 80 (9bb) Distribution of Dividend.—Under the New York Code an objection that the appointment of a receiver for an insolvent bank on the attorney general's application will render it necessary for the depositors to await the result of final judgment before receiving any dividends is not well taken, as Code Civ. Proc., § 1789, empowers the court to direct the temporary receiver to make distribution among depositors, creditors, and stockholders before final judgment.[10]

§ 80 (9b) Interest[11]—§ 80 (9aa) Right to and Liability for.—Creditors may receive interest on dividends paid to them, if they are diligent in the presentation of their claims.[12] If the assets of the corporation, when fully administered, only suffice for the payment of the principal of the debts of the corporation, the statutory liability of the shareholders may be resorted to for the recovery of such interest as would have been recoverable from the corporation, had it continued solvent, without receivership.[13]

§ 80 (9bb) Computation of.—As against the assets of an insolvent bank, interest on a claim is calculated only to the date of the suspension and

8. Palmer *v.* Bank, 72 Minn. 266, 75 N. W. 380.

9. **Establishment of right to dividend.**—A bank, after selling certain notes and indorsing them, became insolvent; and the receiver appointed requested the purchaser to obtain a mortgage from the maker of the notes as security, which he did. Subsequently the claim of the purchaser against the insolvent bank on the notes was allowed, and the receiver was ordered to pay it, with other liabilities. Held, that the order of the court made after the execution of the mortgage was final and conclusive, and the receiver could not refuse to pay the purchaser when a dividend was ordered. Rockwell *v.* Portland Sav. Bank, 39 Or. 241, 64 Pac. 388.

10. Tefft *v.* North River Bank, 14 N. Y. 8, 26 Abb. N. C. 189.

11. See post, "Presentation and Payment of Claims," § 288.

12. **Interest on dividends** should not be allowed in favor of one who voluntarily delayed presenting his claim until long after the dividends were declared, although the delay was due to a mistaken belief that he had a right to pay his claim in full from collaterals in his hands. Chemical Nat. Bank *v.* Armstrong, 8 C. C. A. 155, 59 Fed. 372, 28 L. R. A. 231.

Effect of receiving dividends.—Where, in proceedings against a banking and trust company for the sequestration and division of its assets, the sums received by its creditors from its assets were received as dividends not as payments, and there was no action to recover the principal and no acceptance or even offer of payment of the principal in full for the debt, the acceptance of such dividends to the amount of the principal did not bar the creditors from recovering interest. Flynn *v.* American Banking, etc., Co., 104 Me. 141, 69 Atl. 771.

13. Flynn *v.* American Banking, etc., Co., 104 Me. 141, 69 Atl. 771.

the vesting of the title of the assets in the receiver,[14] unless there are surplus assets after paying the indebtedness.[15]

§ 80 (9cc) Rate of.—In an action brought by the attorney general to wind up the affairs of an insolvent bank, interest at the contract rate should be credited on the accounts of creditors to the date the receiver took possession of the bank's assets, and thereafter interest is not allowable as between the creditors themselves, but is allowable against the bank, and, if the assets are sufficient for the payment of the principal indebtedness as established at the time the receiver took possession, interest should be paid at the legal rate before distribution of surplus to stockholders.[16]

§ 80 (9½) Set-Off—§ 80 (9½a) In General.[17]—Upon the insolvency of a bank, its debtors may avail themselves of any indebtedness of the bank to them as a set-off against their indebtedness to the bank.[18] And

14. Interest on claims against bank.—White *v.* Knox, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686; Richmond *v.* Irons, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788; Sexton *v.* Dreyfus, 219 U. S. 339, 55 L. Ed. 244, 31 S. Ct. 256; Chemical Nat. Bank *v.* Armstrong, 8 C. C. A. 155, 59 Fed. 372, 28 L. R. A. 231; Bank Comm'rs *v.* New Hampshire Trust Co., 69 N. H. 621, 44 Atl. 130; Bank Comm'rs *v.* Security Trust Co., 70 N. H. 536, 49 Atl. 113; Warrant Finance Co.'s Case, 4 Ch. App. 643; In re Joint-Stock Discount Co., 5 Ch. App. 86.

This rule is based both upon reason and authority. If the rule were otherwise, the claimant who delayed until the last to file his claim would have his negligence rewarded by the increased interest which he would receive. New York Security, etc., Co. *v.* Lombard Invest. Co., 73 Fed. 537.

Interest does not run, as against the estate, after the assignment or declared insolvency, unless there are funds sufficient on hand to pay all of the demands and accrued interest; otherwise, interest is to be allowed up to the time of the declared insolvency only. Chemical Nat. Bank *v.* Armstrong, 8 C. C. A. 155, 59 Fed. 372, 28 L. R. A. 231; White *v.* Knox, 111 U. S. 784, 28 L. Ed. 603, 4 S. Ct. 686; Richmond *v.* Irons, 121 U. S. 27, 30 L. Ed. 864, 7 S. Ct. 788; National Bank *v.* Mechanics' Nat. Bank, 94 U. S. 437, 24 L. Ed. 176; Home Sav. Bank *v.* Peirce, 156 Mass. 307, 31 N. E. 483; New York Security, etc., Co. *v.* Lombard Invest. Co., 73 Fed. 537.

15. Flynn *v.* American Banking, etc., Co., 104 Me. 141, 69 Atl. 771.

Moreover, where there is a surplus of assets it shall be applied to the payment of such interests before any distribution is made among shareholders. Flynn *v.* American Banking, etc., Co., 104 Me. 141, 69 Atl. 771.

In Maine claims against insolvent banks bear interest from the time they are filed, provided the assets are more than sufficient to pay the principal of all claims allowed. Rev. Stats. Maine 1883, ch. 47, § 66.

That statute, however, was designed for banks of issue. Flynn *v.* American Banking, etc., Co., 104 Me. 141, 69 Atl. 771.

16. People *v.* Merchants' Trust Co., 187 N. Y. 293, 79 N. E. 1004, affirming 116 App. Div. 41, 101 N. Y. S. 255, following dictum in People *v.* American Loan, etc., Co., 172 N. Y. 371, 65 N. E. 200.

17. Right to set off deposit against debt due insolvent bank, see post, "Set-Off by Depositor," § 135.

Set-off by receiver against claims against estate, see ante, "Presentation and Payment of Claims," § 80.

18. Right of set off against a bank.—Finnell *v.* Nesbit (Ky.), 16 B. Mon. 351; Salladin *v.* Mitchell, 42 Neb. 859, 61 N. W. 127; Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

A bank received on deposit a check drawn by plaintiff on another bank, and carried the amount to the credit of his agent, upon the agreement that he would take for part of the sum a draft drawn on another bank, and would not immediately check out the balance. Before the draft was presented the drawer bank, which was insolvent, passed into the hands of a receiver, without having provided any

this right of set-off against the bank is not affected by the appointment of a receiver, whether the debt was due at that time or not, and whether equitable or legal.[19]

Set-Off by Depositors.—Thus the right of a depositor to set off a claim for his deposit on the insolvency of the bank against a debt due from him to the bank is well settled.[20]

§ 80 (9½b) Conditions Annexed to Exercise of Right.—But the general rule that the right to a set off depends on whether the defendant has a right of action against the plaintiff, applies in the case of set-off by debtors to a bank.[21]

funds with which to pay it. The check, payment of which had been stopped, came to the possession of the receiver, and the draft belonged to plaintiff. Held, that plaintiff was entitled in equity to have the amount of the draft set off against his liability on the check. Armstrong *v.* Warner, 49 O. St. 376, 31 N. E. 877, 17 L. R. A. 466.

The bank A, at the time of its failure, was indebted to the bank B, which subsequently failed; the trustee of the bank A having at the time, on deposit with the bank B, funds of the trust estate. Held, that the receiver of the bank B was not entitled to set off, against the indebtedness due the trustee of the bank A on the deposits, the indebtedness due the bank B from the bank A; nor was the trustee of the bank A entitled to set off, against the pro rata share of the bank B in the funds of the bank A, the indebtedness due from the bank B on account of the deposits; but each was only entitled to receive from the other a pro rata share with the other creditors. Akin *v.* Williamson (Tenn.), 35 S. W. 569.

Checks held for collection.—In an action by an assignee for benefit of creditors of a bank to recover a balance due from another bank, a check drawn on the insolvent bank, which came into the hands of defendant prior to the assignment, and to which no defense is set up, should be allowed as a set-off, though defendant is not the owner of the check, but holds it for collection. Farmers', etc., Nat. Bank *v.* Penn Bank, 123 Pa. 283, 16 Atl. 761, 2 L. R. A. 273.

Rule in Louisiana.—In an action by a bank, in liquidation under the acts of March 14 and 26, 1842, to recover the amount of a dividend due on stock held by it in another corporation to which it was indebted in a larger sum for money on deposit, the claim of the bank must be held to be discharged by compensation, pursuant to Act April 5, 1843, § 2, declaring that it shall be the duty of banks to receive in offset of debts due to it its own debts when liquidated and part due. Citizens' Bank *v.* Steam Cotton Press (N. Y.), 11 Rob. 286.

An appeal lies under Rev. St., p. 135, § 17, from the decision of receivers, who refused to allow a set-off in a case where the applicants admitted that a bank held their promissory note, but claimed that the bank was largely indebted to them for interest, commissions, etc. Jackson *v.* Receivers, 9 N. J. Eq. (1 Stockt.) 205.

19. In re Middle Dist. Bank (N. Y.), 9 Cow. 414, 1 Paige 585, 19 Am. Dec. 452.

20. When a bank stops payment or becomes insolvent, a depositor's right to repayment of his deposit immediately accrues without demand, so that at the time the assets vest in the creditors on insolvency, the deposit of each depositor is due and entitles its owner to use it as a set-off against any debt held by the bank at the time of the transfer, whether due then or not. In one case, his right would be legal, in the other, equitable, but none the less to be protected because the statute law of Ohio recognizes the existence of equitable set-off (Rev. Stat., § 5076). Armstrong *v.* Law, 27 Wkly. L. Bull. 100, 11 O. Dec. 461; Armstrong *v.* Warner, 49 O. St. 376, 31 N. E. 877, 17 L. R. A. 466 (affirming 21 Wkly. L. Bull. 136, 10 O. Dec. 434).

21. Inasmuch as the holder of a check, drawn by a third party on a bank, has no action against the bank in case of refusal to pay, he can not set off such check against his note held by the bank. Case *v.* Henderson, 23 La. Ann. 49, 8 Am. Rep. 590; Case *v.* Marchand, 23 La. Ann. 60.

§ 80 (9½c) Claims That May Be Used as Set-Offs.—Of course only such debts or claims can be used as are contemplated by the statute of set-off in the particular jurisdiction.[22] Claims against the bank acquired after its insolvency can not be used as set-offs against debts due by the defendant to the bank.[23] Nor can a debtor of a bank, after notice that his creditor had assigned the debt to a third person, to secure the latter for acceptances made for the creditor, the proceeds of which had been received

22. **Debt due by contract.**—In adjusting the concerns of a bank by receivers of its assets, the bank tax, imposed by Rev. St., c. 9, § 1, and ç. 36, § 45, and due from the bank, may be set off against money due from the commonwealth to the bank on loan. Commonwealth *v.* Phœnix Bank (Mass.), 11 Metc. 129.

"Mutual credits."—Where, at the time of the failure of the bank, one of its customers was indebted to it on a note not then due, but which matured a few days thereafter, and the bank was also indebted to him for deposits in a sum exceeding the amount of the note, such claims are "mutual credits," within 2 Rev. St., p. 47, § 36, under which it is the duty of the receiver of the bank to set off the one against the other. Jones *v.* Robinson (N. Y.), 26 Barb. 310.

Where, on the insolvency of a bank, the lessor of its banking house was indebted to it on a demand note, he was not entitled to set off a claim for damages for breach of the lease by the bank against its claim on the note. McGraw *v.* Union Trust Co., 135 Mich. 609, 98 N. W. 390.

Where the vice president and attorney of an insolvent bank was indebted to it on notes secured by mortgage, he was estopped to set up claims arising from a liability accruing against him as surety on an attachment bond, and for money which he borrowed on his personal credit and gave to the bank's cashier, as a set-off against his liability on the debt due the bank; and hence he was not entitled to maintain a bill to restrain the receiver of the bank from foreclosing the mortgage. Chapman *v.* Cutrer (Miss.), 29 So. 467.

Unliquidated claims.—Where credit claims exist on both sides between an insolvent bank and one of its customers, and the customer's claim is not liquidated, and incapable of liquidation, without the aid of a jury or extrinsic evidence, the right to set-off is not absolute; but the receiver of the bank must act in good faith, and adopt all proper measures to liquidate the claim in that manner, before the period of distribution arrives In re Van Allen (N. Y.), 37 Barb. 225.

Unascertained indebtedness.—On the distribution of the assets of an insolvent bank, only the direct and ascertained indebtedness of depositors can be set off against their ascertained claims for shares in the money to be distributed. In re Humboldt Safe Deposit, etc., Co., 3 Pa. Co. Ct. R. 621.

A claim for pay for services, due before a bank closes its doors, is a set-off to a liability on bills discounted. Davis *v.* Industrial Mfg. Co., 114 N. C. 521, 19 S. E. 371, 23 L. R. A. 322.

23. **Claims acquired after insolvency.**—Dyer *v.* Sebrell, 135 Cal. 597, 67 Pac. 1036; American Bank *v.* Wall, 56 Me. 167.

In an action by the receivers of a bank, appointed under St. 1851, c. 127, upon a debt contracted before the institution of proceedings against the bank, the defendant may set off debts due from the bank held by him before the commencement of such proceedings, but not debts purchased since their commencement, although before the perpetual injunction. Colt *v.* Brown (Mass.), 12 Gray 233.

Burden of proof.—If a party wishes to avail himself of a set-off against the claim of a bank which has failed, and filed a bill, asking to have its affairs administered as an insolvent corporation, it is incumbent upon him to prove that he acquired his claim before the filing of the bill, when the rights of the creditors attached. Smith *v.* Moseby, 56 Tenn. (9 Heisk.) 501; Lanier *v.* Gayoso Sav. Inst., 56 Tenn. (9 Heisk.) 506.

Where a defendant, who is sued on a note by the receiver of an insolvent bank which has failed and filed a bill asking to be wound up, offers, as a set-off, a certificate of deposit given by the bank, the burden is upon him to show that he received it previous to the filing of the bill by which the assets of the bank were impounded for the benefit of all its creditors. Smith *v.* Moseby, 56 Tenn. (9 Heisk.) 501.

by him, and after notice also of the insolvency of the assignor, purchase, for a trifling consideration, desperate claims against the insolvent creditor, for the purpose of tendering them in payment of the debt, in the hands of the innocent assignee.[24] The purchase of depreciated notes, after knowledge of such an assignment, is an act of bad faith, injurious to the rights of others. It is immaterial in what manner the knowledge of the transfer was acquired, so that it existed at the time of the purchase.[25]

Unpresented Checks.—While the courts differ as to the rights of a holder of a check, where the drawer has become a bankrupt before the check is presented, it seems to be well settled that in case of the insolvency of the drawee bank before the payment of the check the holder will not be entitled to any preference, or to offset the unpresented check against his indebtedness to the insolvent bank. To allow such a set-off would open wide the door for fraud and collusion.[26]

A correspondent bank, indebted to an insolvent bank on open account, is entitled to apply the amount thereof on an indebtedness due to the correspondent bank from the insolvent bank.[27]

24. Claims purchased to be used as set-offs.—Notice having been given to a debtor that his creditor, a bank, had transferred the debt to another person as collateral security for acceptances for the bank, the proceeds of which had been received; that the bank had become insolvent; and that it had made a general assignment in trust for its creditor—the subsequent purchase and the tender of the depreciated notes of the bank to the attorney, or agent thereof, or its general assignees in payment of the debt, will not defeat the claim against him of the transferee. Philips *v.* Bank, 18 Pa. 394. See in accord Bank *v.* Marshall, 66 Va. (25 Gratt.) 378.

25. Philips *v.* Bank, 18 Pa. 394.

It is not necessary that notice of the transfer be given to the debtor by the person in whose favor the transfer was made, nor is it necessary that it be given in writing. Philips *v.* Bank, 18 Pa. 394.

The second section of the Act of March 12, 1842, provides that when a bank has made a general assignment in trust for the benefit of all their creditors, "the assignees shall receive in payment of debts due to said bank, its own notes and obligations." If this provision be limited to the notes and obligations of the bank which the debtor had received in the usual course of business before notice of the assignment, its justice is so obvious as to require no aid from the statute. By the letter and spirit of the statute the notes of an insolvent bank purchased after notice of a general assignment for the benefit of its creditors, can be tendered only in payment of debts "due to the bank," to such as belonged to the bank at the time of its assignment, and which passed to the assignees; and not to such debts as were transferred by the bank before such assignment in good faith and for a valuable consideration, with the knowledge of the debtor. Philips *v.* Bank, 18 Pa. 394.

26. A debtor of an insolvent bank, which has made an assignment for the benefit of creditors, can not set off against his debt to the bank a check drawn in his favor by a depositor of the bank, and not presented for payment until after the assignment. Greenebaum *v.* American, etc., Sav. Bank, 70 Ill. App. 407.

Accordingly, the debtor of an insolvent bank, which has assigned for the benefit of creditors, can not set off against his debt a check drawn in his favor by a depositor, before the failure of the bank, but which had not been presented for payment. Northern Trust Co. *v.* Rogers, 60 Minn. 208, 62 N. W. 273, 51 Am. St. Rep. 526.

27. Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289.

The S. bank, having cashed an exchange for the L. bank, drew a draft on the L. bank for the amount, and indorsed the same to the N. bank. It thereupon wrote a letter of advice to the N. bank, directing it to credit the amount of the draft on its open deposit

§ 80 (9½d) Estoppel to Interpose Set-Off.—A bank is not estopped by judgment from interposing as a set-off in a suit by creditors the claim of the bank for stock subscriptions and other liabilities, where such indebtedness was not involved in the former suit.[28]

§ 80 (9¼) Proceedings to Compel Payment.[29]**—In General.**—The proceeding to compel payment of his claim by a creditor is by petition[30] in the court where the insolvency proceedings are pending, though proceedings against the bank have been stayed.[31] It seems, however, that it is within the discretion of the court either to determine claims against a bank receiver by petition in the original action in which he was appointed or by an independent suit.[32] But where a trustee is empowered to pay claims only after allowance by commissioners appointed therefor, he can not be compelled by suit in a federal court to pay claims rejected by them.[33]

account, but through inadvertence the draft was not inclosed in the letter. While the draft was still in its hands, the S. bank failed, and the draft passed into the hands of its receiver, who received credit for the proceeds thereof. Held, that the letter of advice was not such an assignment of the draft as to entitle the N. bank to receive the proceeds thereof from the receiver, for application on an indebtedness to it from the insolvent bank. Brown *v.* Sheldon State Bank, 139 Iowa 83, 117 N. W. 289.

Mutual debts between banks.—If, at the time one bank failed, owing another bank, that bank also owed the first bank, obviously the proper method of settlement would have been to offset one debt against the other, under the principles laid down in the case of Nashville Trust Co. *v.* Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710. Akin *v.* Williamson (Tenn.), 35 S. W. 569.

28. Estoppel to interpose set-off.—In a suit by creditors, who are also directors and officers, of an insolvent corporation, to marshal and distribute the assets, and to charge the stockholders with their statutory liabilities, neither the bank nor its creditors or stockholders are estopped from offsetting against the debts due other claimants or their assignees, whether by judgment or otherwise (no superior equities intervening), the indebtedness of such claimants to the bank not involved or adjudicated in a former suit between the same parties or their privies. Elliott *v.* Farmers' Bank, 61 W. Va. 641, 57 S. E. 242.

29. See ante, "Assignments for Benefit of Creditors," § 78.

30. Sufficiency of pleadings.—A petition for the allowance of a belated claim against an insolvent bank, which in apt language charged that the defendant was indebted to the plaintiff in a sum named, was not demurrable because it also alleged that the ownership of the claim was disputed and in litigation between the plaintiff and another party. State *v.* Bank, 61 Neb. 22, 84 N. W. 406.

Intervention.—A creditor of an insolvent bank corporation organized under the state law, for which a receiver has been appointed, should apply to the court in which the proceedings are pending for leave to intervene before filing his petition therein as a claimant. Stone *v.* Ingham Circuit Judge, 105 Mich. 234, 63 N. W. 79.

31. Proceedings to adjudicate claims.—Though all proceedings have been stayed against a bank in liquidation under Act March 14, 1842, No. 98, § 29, a creditor may sue in the court where the proceedings are pending to have his claims recognized, to be paid in course of administration. Gaillard *v.* Citizens' Bank (La.), 11 Rob. 168.

32. Adjudication of claims against receiver.—To recover moneys deposited with an insolvent bank, the party may file his petition in the action wherein a receiver for said bank has been appointed. Blake *v.* State Sav. Bank, 12 Wash. 619, 41 Pac. 909.

33. Allowance of rejected claims.—Two statutes of Mississippi, one passed in 1843, and the other in 1846, provided that where the charter of a bank should be declared forfeited, a trustee should be appointed to take possession of its effects, and commissioners ap-

§ 81. Distribution of Surplus.—A judicial forfeiture of the charter of a bank does not extinguish the liabilities of debtors to the bank; but after such forfeiture, and a winding up of the affairs of the bank, the stockholders are entitled to any surplus that may remain after the payment of its debts.[34] And a delinquent debtor can not in such case plead the judgment of forfeiture as against a trustee seeking to reduce his debt to money for

pointed to audit accounts against it. Where these steps had been taken, and the commissioners had refused to allow a certain account, the circuit court of the United States had no right to entertain a bill filed by the creditors to compel the trustee to pay the rejected account. There was a want of jurisdiction. Peale *v.* Phipps (U. S.), 14 How. 368, 14 L. Ed. 459; Applied, Taylor *v.* Carryl (U. S.), 20 How. 583, 15 L. Ed. 1028; Green *v.* Creighton, 23 How. 90, 16 L. Ed. 419; Barton *v.* Barbour, 104 U. S. 126, 26 L. Ed. 672.

A claim by the trustee, in reconvention, was not a waiver of the exception to the jurisdiction, being made conditionally, in case the exception to the jurisdiction should be overruled. Peale *v.* Phipps (U. S.), 14 How. 368, 14 L. Ed. 459.

34. Distribution of surplus to stockholders.—Bacon *v.* Robertson (U. S.), 18 How. 480, 15 L. Ed. 499, affirmed; Lum *v.* Robertson (U. S.), 6 Wall. 277, 18 L. Ed. 742; Hollister *v.* Hollister Bank, 41 N. Y. (2 Keyes) 245, 2 Abb. Dec. 367; Marr *v.* Bank, 44 Tenn. (4 Coldw.) 471.

A trustee of the property of a banking corporation, appointed under a judgment of forfeiture against the corporation, holds the surplus of the property, after paying the debts of the company and the costs of administering the trust, for the benefit of the stockholders. Bacon *v.* Robertson (U. S.), 18 How. 480, 15 L. Ed. 499.

Upon the dissolution of a bank, a resolution permitted debtors to the bank to pay their debts in stock at a certain price, and also provided that dividends should be paid to other stockholders at the same rate. From time to time dividends were allowed to nondebtor stockholders, extending over a period of several years, whereby such stockholders suffered a disadvantage with respect to interest as compared with debtors who turned their stock upon their debts immediately after the passage of the resolution. On a bill by the nondebtor stockholders to equalize the dividends, held that, since those who paid their debts in stock prevented an accumulation of interest on their debts from the time of such payment, they should be regarded, upon subsequent distributions of the fund, as if they had received interest on their stock from the time it was applied upon their debts. Conococheague Bank *v.* Ragan (Md.), 7 Gill & J. 341.

Estoppel to deny title.—Where a judgment of forfeiture has been rendered against a bank, and a trustee appointed to take charge of its assets, his title to the assets, after payment of the debts, is subordinate to that of the stockholders, and he was estopped to deny their right to a distribution of the remaining assets. Bacon *v.* Robertson (U. S.), 18 How. 480, 15 L. Ed. 499.

And a bill can be maintained, filed by a number of stockholders owing one-fifth part of the capital stock, suing for themselves and such of the stockholders as were not citizens of Mississippi, nor defendants in the bill. Bacon *v.* Robertson (U. S.), 18 How. 480, 15 L. Ed. 499.

Rights of ecclesiastical societies.—The charter of a bank provided that ecclesiastical societies might subscribe for its stock, with the privilege of withdrawing their subscriptions at any time, on giving six months' notice to the directors. Pursuant to this provision, certain ecclesiastical societies subscribed for stock, and afterwards gave the required notice of withdrawal. The bank afterwards went into liquidation by the appointment of receivers, and its assets proved sufficient for the payment of all liabilities, leaving in the hands of the receivers funds sufficient to refund to the privileged stockholders in full the amounts subscribed by them, with a balance for distribution among the general stockholders. Held, that the societies were stockholders, and as such were entitled only to their proportion of the assets after the payment of debts, and that no distinction should be made in their favor in the distribution of the funds. Stonington Bank *v.* Baptist Soc., 38 Conn. 577.

the benefit of the stockholders.[35] But until all debts are fully paid there will be no distribution of the assets among stockholders.[36]

§ 82. Civil Liability on Insolvency.—See ante, "Officers and Agents," § 50-58 (6).

§ 83. Criminal Responsibility on Insolvency.—See ante, "Criminal Responsibility," §§ 60-62.

§ 84. —— Offenses.—See ante, "Criminal Responsibility," §§ 60-62.

§ 85. —— Prosecution and Punishment.—See ante, "Criminal Responsibility," § 60-62.

35. Suit by trustee.—Lum *v.* Robertson (U. S.), 6 Wall. 277, 18 L. Ed. 742.

Nor can a delinquent be permitted to show (not having a meritorious defense to the suit) that the former trustee, the nominal plaintiff, in whose name the suit is brought, is no longer the real party in interest. Lum *v.* Robertson (U. S.), 6 Wall. 277, 18 L. Ed. 742.

36. Where, after an assessment had been levied on the stockholders of an insolvent bank under Act April 5, 1849, to enforce their personal liability for the bank's unsatisfied debts, there remains a sum in the receiver's hands arising from assets not anticipated at the time of the assessment, that sum will not be ordered distributed among the stockholders until all creditors of the bank are fully paid. Pruyn *v.* Van Allen (N. Y.), 39 Barb. 354.

CHAPTER VII.

III. Functions and Dealings.

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III. FUNCTIONS AND DEALINGS.[1]

A. BANKING FRANCHISES AND POWERS, AND THEIR EXERCISE IN GENERAL.[2]

§ 86. What Are Banking Powers in General—§ 86 (1) Functions in General.—The principal functions of a bank are: 1, To receive and pay deposits; 2, to issue notes of circulation redeemable on presentation at its counter; 3, to buy and sell exchange; and, 4, to loan money.[3]

Banking Powers.—Bank charters contain an infinite variety of provisions. Some are exceedingly restricted, while others are almost unlimited, in the power which they confer; and the shades of difference between these two extremes are so numerous that it would be impossible to form any definite idea of what were the powers intended to be granted in any particular case. The consequence is that a body of men, to whom banking powers, in the abstract, were conceded, would be placed in an infinitely better condition than any other corporation in the state. Their powers would, literally, be unbounded, in consequence of the very defect which was inherent in their creation. That they were without law would be a passport to the exercise of all law.[4] The expression, "banking powers," has been held to

1. **Functions and dealings.**—Of loan, trust and investment companies, see post, "Functions and Dealings," § 315.

Of national banks, see post, "Banking Powers," § 258, et seq.

Of savings banks, see post, "Powers in General," § 295, et seq.

2. Of national banks, see post, "Banking Powers," § 258; "Effect of Acts Ultra Vires," § 261; "Powers in General," § 295.

Of savings banks, see post, "Powers in General," § 295.

Of branch banks, see ante, "Powers," § 33 (3).

Right to exercise.—See ante, "Right of Banking in General," § 1.

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What are banks or banking privileges within prohibition of unauthorized banking, see ante, "What Are Banks," § 2.

3. **Principal functions.**—Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944.

In Chafin *v.* Lincoln Sav. Bank, 54 Tenn. (7 Heisk.) 499, speaking of the rights of banks to exercise the particular functions of banking, it is said: "It is authorized to discount notes; to buy and sell notes, stock and uncurrent money; deal in exchange, gold and silver, bullion, etc. This is the language by which the privileges of banking have been given by the legislature to the various banks which have been chartered."

4. **Banking powers.**—State *v.* Washington, etc., Library Co., 11 O. 96.

connote the idea of issuing circulating notes only.[5] And a bank, though owned entirely by the state, is a mere corporation, possessing no greater powers and privileges than other corporations,[6] unless privileges and immunities belonging to the state are expressly conferred by its charter.[7]

The purposes of an organization are very material in determining whether its act is ultra vires.[8]

§ 86 (2) Mode of Exercise.—A bank acts either by its president or directors, or their agents, or by its stockholders. In the exercise of its ordinary functions by the former; in extraordinary matters, by its stockholders.[9]

5. As connoting issue of notes only.—The term "banking powers" is broad enough to include the powers usually enjoyed by banking associations, such as making loans and discounts, receiving deposits and dealing in securities, etc., as well as issuing bills and notes for circulation as money; and at the date of the adoption of the Ohio constitution of 1851, and for a long time prior thereto, the commercial world was familiar with banks of deposit and discount as well as banks of issue, of which only the latter made and issued notes to circulate as money, the powers of either class being properly denominated "banking powers." The phrase used by the constitution, "associations with banking powers," was susceptible, however, of another and restricted meaning, relating only to the powers employed in making and issuing paper money, and under the Ohio constitution of 1851, and prior thereto, "banking powers" meant only this power of issuing money. Dearborn *v.* Northwestern Sav. Bank, 42 O. St. 617, 51 Am. Rep. 851.

The term "banking powers," as used in Ohio Const., 1851, art. 13, § 7, providing that no act of the general assembly authorizing associations with "banking powers" shall take effect until submitted to the people, relates only to the power to issue notes or other obligations intended to circulate as money. Bates *v.* People's Sav., etc., Ass'n, 42 O. St. 655; Dearborn *v.* Northwestern Sav. Bank, 42 O. St. 617, 51 Am. Rep. 851; Exchange Bank *v.* Hines, 3 O. St. 1; State *v.* Granville Alexandrian Soc., 11 O. 1. See, also, Forrest City, etc., Bldg. Ass'n *v.* Gallagher, 25 O. St. 208.

Thus the term "banking powers," as used in a charter provision prohibiting the exercise of banking powers, does not prohibit the receiving of deposits. Corwin *v.* Urbana, etc., Ins. Co., 14 O. 7.

And the advancing of money by a building association to its members is not the exercise of banking powers. Forrest City, etc., Bldg. Ass'n *v.* Gallagher, 25 O. St. 208.

6. Bank owned by the state.—Bank *v.* Gibbs (S. C.), 3 McCord 377.

7. Where conferred by charter.—Mahone *v.* Central Bank, 17 Ga. 111. See post, "Construction of Charters and Banking Laws," § 87.

8. Materiality of purposes of organization.—Judgment, Gause *v.* Commonwealth Trust Co., 124 App. Div. 438, 108 N. Y. S. 1080, which affirmed in 55 Misc. Rep. 110, 106 N. Y. S. 288; S. C., 196 N. Y. 134, 89 N. E. 476.

And the courts treat the question as it relates to a corporation organized for business purposes, where the only persons interested, other than its business creditors, are its stockholders, and their only interest therein is to secure dividends upon their investment, very differently than they do in the case of a banking corporation which occupies a fiduciary position. Judgment, Gause *v.* Commonwealth Trust Co., 124 App. Div. 438, 108 N. Y. S. 1080, which affirmed in 55 Misc. Rep. 110, 106 N. Y. S. 288; S. C., 196 N. Y. 134, 89 N. E. 476.

9. By officers or stockholders.—"When we speak of an act to be done by a bank or banks, we mean an act to be done by those who have the authority to do it. If it be an act within the franchise for banking, or the ordinary power of the bank to contract, and it is done by the president and directors, or by their agent, we say the bank did it, and every one understands what is meant. If, however, an act is to be done relative to the institution, by which its charter is to be in any way changed, the stockholders must

§ 86 (3) Place of Exercise.[10]—Foreign Banking Corporations.—While, by comity, a foreign banking corporation may do business within a state, this is only in the absence of legislation indicating a contrary intention,[11] and if the law creating a banking corporation does not, by the true construction of the words used in the charter, give it the right to exercise its powers beyond the limits of the state, all contracts made by it in other

do it, unless another mode to effect it has been provided by the charter." Gordon *v.* Appeal Tax Court (U. S.), 3 How. 133, 11 L. Ed. 529. See post, "Grounds and Extent of Liability in General," § 102, et seq., as to representation of bank by officers and agents.

Execution of bond as depositary.—See post, "Special Deposits," § 153.

10. Place of exercise.—Right to sue in another state, see post, "Capacity to Sue and Be Sued," § 213.

As to location and place of business, see ante, "Location and Place of Business," § 32.

Foreign corporation carrying on business under name similar to domestic corporation, see ante, "Statutory Requirements," § 31 (1).

11. Rule of comity.—It is well settled, that by the law of comity among nations, a banking corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts; and that the same law of comity prevails among the several sovereignties of this Union. The public, and well-known and long-continued usages of trade; the general acquiescence of the states; the particular legislation of some of them, as well as the legislation of congress; all concur in proving the truth of this proposition. But this comity is presumed from the silent acquiescence of the state. Whenever a state sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made. Bank *v.* Earle, 13 Pet. 519, 10 L. Ed. 274.

Alabama.—There is nothing in the constitution or laws of Alabama, from which this court would be justified in concluding that the purchase of bills of exchange by a foreign banking corporation within the state of Alabama, was contrary to its policy. Bank *v.* Earle (U. S.), 13 Pet. 519, 10 L. Ed. 274.

Ohio.—**General right to transact business.**—A banking corporation, created by the laws of one state, has capacity to make a contract falling within its corporate powers in any other state, unless its capacity to make such contract is opposed to the laws or the settled policy of the state in which its exercise is attempted. Such contracts are permitted upon principles of comity between the different states of this Union, and in furtherance of the intimate commercial relations existing between their respective citizens. Pickaway County Bank *v.* Prather, 12 O. St. 497.

Michigan.—Banking corporations and corporations within the contemplation of the banking laws of Michigan are not within the provisions of the act authorizing foreign corporations to transact business in Michigan. New York Mortg. Co. *v.* Secretary, 150 Mich. 197, 114 N. W. 82.

Virginia.—**Enforcement of primary contract.**—A bank of another state can not enforce a primary contract made in Virginia, as by discounting notes or otherwise. Bank *v.* Pindall, 23 Va. (2 Rand.) 465.

It would not, therefore, be permitted to a bank in Ohio, to establish an agency in Virginia, for discounting notes, or for carrying on any other banking operations; nor could they sustain an action on any note thus acquired by them. But this would not prevent borrowing money from a bank in Ohio, or restrain one citizen of Virginia from executing to another citizen, or to a foreigner, a note payable at the banking house of a bank legally constituted in Ohio; nor prevent such bank from taking an assignment of such note by discounting it in Ohio. No doubt, but the bank may recover by suit in Virginia, a debt thus contracted. Bank *v.* Pindall, 23 Va. (2 Rand.) 465.

Wisconsin.—Kennedy *v.* Knight, 21 Wis. 340, 94 Am. Dec. 543.

Prohibition of carrying on business by agent.—*Mississippi.*—A bank of another state can not, by an agent, carry on the business of banking in this state. Bank *v.* Stegall, 41 Miss. 142.

states would be void.[12] But it has been held that, in the absence of any statute limiting its authority, a bank organized under the laws of one state may transact any business within the scope of its charter in other states.[13]

The Bank of the United States, had, constitutionally, a right to establish its branches of offices of discount and deposit within any state.[14]

In State of Incorporation.—They may be freely exercised anywhere therein, if unrestricted.[15]

What Constitutes Doing Business in State Contrary to Laws Thereof.—Where a note and mortgage were given in Wisconsin to secure payment of principal and interest to a bank in New York, it was not an attempt on the part of the bank to exercise its powers of banking within this state; especially as the liability might have been prior to the note and mortgage, and as the laws of Wisconsin did not forbid a foreign bank to take securities there for a loan previously made.[16] And under a statute by

12. **Right must be given by law of creation.**—Bank *v.* Earle (U. S.), 13 Pet. 519, 10 L. Ed. 274. See, also, Metropolitan Bank *v.* Godfrey, 23 Ill. 579.

Restriction in charter or general law.—Although a general law prohibiting corporations from exercising banking powers unless expressly granted would have no force beyond the limits of the state, a similar restriction of its charter would restrain the action of the corporation wherever, by comity, it might be permitted to exercise its powers and functions. Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co, 30 Tenn. (11 Humph.) 1.

13. **Outside of state of incorporation.**—Fawcett *v.* Mitchell, etc., Co., 133 Ky. 361, 117 S. W. 956. See, however, Lane & Co. *v.* Bank, 56 Tenn. (9 Heisk.) 419, where it was held that though the assets of a bank be forced out of the state by military power, yet its corporate rights and franchises still remain—these can not be expelled; nor can the bank exercise them or transplant its corporate entity beyond the bounds of the sovereignty, which created it.

Yet this case holds that a bank may, by the comity of states, if not forbidden by its charter, make a contract in another state, but the general franchises conferred by its charter can only be exercised within the government whose creature it is. Lane & Co. *v.* Bank, 56 Tenn. (9 Heisk.) 419. And see Talmadge *v.* North American Coal, etc., Co., 40 Tenn. (3 Head) 337; McCullough *v.* Moss (N. Y.), 5 Denio 567.

Corporate existence recognized.—Banks incorporated under the laws of another state, without any intent to evade the laws of Ohio, for the purpose of doing business chiefly in Ohio, having an office and holding their annual meetings in the incorporating state, all their business meetings, however, being held, for convenience, in Ohio, will not be treated as mere associations or partnerships, but as corporations. Second Nat. Bank *v.* Lovell, 2 Cin. R. 397, 13 O. Dec. 972.

Estoppel to deny corporate existence.—An officer of a bank, purporting to be incorporated under the laws of another state, who has dealt with the bank as a corporation, as by lending money to it, can not, in a suit for the money, deny the corporate existence of the bank. Second Nat. Bank *v.* Lovell, 2 Cin. R. 397, 13 O. Dec. 972.

14. **Location of branch of United States bank.**—McCulloch *v.* Maryland (U. S.), 4 Wheat. 316, 4 L. Ed. 579.

As to construction of § 5190, U. S. Rev. Stat., providing where the "Usual" business of a national bank shall be transacted, see post, "Location and Place of Business," § 239.

15. **Anywhere in state.**—Where a banking corporation, whose location and place of business is at Columbus, Ohio, has power by its charter to deal in bills of exchange, without restriction as to place, it may purchase such bills at Cleveland, Ohio, for the purpose of remitting to New York the proceeds of paper belonging to the bank, collected at Cleveland. City Bank *v.* Beach, Fed. Cas. No. 2,736, 1 Blatchf. 425. See ante, "Location and Place of Business," § 32.

16. **What constitutes doing business in state contrary to laws thereof.**—Kennedy *v.* Knight, 21 Wis. 340, 94 Am. Dec. 543.

which foreign corporations are prohibited from keeping an office within the state to receive deposits, or discount notes, etc., where such a corporation authorizes an agent to attend at known places within the state for the purposes specified, such places are offices of discount and deposit.[17]

Compliance with Conditions Prescribed.—A foreign corporation purchasing a note in the state, and having no purpose to do any other act in the state, is not "transacting business" in the state, within a statute providing that a foreign banking corporation, "before transacting business" in the state, must record a power of attorney in each county where it has "a resident agent," which, so long as the company has "places of business" in the state, shall be irrevocable.[18] Nor is bringing an action doing business under a similar statute requiring a certificate to be obtained and the appointment of an agent for service of process.[19] And a statute prohibiting any one, except a body corporate expressly authorized by law, from keeping any office to receive deposits, or discount notes, etc., includes foreign banking corporations.[20]

§ 86 (4) Incidental and Implied Powers.—The incidental powers necessary to carry on a banking business are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. Obligations may be assumed that result unfortunately. Loans or discounts may be made that can not be met at maturity. Compromises to avoid or reduce losses are often the necessary results of this condition of things. These compromises come within the general scope of the powers committed to the board of directors and the officers and agents of the bank, and are submitted to their judgment and discretion, except to the extent that they are restrained by the charter or by-laws. Banks may do, in this

17. **Statute forbidding foreign corporation to keep office of deposit or discount in state.**—Taylor *v.* Bruen (N. Y.), 2 Barb. Ch. 301.

18. **Compliance with conditions prescribed.**—Commercial Bank *v.* Sherman, 28 Ore. 573, 43 Pac. 658, 52 Am. St. Rep. 811, construing Oregon statute.

19. **Bringing of action not doing business.**—The mere bringing of an action on a negotiable instrument by a foreign bank is not doing business within the state, under the banking law (Laws 1892, p. 1861, c. 689, §§ 31, 32), providing that a foreign corporation shall not transact business in the state without a written certificate from the superintendent of banks, and the appointment by such corporation of the superintendent as its agent for service of process. Judgment, Citizens' State Bank *v.* Cowles, 39 Misc. Rep. 571, 80 N. Y. S. 598; S. C., 89 App. Div. 281, 86 N. Y. S. 38, reversed in 180 N. Y. 346, 73 N. E. 33, 105 Am. St. Rep. 765, but on other grounds; Western Nat. Bank *v.* Kelly, 95 N. Y. S. 574, 48 Misc. Rep. 366.

20. **Statute requiring incorporation.**—Taylor *v.* Bruen (N. Y.), 2 Barb. Ch. 301.

behalf, whatever natural persons could do under like circumstances.[21]

Implied Powers.—In the absence of any denial thereof in the charter, a bank has certain implied powers which are as complete as if they were expressly given.[22]

Definition and Regulation by Legislature.—The legislature, by whose fiat the corporation exists, and whose creation it is, may prescribe and regulate the mode of its operation, and in what manner its powers shall be exercised. It may by special restriction in the charter define and limit the incidental powers which the corporation shall possess; and so far as this is done, the statute and not the common law will determine what those powers are.[23]

§ 87. Construction of Charters and Banking Laws.[24]—Charter as Limit of Powers.—The powers of a banking corporation are limited by its charter, both as to what it can do, and how and by whom it can act,[25] or

21. Incidental and implied powers.—First Nat. Bank *v.* National Exch. Bank, 92 U. S. 122, 127, 23 L. Ed. 679, 51 How. Prac. 320.

22. Implied powers.—Wroten *v.* Armat, 72 Va. (31 Gratt.) 228.

23. Definition and regulation by legislature.—Crocker *v.* Whitney, 71 N. Y. 161; citing Bank *v.* Dandridge (U. S.), 12 Wheat. 64, 6 L. Ed. 552; Head *v.* Providence Ins. Co. (U. S.), 2 Cranch 127, 2 L. Ed. 229.

24. Construction of charters and banking laws.—Construction of special charters, see ante, "Nature and Formation in General," § 22; "Special Charters or Acts," § 25; "Extension or Renewal," § 30 (1).

Creation of banks by general law, see ante, "General Laws," § 26.

In reference to contracts of bank, see post, "Contracts in General," § 96, et seq.

In reference to power of bank to borrow money, see post, "Borrowing Money," § 97.

In reference to power of bank to hold and convey property, see post, "Property and Conveyances," § 93, et seq.

In reference to purchasing and holding bank's own stock, see post, "Purchasing and Holding Bank's Own Stock," § 91.

In reference to purchasing and holding stock in other corporations, see post, "Purchasing and Holding Stock in Other Corporations," § 92.

Statutes concerning right of banking, see ante, "Construction, Charter and By-Laws," § 34.

As to locality for transaction of business, see ante, "Location and Place of Business," § 32.

Results of incorporation, see ante, "Results of Incorporation," § 23 (3).

Charter as contract, and amendment or repeal, see ante, "Charter as Contract, and Amendment or Repeal," § 23 (3b).

Of foreign corporations.—See ante, "Foreign Banks," § 18; "Location and Place of Business," § 32; "Place of Exercise," § 86 (3).

25. Charter as limit of powers.—Thweatt *v.* Bank, 81 Ky. 1, 4 Ky. L. Rep. 557; Wroten *v.* Armat, 72 Va. (31 Gratt.) 228; Lofford *v.* Wyckoff, 4 Hill 442.

A banking corporation can make no contracts, and do no acts, either within or without the state which creates it, except such as are authorized by its charter; and those acts must also be done, by such officers or agents, and in such manner, as the charter authorizes. Bank *v.* Earle (U. S.), 13 Pet. 519, 10 L. Ed. 274. See Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 44 L. Ed. 657, 20 S. Ct. 518; Pacific R. Removal Cases, 115 U. S. 1, 29 L. Ed. 319, 5 S. Ct. 1113; Bartholomew *v.* Bentley, 1 O. St. 37.

The correct doctrine as to the power of corporations to engage in banking is that, even in the absence of statutory restriction, a corporation has no right to exercise banking functions unless such right be conferred by its charter, either directly or by necessary implication. Morris *v.* Way, 16 O. 469; Miami Exporting Co. *v.* Clark, 13 O. 1; State *v.* Washington,

where the charter has been amended, by the amended charter.[26]

Like other corporations, banking associations can only exercise the powers, and carry on the business, which the statute under which they are created has authorized them to exercise and carry on, either in terms or by necessary implication.[27]

Power of Legislature to Restrict.—Under a clause, in an act of incorporation, that the action of the corporation shall be "subject to such rules and regulations as the legislature from time to time may think proper to make," the legislature may restrict such corporation from exercising the franchise of banking; it not being expressly granted.[28]

Under Charters Granted for Other Purposes.—And banking powers can not be exercised under charters granted for other purposes, whether prohibited or merely not mentioned.[29]

etc., Library Co., 11 O. 96; State *v.* Granville Alexandrian Soc., 11 O. 1.

Continuation of incorporation under state government.—A constitutional provision (of Ind.), that the Bank of Vincennes shall be considered as an incorporated bank, gives no new powers or privileges to that bank, but merely continues it under the state government, as it was under that of the territory. State Bank *v.* State (Ind.), 1 Blackf. 267.

Provision conferring the like privileges as another bank.—A provision in a bank charter under Const. 1812, "that it shall have the like privileges, etc., as are now accorded by law to" another bank, will confer on the former all privileges granted the latter. Mechanics', etc., Bank *v.* Rowly, 2 La. Ann. 372.

Charter authority to grant evidences of debt.—The charter of a railroad company authorized it to grant such evidences of debt incurred by the company as might by the by-laws thereof be directed, to such an amount as might be deemed necessary for transacting its business. Held, that this provision did not authorize the company to issue notes for general circulation, or otherwise exercise banking powers. People *v.* River Raisin, etc., R. Co., 12 Mich. 389, 86 Am. Dec. 64.

Power to hold any estate, real or personal, and dispose thereof.—A grant of power, in an act of incorporation, "to hold any estate, real or personal, and the same to sell, grant, or dispose of, or bind by mortgage, or in such other manner as they shall deem most proper for the best interests of the corporation," does not confer upon such corporation banking privileges. State *v.* Granville Alexandrian Soc., 11 O. 1; State *v.* Washington, etc., Library Co., 11 O. 96.

26. Amendment enlarging powers of savings bank so as to do general banking.—An act reciting that a corporation since its organization had conducted a savings bank, but that it desired to have its corporate powers increased and enlarged to enable it to conduct a general banking business, and then authorizing and empowering it to borrow money, receive money on deposit, and pay interest thereon, to lend money on real or personal security, discount, buy or sell commercial paper, and to do or transact a general banking business, gives the bank adequate authority to transact a general banking business, notwithstanding ambiguity and inconsistency in provisions of the act, including a provision that the bank should be subject to the statutory provisions relating to security and guarantee companies. State *v.* German Sav. Bank, 103 Md. 196, 63 Atl. 481, construing Maryland Acts 1898, p. 808, c. 266.

27. Like other corporations in this.—Safford *v.* Wyckoff (N. Y.), 4 Hill 442.

28. Power of legislature to restrict.—State *v.* Granville Alexandrian Soc., 11 O. 1.

29. Charters for other purposes.—State *v.* Stebbins (Ala.), 1 Stew. 299; Morris *v.* Way, 16 O. 469; Miami Exporting Co. *v.* Clark, 13 O. 1.

Under insurance charters.—Banking does not pertain to the functions of an insurance company, and can not be exercised by such a company simply because not included in the grant; and a fortiori, if prohibited by the very terms of the charter whose "rights

Provisions Conferring on State Bank the State's Rights and Privileges.—A charter provision conferring on a state bank the rights, powers, privileges and immunities of the state has been held applicable to all evidences of debt owned by the bank.[30]

and privileges" are conferred upon it, as well as by general law. Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 30 Tenn. (11 Humph.) 1; Memphis *v.* Memphis City Bank, 91 Tenn. 574, 19 S. W. 1045.

An act incorporating an insurance company, giving the directors power to make such by-laws, rules, and regulations as they shall deem proper, touching the management of the stock and effects of the corporation and the investment of its funds which the business of insurance may not actively employ, gives no right to invest such surplus funds in banking operations. People *v.* Utica Ins. Co. (N. Y.), 15 Johns. 353, 8 Am. Dec. 243.

And charter authority to make loans, to create debts, and make promissory negotiable notes, does not confer the right to carry on banking. People *v.* Utica Ins. Co. (N. Y.), 15 Johns. 353, 8 Am. Dec. 243.

Although the preamble to the act incorporating the Utica Insurance Company states that, the objects of said company being laudable, it should be liberally encouraged. People *v.* Utica Ins. Co. (N. Y.), 15 Johns. 353, 8 Am. Dec. 243.

Under building and loan charter.—A building and loan association, can not engage in the banking business. State *v.* Oberlin Bldg., etc., Ass'n, 35 O. St. 258. See, also, State *v.* Greenville Bldg., etc., Ass'n, 29 O. St. 92.

Under social club charter.—The charter of a social library club which merely gave the corporation capacity of suing and being sued, of making contracts, a common seal, the power to make by-laws, and of acquiring, holding and disposing of, by mortgage or in such other manner as it should deem most proper for its best interest, any estate, real or personal, did not give the corporation banking powers. State *v.* Washington, etc., Library Co., 11 O. 96.

Under power to employ capital in any lawful moneyed transaction.—The act incorporating a company, authorizing the employment of its surplus capital in the purchase of public or other stock, or in any other moneyed transactions not inconsistent with the constitution and laws of the state or of the United States, having been passed before any restraining act rendering banking illegal if carried on by corporations not specially created for banking purposes, said company has the right of doing banking business, and is not affected by the restraining acts, the original act having never been repealed. People *v.* Manhattan Co. (N. Y.), 9 Wend. 351.

Power to hold, sell and encumber any estate.—A grant of power, in an act of incorporation, "to hold any estate, real or personal, and the same to sell, grant, or dispose of, or bind by mortgage, or in such other manner as they shall deem most proper, for the best interest of the corporation," does not confer upon such corporation banking privileges. State *v.* Granville Alexandrian Soc., 11 O. 1.

Under power to draw and sell bills of exchange.—The provision of a charter that the corporation "shall have power to draw and sell drafts or bills of exchange on the different cities to which they may ship their merchandise" does not confer any banking privileges upon it. Smith *v.* State, 21 Ark. 294.

Power to receive trusts and to loan surplus funds.—The grant to a corporation of the power to receive, in trust for any person, moneys or other valuable things, and to give an acknowledgment therefor, and to loan its surplus funds, does not authorize it to conduct a general banking business. Memphis City Bank *v.* Tennessee, 161 U. S. 186, 40 L. Ed. 664, 16 S. Ct. 468, affirming 19 S. W. 1045.

30. Charter conferring on state bank the rights and privileges of the state.—The provisions of Act 1829, § 12, amending the charter of the Central Bank, and vesting in the corporation the rights, powers, privileges, or immunities reserved by law or accruing to the state in virtue of its sovereign capacity in regard to the collection of bonds, notes, etc., due to it or to become due, does not apply only to such bonds, notes, etc., as were originally transferred to the bank by the state, or the renewals thereof, but to all evidence of debt owned by the bank. Mahone *v.* Central Bank, 17 Ga. 111.

Construction Strict.—The charter will be construed strictly against the stockholders and in favor of the state, and no privileges or powers will be implied.[31]

As Question for Jury.—Whether a bank used its power of collecting its debts as a pretext for embarking in a business foreign to that for which it was created and which it was authorized to conduct, or whether it made a proper use of it in furtherance of its legitimate business is a proper question for the jury.[32]

§ 88. Rules of Bank.[33]—As to Banking Hours.—Banks may establish reasonable hours for transacting business at the bank,[34] but such a rule is to be construed as referring to ordinary banking business only.[35]

§ 89. Customs and Usages[36]—§ 89 (1) Admissibility of Evidence and Its Sufficiency.—Evidence of the custom and usage of a bank in the transaction of business with its customers is admissible to raise a prima facie presumption of fact in aid of other testimony.[37] And it would

31. **Construction.**—Bank *v.* Commonwealth, 19 Pa. 144.

32. **As question for jury.**—Reynolds *v.* Simpson, 74 Ga. 454.

33. **Rules of bank.**—Constitution and by-laws, see ante, "Constitution, Charter and By-Laws," § 34.

34. Rules of bank as to receiving general deposits, see ante, "Offenses of Persons Dealing with Bank," § 21.

Rules as to special deposits, see post, "Special Deposits," § 153.

Customs and usages, see post, "Customs and Usages," § 89.

As to banking hours.—Jones *v.* Coos Bank (N. H.), Smith 249; Marshall *v.* Wells, 7 Wis. 1, 73 Am. Dec. 381.

"Day" in banking parlance.—The "day" in banking parlance, means simply the few hours set apart by usage as banking hours. Banking hours are so far recognized by the courts that any transaction in the ordinary course of banking business, which is to be had with the bank on any day, must be had within banking hours upon that day. First Nat. Bank *v.* Payne, 85 Va. 890, 9 S. E. 153, 3 L. R. A. 284.

35. **Construction.**—A rule of a bank that business therewith must be transacted in banking hours, must be construed as referring to the ordinary business of the bank, and not to the sending or receiving of packages or messages. Marshall *v.* Wells, 7 Wis. 1, 73 Am. Dec. 381.

36. **Customs and usages.**—Defense of custom in action against bank for failure to fix endorser, see post, "Failure to Fix Liability of Indorser or of Drawer of Check or Draft," § 172.

37. **Evidence of custom and usage.**—Knickerbocker Life Ins. Co. *v.* Pendleton, 115 U. S. 339, 29 L. Ed. 432, 6 S. Ct. 74; Renner *v.* Bank (U. S.), 9 Wheat. 581, 6 L. Ed. 166; Mills *v.* Bank, 11 Wheat. 431, 6 L. Ed. 512; Bank *v.* Triplett (U. S.), 1 Pet. 25, 7 L. Ed. 37; Fowler *v.* Brantly (U. S.), 14 Pet. 318, 10 L. Ed. 473; Bank *v.* New England Bank (U. S.), 1 How. 234, 11 L. Ed. 115; Thompson *v.* Riggs, 5 Wall. 663, 18 L. Ed. 704.

"The public charter of the business of a bank, the strict regulations under which its business is usually transacted, the care required of its officers and agents in performing their duties, bring the case fully within the operation of the rule which allows usage and the course of business to be shown for the purpose of raising a prima facie presumption of fact in aid of collateral testimony." Knickerbocker Life Ins. Co. *v.* Pendleton, 115 U. S. 339, 29 L. Ed. 432, 6 S. Ct. 74.

"A bank is a quasi public institution. Its officers have regular and set duties to perform, directly affecting the financial transactions of the entire public. It is essential to the public interest that these duties should be performed with invariable certainty and exactness. The business community relies upon such performance, and, at least after the lapse of a considerable time, it should be presumed that these duties have been performed and business done in accordance with the cus-

seem that if a custom could be established by the uniform course of business of several banks in a given locality, it might be done by one where there was but one.[38] But a single case is not sufficient to establish a general usage of a bank.[39]

A Question of Fact, Not of Opinion of Witnesses.—The existence of a general usage prevailing among banks must be established as a fact, and not as a matter of judgment or opinion of witnesses deduced from the manner of dealing in a few instances in particular banks.[40]

§ 89 (2) Character and Effect.—But an usage, to be binding, must be general, as to place, and not confined to a particular bank, and, in order to be obligatory must have been acquiesced in, and become notorious, and must be reasonable.[41] It must be certain and uniform, and there must be

tom and course of business of the bank. The degree of exactness with which they have been performed by a particular bank is matter of proof, depending upon the custom and course of business of that bank, and is matter of consideration for the jury." Knickerbocker Life Ins. Co. *v.* Pendleton, 115 U. S. 339, 29 L. Ed. 432, 6 S. Ct. 74.

The testimony of the president of the bank, explanatory of the conduct of its officers when certain drafts came back protested, stating the usage of the bank in such matters, is admissible. Goetz *v.* Bank, 119 U. S 551, 30 L. Ed. 515, 7 S. Ct. 318.

The usage of issuing certificates of deposit by a teller of a bank is not evidence to prove a usage of certifying checks. Mussey *v.* Eagle Bank (Mass.), 9 Metc. 306.

Custom to pass exchange to credit of foreign customers.—The general custom of a bank to pass exchange drawn by shippers of cotton, on their foreign customers, to their credit and allow them to pay for the cotton by their local checks was not only admissible as evidence on the question as to whether such drafts were deposited to the credit of the shippers or to their sellers, but was conclusive against the right of the bank to claim the profits of the shippers on their sale by reason of a lien which they claimed on the cotton for a debt due the bank by the seller. Farmers', etc., Bank *v.* Slayden, 8 Tex. Civ. App. 63, 27 S. W. 424, citing Wootters *v.* Kaufman, 73 Tex. 395, 11 S. W. 390. See post, "Relation between Bank and Depositor for Collection," § 156, as to collection generally.

Custom of banks as to means for safe-keeping of funds.—In an action by a bank against its agent for a failure to account for money of which the agent had been robbed by a burglar who entered his office in the night, evidence is not admissible on the part of the agent to show that it was the custom of another bank to furnish its agents with safes in which to keep its money, but he may show that it is on their safes and vaults, and not the fastenings of their rooms, that banks generally rely for protection. Wright *v.* Central R., etc., Co., 16 Ga. 38.

Custom of bankers to borrow money on time notes.—Evidence of the custom of bankers of a particular place to borrow money on time notes is admissible to show that the execution of such a note by a banking firm of that place would be in the ordinary course of business. Crain *v.* First Nat. Bank, 114 Ill. 516, 2 N. E. 486.

As to "day."—See ante, "Rules of Bank," § 88.

38. Sufficiency of evidence to establish.—Bank *v.* Triplett (U. S.), 1 Pet. 25, 7 L. Ed. 37; Morse on Banks, vol. 1, § 221; Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

39. Single case insufficient.—Duvall *v.* Farmers' Bank (Md.), 9 Gill & J. 31.

40. A question of fact, not of opinion of witnesses.—Chesapeake Bank *v.* Swain, 29 Md. 483.

41. Character of usage.—Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669; Mussey *v.* Eagle Bank (Mass.), 9 Metc. 306.

The federal supreme court, by several decisions, have sanctioned the usages of banks, in making demand and giving notice of nonpayment, varying from the law merchant. Renner *v.* Bank (U. S.), 9 Wheat. 581, 6 L. Ed. 166; Mills *v.* Bank (U. S.), 11 Wheat.

reasonable ground to suppose that the custom was known to both parties to the contract, as it is upon this supposition that the parties are presumed to have contracted with reference to it.[42] And a party dealing with a bank, with knowledge of its usage in contravention of the general commercial law, will be bound by the usage.[43] But not to contradict a rule of law,[44]

431, 6 L. Ed. 512, and in some instances where, in this respect, notes left in a bank for collection, have been placed on a different footing from notes discounted. Cookendorfer *v.* Preston (U. S.), 4 How. 317, 11 L. Ed. 992. But these usages had been of long standing and of general notoriety. Rights had grown up under them which could not be disregarded without injury to commercial transactions. Adams *v.* Otterback (U. S.), 15 How. 539, 14 L. Ed. 805.

Where a note was made payable at a certain bank, and by the agreement between the parties it was moreover expressly stipulated, that it should be sent to that bank for collection; if, then, any custom or practice other than general commercial usage were to control the management of the note, it was the usage of that bank, certainly not the particular usage of other banks not mentioned in the contract, and perhaps never within the contemplation of the parties to that contract. Camden *v.* Doremus (U. S.), 3 How. 515, 11 L. Ed. 705.

A custom of banks not to correct mistakes in the receipt or payment of money, unless discovered before the person leaves the room, is illegal and void. Gallatin *v.* Bradford (Ky.), 1 Bibb 209.

A usage that a bank which has certified by mistake a note as good can not correct such mistake is unreasonable. Second Nat. Bank *v.* Western Nat. Bank, 51 Md. 128, 34 Am. Rep. 300.

As to appointment of discount and examining committees.—The custom of appointing discount and examining committees to attend to the details of the management of the business of a bank is a reasonable one. Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76.

42. Certainty, uniformity and notice.—Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 2 L. R. A. 273, 10 Am. St. Rep. 669, citing Dabney *v.* Campbell, 28 Tenn. (9 Humph.) 680; Saint *v.* Smith, 41 Tenn. (1 Coldw.) 51; Adams *v.* Otterbach (U. S.), 15 How. 539, 14 L. Ed. 805; Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 30 L. Ed. 573, 7 S. Ct. 460.

43. Notice of usage.—Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665.

The known custom of a bank, and its ordinary modes of transacting business, enter into the contract of those giving notes, for the purpose of having them discounted at the bank, and the parties to such notes must be understood as having agreed to govern themselves by such customs and modes of doing business, whether they had actual knowledge of them or not. Renner *v.* Bank (U. S.), 9 Wheat. 581, 6 L. Ed. 166; Mills *v.* Bank (U. S.), 11 Wheat. 431, 6 L. Ed. 512; Bank *v.* Triplett (U. S.), 1 Pet. 25, 7 L. Ed. 37; Fowler *v.* Brantly (U. S.), 14 Pet. 318, 10 L. Ed. 473; Wiseman *v.* Chiappella (U. S.), 23 How. 368, 16 L. Ed. 466.

A reasonable custom or usage of a bank in the transaction of business with its customers, may be binding upon such customers, though not upon third persons unless known and assented to by them. Renner *v.* Bank (U. S.), 9 Wheat. 581, 6 L. Ed. 166; Yeaton *v.* Bank (U. S.), 5 Cranch 49, 3 L. Ed. 33.

A reasonable usage or custom of a bank in the transaction of business with its customers, particularly when universal among the banks of the locality, is binding upon parties who have resorted to the bank governed by such usage, to make paper negotiable, whether such usage is known to them or not. Bank *v.* Triplett (U. S.), 1 Pet. 25, 7 L. Ed. 37, citing Renner *v.* Bank (U. S.), 9 Wheat. 581, 6 L. Ed. 166; Mills *v.* Bank, 11 Wheat. 431, 6 L. Ed. 512.

44. Can not contradict rule of law.—Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 30 L. Ed. 573, 7 S. Ct. 460; Vermilye *v.* Adams Exp. Co. (U. S.), 21 Wall. 138, 22 L. Ed. 609; Thompson *v.* Riggs (U. S.), 5 Wall. 663, 18 L. Ed. 704; First Nat. Bank *v.* Nelson, 105 Ala. 180, 16 So. 707; Mussey *v.* Eagle Bank (Mass.), 9 Metc. 306; Corn Exch. Bank *v.* Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655; Shaw *v.* Jacobs, 89 Iowa 713, 55 N. W. 333, 56 N. W. 684, 21 L. R. A. 440, 48 Am. St. Rep. 411.

"Bankers, brokers, and others can

not, as was attempted in this case, establish by proof a usage or custom in dealing in such paper, which, in their own interest, contravenes the established commercial law. If they have been in the habit of disregarding that law, this does not relieve them from the consequences nor establish a different law." Vermilye *v.* Adams Exp. Co. (U. S.), 21 Wall. 138, 22 L. Ed. 609.

As to days of grace on drafts.—"Evidence of the usage of banks to regard drafts drawn upon them, payable at a day certain, as checks, and not entitled to days of grace, is inadmissible as evidence to control the rules of law in relation to such paper." Thompson *v.* Riggs (U. S.), 5 Wall. 663, 18 L. Ed. 704.

As to payment of checks.—A customer of certain bankers at Washington, D. C., in times when, specie payments having been lately suspended, coin was acquiring one value and currency (paper money) another and less, deposited with them both coin and paper money; the different deposits being entered in his pass book, the one as "coin" the other as "currency," etc. Debts being at this time payable by law only in coin, the bankers requested their customer to make his full balance coin, which he did. Congress passed, about eight months afterwards, an act making certain treasury notes lawful money for the payment of debts. The depositor went on depositing "coin," and "treasury notes" then regarded as currency, and both were entered accordingly. He afterwards drew for "coin," for a part of his deposit, exceeding the coin deposited after the legal tender act, and his check was paid in coin. He afterwards drew for "coin"—the bulk of his coin balance deposited before the legal tender act. Coin was refused and tender made of the notes declared by congress a legal tender. On suit brought to recover the market value of the coin drawn for—the bank teller having testified among other things that "after the suspension, and particularly after the act making treasury notes a legal tender, his employers uniformly made with customers depositing with them a difference, in receiving and paying their deposits, between coin or specie and paper money, and in all cases when the deposit was in coin they paid the checks of their customers in coin when they called for coin, otherwise they paid currency, treasury or bank notes"—the plaintiff offered evidence to show "that the usage and mode of dealing between the said parties as set out in the testimony of the teller was uniformly used and practiced by all the banks and bankers of the District of Columbia with their customers." It was held, that the evidence was rightly excluded. Thompson *v.* Riggs (U. S.), 5 Wall. 663, 18 L. Ed. 704.

As to relation arising from deposit of money.—"The general rule of law is, that if a merchant deposits money with a bank, the title to the money passes to the bank, and the latter becomes the debtor of the merchant to that amount; and it is not perceived that the evidence offered, if it had been admitted, could have had any other effect than to control that general rule of law, as it is not pretended that the evidence showed a special deposit or any special contract. Viewed in any light consistent with the other evidence in the record, the testimony was either entirely immaterial or inadmissible, as tending to control the well-settled rules of law." Thompson *v.* Riggs (U. S.), 5 Wall. 663, 18 L. Ed. 704. See post, "Relation between Bank and Depositor in General," § 119, as to relation arising.

To change values fixed by law.—The special custom of bankers in a particular locality can not change values as fixed by law; and can not, therefore, give a right to enforce payment in depreciated paper. Marine Bank *v.* Chandler, 27 Ill. 525, 81 Am. Dec. 249.

A usage for a teller to certify a check as "Good," to enable the holder to use it at his pleasure, is bad, even if such a usage is shown. Mussey *v.* Eagle Bank (Mass.), 9 Metc. 306.

Usage to discount at illegal rate.—Evidence of a usage with other banks organized under the same law, to discount more than the legal rate of interest, upon the acquisition of business paper, is not admissible in a suit by a bank upon the paper so discounted. Niagara County Bank *v.* Baker, 15 O. St. 68.

To change legal character of power of attorney.—Evidence of a custom among banks and brokers in a particular city to treat registered Virginia consols as negotiable, when accompanied by a power of attorney authorizing the agent to sell, is not admissible in an action by the owner of the consols against a bank to which they have been pledged by the agent as a security for his own debt, as no cus-

or to dispense with documentary evidence, where such is necessary.[45]

Effect of Custom for Transacting Banking Business.—The courts recognize and enforce, and the public and individuals must, at their peril, take notice of the reasonable and lawful customs adopted for the transaction of commercial business.[46]

Abandonment.—A bank which has ceased to follow a custom can not rely thereon.[47]

§ 89 (3) Presumption of Action by Directors.—The ordinary usage and practice of a bank, in the absence of counter proof, must be supposed to result from the regulations prescribed by the board of directors; to whom the charter and by-laws submit the general management of the bank, and the control and direction of its officers. It would be not only inconvenient, but perilous, for the customers, or any other persons dealing with the bank, to transact their business with the officers, upon any other presumption.[48]

tom can change the legal character of the power of attorney. First Nat. Bank *v.* Taliaferro, 72 Md. 164, 19 Atl. 364.

45. Or dispense with documentary evidence.—"Of course, proof of such custom and course of business can not dispense with documentary evidence when such evidence is requisite in law to verify the act done, or to make it complete, such as protest and notice of dishonor, when these are necessary; and, in all cases, it is the province of the jury to determine, under all the circumstances of the case, the weight to be given to the evidence. See Rosenthal *v.* Walker, 111 U. S. 185, 28 L. Ed. 395, 4 S. Ct. 382." Knickerbocker Life Ins. Co. *v.* Pendleton, 115 U. S. 339, 29 L. Ed. 432, 6 S. Ct. 74.

46. Effect of custom for transacting banking business.—Howard *v.* Walker, 92 Tenn. 452, 21 S. W. 897, citing Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373; First Nat. Bank *v.* McClung, 75 Tenn. (7 Lea) 492, 40 Am. Rep. 66; Bank *v.* Triplett (U. S.), 1 Pet. 25, 7 L. Ed. 37; Mills *v.* Bank (U. S.), 11 Wheat. 431, 6 L. Ed. 512; Commercial Bank *v.* Union Bank, 11 N. Y. 203, 213; Briggs *v.* Central Nat. Bank, 89 N. Y. 182, affirming 61 How. Prac. 250.

An agent is liable to suit for deviation from a custom which one who deals with him is presumed to contract to have followed. Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

As to manner of notice to directors.—An established custom that notice, etc., to directors of a bank shall be left on the cashier's desk, is binding on the directors whose notes come into the bank. Weld *v.* Gorham, 10 Mass. 366.

Effect of nonobservance—As to character and form of transfers—Notice of irregularity.—The custom among bankers, as to the form and character of transfers of a particular class of securities, when not complied with as to securities of that class received by a bank, is sufficient to put the bank on inquiry as to ownership. Taliaferro *v.* First Nat. Bank, 71 Md. 200, 17 Atl. 1036.

47. Abandonment.—Isbell *v.* Lewis, 98 Ala. 550, 13 So. 335.

48. Presumption of regulation of directors.—Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

The established usage and practice of the bank, for a long period, known to the president and directors, does, in a general view, in reference to the principles of the law of evidence, afford a presumption of the approbation, assent and acquiescence of the president and directors, as to such usage and practice; though the balances resulting therefrom were not formally communicated to the directors. Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

"In the case of the Bank of the United States *v.* Dandridge, 12 Wheat. 64, 6 L. Ed. 552, the subject was under the consideration of this court; and circumstances, far less cogent than the present, to found a presumption of the official acts of the board, were yet deemed sufficient to justify their being laid before the jury, to raise such a presumption. If, therefore, the usage and practice alluded to, in the instruc-

§ 89 (4) Particular Customs[49]**—§ 89 (4a) As to Notice of Maturity of Negotiable Paper.**—Banks often give notice to their customers of the approaching maturity of their promissory notes or bills of exchange; but they are not obliged to give such notice, and their neglect to do it would furnish no excuse for nonpayment at the day.[50]

§ 89 (4b) As to Deposits and Checks and Payment Thereof.[51]**—As to Time of Deposit and Return of Unpaid Check.**—The usage of depositors in certain banks to deposit a check on, or the next day after, the day on which it was received, and of the bank immediately to return any checks from the clearing house which the bank has not funds to cover, held to be reasonable.[52]

Custom of Passing Checks Payable to Persons or Bearer by Delivery Only.—A custom of passing checks payable to a person "or bearer" by delivery only does not affect the operation of a statute, requiring such checks to be construed as payable to a person "or order."[53]

Usage Dispensing with Cashier's Signature to Certificate of Deposit.—Such a usage, allowing the certificate to be signed by another officer, as the president, has been sustained.[54]

tion, were within the legitimate authority of the board, and such as its written vote might justify, there would be no question, in this court, that it ought to have been given." Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

49. Particular customs.—As to means for safe-keeping of funds, see ante, "Admissibility of Evidence and Its Sufficiency," § 89 (1).

As to borrowing money on time notes, see ante, "Admissibility of Evidence and Its Sufficiency," § 89 (1).

As to "day," see ante, "Rules of Bank," § 88.

As to issue of certificate of deposit by teller, see ante, "Admissibility of Evidence and Its Sufficiency," § 89 (1).

As to passing exchange to credit of foreign shippers, see ante, "Admissibility of Evidence and Its Sufficiency," § 89 (1).

As to notice to directors, see ante, "Character and Effect," § 89 (2). And see, generally, "Admissibility of Evidence and Its Sufficiency," § 89 (1); "Presumption of Action by Directors," § 89 (3).

50. Custom to give notice of maturity of paper not binding.—Thompson *v.* Knickerbocker Life Ins. Co., 104 U. S. 252, 26 L. Ed. 765.

The indorser on a note discounted by a bank is not bound by a usage of the bank to merely notify nonresident makers of the maturity of the note, instead of demanding payment. Bank *v.* Deneale, Fed. Cas. No. 846, 2 Cranch C. C. 488.

In an action by a bank on a note held by it as collateral, it was not error to reject evidence of a custom of banks to send notices to persons whose names were on notes held as collateral, and that no such notice had been sent to defendant, as no rule of law required the sending of such notice, and plaintiff had not adopted such custom. Williams *v.* National Bank, 70 Md. 343, 17 Atl. 382. See, also, ante, "Character and Effect," § 89 (2).

As to giving notice of dishonor, see post, "As to Collections," § 89 (4c).

51. As to deposits, checks and payment thereof.—See, also, ante, "Character and Effect," § 89 (2), as to changing rule of law.

As to medium for repaying deposits.—See post, "Repayment in General," § 133.

As to correcting mistakes, see ante, "Character and Effect," § 89 (2).

52. As to time of deposit and return of unpaid check.—Marrett *v.* Brackett, 60 Me. 524.

53. Custom of passing checks payable to person or bearer by delivery only.—First Nat. Bank *v.* Nelson, 105 Ala. 180, 16 So. 707, construing Ala. Code, § 1761.

54. Usage dispensing with cashier's signature to certificate of deposit.—In an action against the indorser of a

Usage Modifying Usual Rule as to Transmission of Checks for Collection.—Such a usage, held to vary the usual rule of law, was held in an early case to be the custom of sending checks once a week to New York City by steamer from an outlying point, Bridgeport, Conn.[55]

As to Legal Effect of Transfer of Check.—The legal effect of the transfer of a check under the law merchant can not be modified by usage.[56]

Custom as to Mode of Opening Account with Unknown Party Not Writing His Name.—In an action to recover money deposited by one who could not write his name, which money had been paid by the bank to a third person on a forged indorsement, it appeared that it was the general custom of banks, where a person unknown to a bank brought money for deposit, gave a name as his own, and asked for a certificate, there being no suspicious circumstances, to issue to him such certificate in the name given, on his signing the signature book, if he could write, without further inquiry, and pay the money on return of the certificate indorsed with the name written in the signature book; but that, where the depositor could not write his name, it was the custom to ask questions, the answers to which were entered in the signature book as a means of identification. It was held, that it was error to refuse to instruct the jury that, if they found the custom so to be, the action on the part of defendants' bank in following it was not negligence.[57]

Customs of Bookkeeping.—In an action against a bank to recover a deposit, the cashier testified that plaintiff had not made the alleged deposit. He was then allowed to testify as to certain customs of the bank relative to keeping its books, by reason of which the transaction would appear if it had occurred as alleged. Such customs and usages may be shown to corroborate the testimony already given.[58]

Usage to Hold Checks until Receipt of Funds to Meet.—An oil dealer left at his bank a check for $1,500, drawn in his favor by B. There

certificate of deposit issued by an association in fact, organized under the general banking law of New York, which certificate was signed by the president, but not by the cashier, it was held that the want of a cashier's certificate was unavailing as a defense, because the association might, by a course of practice, render itself liable on such instrument, though not executed in the mode prescribed. Kilgore *v.* Bulkley, 14 Conn. 362.

55. Usage modifying usual rule as to transmission of checks for collection.—Bridgeport Bank *v.* Dyer, 19 Conn. 136.

56. As to legal effect of transfer of check.—Where a check is payable to a named person or bearer, and the payee indorses it in blank, and delivers it to a bank, and receives credit for it, in an action by the indorsee against the maker, evidence that, by a custom among bankers, where a check is drawn on a bank and presented to another bank, it is passed to the credit of the customer, but that the credit so given is treated as a receipt for the check, and not as a payment, is inadmissible, as the indorsement and check evidence the agreement between the payee and indorsee, and the transfer of the check is governed by the law merchant. Shaw *v.* Jacobs, 89 Iowa 713, 55 N. W. 333, 56 N. W. 684, 21 L. R. A. 440, 48 Am. St. Rep. 411.

57. Custom as to mode of opening account with unknown party not writing his name.—Fiore *v.* Ladd, 22 Or. 202, 29 Pac. 435.

58. Customs of bookkeeping.—Meighen *v.* Bank, 25 Pa. 288.

were no funds of B. at the bank at that time, and the check was left there under an agreement with the bank officials that they would see it paid out of the first unappropriated funds of B. coming in. Large sums were subsequently deposited by B., but they were not unappropriated. Plaintiff offered to show that it was the custom and usage of the banks of the city to receive the checks of oil dealers, and hold the same for future payment as soon as the drawees would deposit funds sufficient to meet them. The evidence was properly excluded, as it was neither an offer to prove a special custom nor a special course of dealing between the bank and plaintiff.[59]

As to Right of Bank to Apply Deposit to Depositor's Note.—The note of a bank depositor payable at his bank is not equivalent to a check, and the bank has no authority to pay such note to the holder in the absence of authority from the maker so to do, or a general usage giving the bank such authority; and where the evidence to prove such usage showed that it was not uniform among banks, in some cases depending on circumstances, and in others not existing at all, the depositor, having no knowledge thereof, is not bound by it.[60]

As to Duty of Bank Paying to Another Bank a Check with Forged Indorsement to Detect Forgery.—Where a bank pays a check drawn upon it to a bank in the same city, which has received it from a depositor, with a forged indorsement, evidence that, by usage among banks in that city it was the duty of the former bank to examine and satisfy itself of the genuineness of the indorsement, and to return the check immediately to the latter bank if not good, is incompetent as it contradicts a rule of law.[61]

As to Officer Authorized to Certify Check.—A usage allowing a teller to certify a check as good, to enable the holder to use it afterwards at his pleasure, is bad.[62]

§ 89 (4c) As to Collections.—In General.—Where a payee of a draft selects a bank as his collecting agent, he is presumed to know the methods by which such transactions are effected through banking customs, and actual ignorance of them is of no avail as an excuse.[63]

59. **Usage to hold checks until receipt of funds to meet.**—Johnston *v.* Parker Sav. Bank, 101 Pa. 597.

60. **As to right of bank to apply deposit to depositor's note.**—Grissom *v.* Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669.

61. **As to duty of bank paying to another bank a check with forged indorsement to detect forgery.**—Corn Exch. Bank *v.* Nassau Bank, 91 N. Y. 74, 43 Am. Rep. 655.

62. **As to officer authorized to certify check.**—Evidence that the teller of a bank, during all the time of his holding office, whenever the convenience of the bank or of its customers required it, certified that checks were "good," which were drawn on the bank by its customers, when funds to the amount of such checks were to the credit of the drawers, and that his so doing was, in some instances, known to the bank, and was not forbidden, and that it was the usage of the tellers of other banks to do the same thing, does not warrant a jury to infer that the power of so doing was an original, inherent, implied power of the teller, as such. Mussey *v.* Eagle Bank (Mass.), 9 Metc. 306.

63. **In general.**—Howard *v.* Walker, 92 Tenn. 452, 21 S. W. 897. See, also, ante, "Character and Effect," § 89 (2).

As to Giving of Notice.—Plaintiffs, doing a banking business, after abandoning a practice to give notice of the dishonor of notes by mail notwithstanding that the indorser and holder lived in the same town, could not rely on such custom, even though it continued to prevail among other banks.[64]

As to Right to Proceeds of Note Collected.—A custom among banks of sending bills and notes from one to the other for collection, and of passing the avails, when paid, to the credit of the bank so sending it, and to the debt of the bank receiving it, can not affect the claim of a third person to the avails of a bill which he has committed to one of them for collection.[65]

Usage as to Holding for Collection after Presentation and Promise of Payment.—A person sending paper to a bank for collection, without special instructions, is bound by a custom of the bank to hold paper sent to it for collection for some days after presenting it and receiving a promise of payment, if such usage is not in violation of the general law.[66]

§ 89 (4d) As to Loans and Discounts.[67]**—As to Effect of Pledge of Property by Factor for Individual Benefit.**—A pledge of cotton by a factor to a bank as security for advances made by the bank to the factor in his individual capacity, if not otherwise binding on the owner and consignor of the cotton, is not made so by a general usage of trade between the banks and cotton factors in the place where they do business, not shown to be known to the consignors or other owners of cotton.[68]

As to Forwarding Draft for Acceptance after Discount.—A bank's previous practice in this respect, of doing what the law did not require of it, does not obligate it to continue so to act.[69]

§ 90. Agency of Bank.—A bank has power to act as agent in the collection and remission of money, though it be due and payable under a lease,[70]

64. As to giving of notice.—Isbell *v.* Lewis, 98 Ala. 550, 13 So. 335. See, also, ante, "As to Notice of Maturity of Negotiable Paper," § 89 (4a), as to notice of maturity of negotiable paper.

65. As to right to proceeds of note collected.—Lawrence *v.* Stonington Bank, 6 Conn. 521.

66. Usage as to holding for collection after presentation and promise of payment.—Sahlien *v.* Bank, 90 Tenn. 221, 16 S. W. 373.

67. See, also, ante, "Character and Effect," § 89 (2).

As to discount at illegal rate, see ante, "Character and Effect," § 89 (2).

As to notice of maturity, see ante, "As to Notice of Maturity of Negotiable Paper," § 89 (4a).

68. As to effect of pledge of property by factor for individual benefit.—Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 30 L. Ed. 573, 7 S. Ct. 460.

69. As to forwarding draft for acceptance after discount.—In an action against a bank for not forwarding a draft for acceptance, after discounting it for plaintiff, the fact that plaintiff had been the constant customer of the bank, which has discounted for him many drafts, and immediately forwarded them for acceptance, when the law did not require it so to do, is no just reason why the bank should be compelled to pursue a similar course in the future. Citizens' Bank *v.* Graffin, 31 Md. 507, 1 Am. Rep. 66.

70. Agency of bank.—Knapp *v.* Saunders, 15 S. Dak. 464, 90 N. W. 137.

or as agent in the collection of drafts drawn against shipments.[71]

§ 91. Purchasing and Holding Bank's Own Stock.—While a bank may own and sell its own stock,[72] a bank can not purchase its own stock, except, perhaps, where the purpose is to secure a previously existing debt,[73] and then it can, of course, sell it again, taking the purchaser's note.[74] It has, however, been held that a purchase of the bank's own stock, made with capital which can not be usefully employed in loans, is legal.[75] And a bank may receive a transfer of its stock as collateral security without being a purchaser thereof.[76]

Under Particular Statutes and Charter Provisions.—But sometimes there is an express statutory prohibition,[77] which may make an exception in favor of a right to purchase to prevent loss upon a debt previously contracted in good faith on security deemed adequate.[78] Associations for banking, organized under the New York Act of April 18, 1838, have been held not "moneyed corporations," within the New York statute prohibiting "moneyed corporations" from applying any of its capital to the purchase of their own stock.[79] The provision of a bank charter prohibiting the cor-

71. First Nat. Bank *v.* Baken, 17 N. Dak. 224, 116 N. W. 92.

As to agency for collection, see post, "Relation between Bank and Depositor for Collection," § 156, et seq.

72. **Purchasing and holding bank's own stock.**—Robison *v.* Beall, 26 Ga. 17.

73. **Can not purchase except to secure debt.**—German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60.

In the absence of statutory restriction, a solvent banking corporation, not in contemplation of insolvency or dissolution, as against creditors, may purchase its own stock in payment of a previously existing debt due from the stockholder. Draper *v.* Blackwell, 138 Ala. 182, 35 So. 110.

A bank may receive its own stock from stockholders in payment of debts previously contracted by them, and in such case equity will not compel former stockholders who so transferred their stock to reinstate it after the transaction has been long acquiesced in by the company. Taylor *v.* Miami Exporting Co., 6 O. 176.

74. **Power to sell on credit.**—Where a bank purchases its own stock to protect itself from loss, it may sell said stock on credit, and take the purchaser's note with the stock as collateral security. Union Nat. Bank *v.* Hunt, 7 Mo. App. 42.

75. **Purchasing bank's own stock with unemployed capital.**—Where, from the course of its business, the capital of a bank can not be usefully employed in loans, it may be applied to the purchase of its own stock; and on the resale of such stock the stockholders have no right to a preference in the purchase, nor can the directors be deemed as trustees, and on that ground restricted from the purchase of the stock. Hartridge *v.* Rockwell (Ga.), R. M. Charlt. 260.

76. **Transfer as collateral.**—Where R. gave his note to a bank in payment of 10 shares of its capital stock, which were transferred back to the bank as collateral security for the note, the transaction was not fraudulent, as constituting a purchase by the bank of its own stock. Dalzell *v.* Commercial Bank, 82 Mo. App. 264.

77. **Statutory prohibition.**—A stockholders' resolution reducing the amount of capital stock of a bank one-half, and providing that long-time certificates of deposit should be issued to the stockholders in payment for stock surrendered by them, amounted to a sale of one-half of the capital stock to the bank itself, and was within the prohibition of Mills' Ann. St., of Colorado, § 510, declaring that no bank shall be the holder, as purchaser, of any portion of its own stock. Kassler *v.* Kyle, 28 Colo. 374, 65 Pac. 34.

78. **To secure debt.**—Franklin Bank *v.* Commercial Bank, 36 O. St. 350, 38 Am. Rep. 594.

79. **Under statute prohibiting moneyed corporation from purchasing own stock.**—Leavitt *v.* Blatchford, 17 N. Y. 521, reversing 5 Barb. 9, and overruling the dictum to the contrary in Gil-

poration from dealing or trading, directly or indirectly, in buying or selling any goods, wares, or merchandise, or commodities whatsoever, does not prohibit the bank from making a bona fide purchase of its own stock.[80]

§ 92. Purchasing and Holding Stock in Other Corporations.—In general, a bank can not, without express authority, purchase or subscribe for stock in other corporations,[82] and its action in doing so can not be validated by estoppel,[83] and certainly not where expressly prohibited from so doing.[84] But if not prohibited, it has been held that a bank might accept stock in another corporation; e. g., a railroad company, in satisfaction of debts owing it;[85] and the prohibitory clause usually makes this an exception,[86] but it does not include a receipt of stock in pledge for a contempo-

let *v.* Moody, 3 N. Y. 479. In that case the decision was correct for another reason, i. e., that the purchase of the stock by the insolvent bank amounted to a gift of the amount paid to the stockholder and affected creditors' rights.

80. Charter prohibition of purchase of any commodities.—Farmers', etc., Bank *v.* Champlain Transp. Co., 18 Vt. 131.

82. Purchasing and holding stock in other corporations.—One corporation can not hold stock in another unless a statute confers the power to do so, and one bank organized under that act is not liable to another for refusing to transfer to it stock of which it holds the certificate by assignment. Franklin Bank *v.* Commercial Bank, 36 O. St. 350, 38 Am. Rep. 594.

A banking corporation has no implied power to subscribe for railroad stock. Nassau Bank *v.* Jones, 95 N. Y. 115, 47 Am. Rep. 14. See, also, Deposit Bank *v.* Barrett, 11 Ky. L. Rep. 910, 13 S. W. 337.

And a banking corporation can not become a stockholder in an insurance company. Bank *v.* Hart, 37 Neb. 197, 55 N. W. 631, 20 L. R. A. 780, 40 Am. St. Rep. 479.

But in Goddin *v.* Crump, 35 Va. (8 Leigh) 120, it was held, that a statute authorizing a bank to subscribe for stock in a company incorporated to effect a line of transportation from Ohio to the city of Richmond (where the bank was situated) was valid, since the purchase of such stock was germane to the banking business.

83. Not validated by estoppel.—The purchase by a corporation, only empowered by its charter to transact a banking business, of the stock of another corporation, as an investment, and not as security or in payment of a debt, is ultra vires and void, and can not be validated by estoppel. Hence such a corporation can not be held liable for an assessment as a stockholder of a national bank, where it purchased the stock as an investment, although it retained such stock until the national bank became insolvent, and received dividends thereon. Schofield *v.* Goodrich Bros. Banking Co., 39 C. C. A. 76, 98 Fed. 271.

84. Express prohibition.—Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339, affirmed in 36 O. St. 350, 38 Am. Rep. 594.

Where a bank, which is prohibited by law from taking stock in another corporation as a pledge for a contemporary loan, takes, in such manner, the stock of another bank, it has no right of action against the latter bank for its refusal to transfer the stock, though the law provides that any bank violating any provision of the act shall forfeit all its rights and franchises, which forfeiture can only be declared in a proceeding by the state. Franklin Bank *v.* Commercial Bank, 36 O. St. 350, 38 Am. Rep. 594.

85. Acceptance of stock for debt.—It is consistent with the powers of a bank to either own stock in a railroad company, or buy a railroad, or accept stock in a new company in satisfaction of debts owing it, and, if the corporation in which it has accepted stock has violated its contract by consolidating with another company, the bank, being a stockholder, may maintain an action against the corporation. Deposit Bank *v.* Barrett, 11 Ky. L. Rep. 910, 13 S. W. 337.

86. Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339, affirmed in 36 O. St. 350, 38 Am. Rep. 594.

The Ohio free banking act, enacted March 21, 1851, expressly provided that no banking company organized thereunder should be the holder or pur-

raneous loan.[87] And where such purchase is merely ultra vires and not prohibited, it has been held that the bank gets title to the stock thereby.[88]

Particular Statutory and Charter Provisions Considered.—Authority to invest in personal securities, but limiting the stock held to ten per cent of the capital, is sufficient,[89] and a contract to sell a greater amount than this, within one year for a sum named, does not violate this limitation, as it is not a purchase.[90] A statutory requirement of reports to the state auditor of the value of stock and bond investments does not confer any such power.[91] The fact that a banking law specially restricts the power of the banks organized thereunder in the purchase and sale of real estate does not justify the inference that the bank is not prohibited from purchas-

chaser of any portion of its capital stock or of the capital of any other incorporated company, unless such purchase should be necessary to prevent loss upon a debt previously contracted in good faith, on security which, at the time, was deemed adequate to insure the payment of such debt, independent of any lien upon such stock. Franklin Bank *v.* Commercial Bank, 36 O. St. 350, 38 Am. Rep. 594; S. C., 5 O. Dec. 339. As to grounds of forfeiture, see a n t e, "Grounds for Forfeiture of Franchise or Dissolution," § 68.

87. Pledge for contemporaneous loan not included.—Under 1 Swan & C. St., p. 170, § 12, prohibiting a banking corporation from holding or purchasing any stock in another corporation unless necessary to prevent loss on a debt previously contracted, a bank can not take stock of another bank as pledge for loan made at the same time. Franklin Bank *v.* Commercial Bank, 36 O. St. 350, 38 Am. Rep. 594.

88. Where purchase merely ultra vires title passes.—That a bank's purchase of stock in another bank was ultra vires did not prevent it from getting title to the stock, both because an ultra vires contract is simply unauthorized and not forbidden by law, and because the passing of title depends on the intention of the parties and the performance of the requisite formalities by the parties, regardless of whether they are engaged in an illegal enterprise. Metropolitan Trust Co. *v.* McKinnon, 172 Fed. 846.

89. Authority to invest in personal securities.—Cause *v.* Commonwealth Trust Co., 44 Misc. Rep. 46, 89 N. Y. S. 723, reversed on another point in 100 App. Div. 427, 91 N. Y. S. 847.

90. Agreement to take and sell.—A contract whereby a banking corporation organized under the banking law agreed to sell for plaintiff certain corporate stock within one year, for a sum named, is not in violation of the New York Banking Law (Laws 1892, p. 1911, c. 689), § 159, prohibiting such a corporation from holding stock in excess of ten per cent of its capital; the contract not showing that the stock was intended by the parties to constitute part of the capital of the bank, or that it was intending, or that plaintiff knew it was intending, to invest any trust funds in the stock so to be sold. Gause *v.* Commonwealth Trust Co., 44 Misc. Rep. 46, 89 N. Y. S. 723, reversed in 100 App. Div. 427, 91 N. Y. S. 847, but on other grounds.

91. Requirement of reports of value of stock investments.—Consol. St. Neb. 1891, p. 132, § 294, enacted in 1889, requiring state banks to make reports to the state auditor containing specified information, did not add to the powers of such banks; and the requirement therein that such banks should report, among other things, "the par value and actual market value of all stock or bond investments," did not empower them to purchase the stock of other corporations as an investment, where, under the prior statutes, as construed by the supreme court of the state, they were without such powers. Schofield *v.* Goodrich Bros. Banking Co., 39 C. C. A. 76, 98 Fed. 271.

And the provisions of a general banking law authorizing the state comptroller to change for other stocks stocks deposited with him by the bank as security, and requiring the bank in its semi-annual return to state the shares of stock held by it absolutely and as collateral, does not authorize or tend to authorize the bank to purchase and sell stocks or bonds for profit, or to pay liabilities with the proceeds thereof. Talmage *v.* Pell, 7 N. Y. 328.

ing and selling stocks or bonds.[92] Nor does the fact that all bank charters granted by a state prior to the passage of a general banking law prohibited the bank from dealing in stocks justify the inference that a bank has such power as incidental to the banking business.[93] A power to discount bills, notes and other securities confers the power to buy from a stockholder in another bank stock therein.[94]

§ 93. Property and Conveyances[95]—§ 94. —— In General[96]—§ 94 (1) Acquisition and Holding.—Implied Power.—One of the implied powers of a bank is the power to acquire estate, real or personal.[97]

Acquisition of Property Incident to Engaging in Unusual Occupation and Vice Versa.—While, generally speaking, a bank can not purchase property for the purpose of engaging in an occupation foreign to the business of banking,[98] yet, where a banking corporation acquires possession of property, either by a lien thereon or by the purchase of the same, for the payment of a debt due to it, and expends money on it, or furnishes supplies either for its preservation or to carry on the business in which such property is employed, with a view to rendering it productive, in order to satisfy the debt the bank holds against the former owner of the property, it is not chargeable with exceeding its corporate powers by engaging in a business beyond the scope and purposes of its creation,[99] and, to save itself from loss, a banking corporation may, under its general powers, take an assignment of an account due a debtor of the corporation, as well as other things which it could not otherwise do,[1] or may receive other property in which it is not authorized to deal regularly.[2]

92. **Implication from restriction of power as to land.**—Talmage *v.* Pell, 7 N. Y. 328.

93. **Implication from prohibition in all previous charters but not in this.**—Talmage *v.* Pell, 7 N. Y. 328.

94. **Under power to discount bills, notes and other securities.**—Latimer *v.* Citizens' State Bank, 102 Iowa 162, 71 N. W. 225.

95. **Property and conveyances.**—Disposition of property by officers or agents, see post, "Disposition of Property," § 104.

Of national banks, see post, "Property and Conveyances," § 259.

96. Branch banks, see ante, "Powers," § 33 (3).

97. **Implied power.**—Wroten *v.* Armat, 72 Va. (31 Gratt.) 228.

98. **Unusual occupation.**—Veasey *v.* Graham, 17 Ga. 99, 63 Am. Dec. 228; Morris *v.* Hall, 41 Ala. 510.

99. **When engaging in unusual occupation proper.**—Reynolds *v.* Simpson, 74 Ga. 454.

1. **Steps to prevent loss.**—Bank *v.* Tamblyn, 7 Mo. App. 571.

A bank may purchase any personal property at a sale on an execution in its own favor, or under a mortgage or pledge of the property taken by it as security for a loan. Farmers', etc., Bank *v.* Detroit, etc., R. Co., 17 Wis. 372.

Where certain banks as creditors of a mining company obtained a trust deed of the mining company's property to secure payment of their demand, they had power to buy in the property at sales thereof to protect their rights under their security. Missouri State Bank *v.* St. Louis Foundry (Mo. App.), 129 S. W. 433.

Purchase of judgment prior to bank's mortgage.—A bank, having a mortgage on a tract of land, has a clear right to purchase a judgment being a lien thereon, if the object was to protect itself and secure the payment of its own claim. Brown *v.* Hogg, 14 Ill. 219.

2. **Reception of property in which unauthorized to deal.**—Sacker's Harbor Bank *v.* Lewis County Bank (N. Y.), 11 Barb. 213.

Part Ownership of Property Arising from Purchase of Partnership Shares.—Where a national bank became the owner of nine shares in a partnership, not having the power to become a partner, it became, in legal effect, a part owner of the property of the syndicate, which ownership is in its nature several, and the bank, through its trustee, having managed this several interest in connection with the trustees of the other shares as to their interests, the bank became and was liable for its share of the expenses of purchasing, managing, handling, holding, improving and disposing of the property.[3]

Particular Charters and Statutes Construed.—See note 4.

Personal Property Generally.—A statute which expressly empowers banks to acquire real estate sold on execution in their favor, or under mortgages made to them as security for loans, or where such real estate is conveyed to them in satisfaction of debts previously contracted, does not, by implication, abridge their power to acquire personal property in like ways.[5]

State Stocks and Bonds.—Under a banking law expressly empowering the banks formed thereunder to deal in certain kinds of personal property, among which state bonds are not mentioned, and giving the banks all incidental powers as might be necessary to transact the business defined, a bank has no authority to purchase state bonds, for sale and profit, or with the proceeds to pay existing liabilities.[6] But it may, ex necessitate rei, acquire and hold such stocks as it is required by law to deposit from time to

3. **Part ownership of property arising from purchase of partnership shares.**—Merchants' Nat. Bank *v.* Wehrmann, 69 O. St. 160, 68 N. E. 1004. See, also, ante, "Partnerships and Joint-Stock Companies," § 24.

4. **Particular charter provisions.**—**A charter provision that the "bank shall not deal in articles of goods, wares, or merchandise, in any manner whatever, unless it be to secure a debt** due the said bank, incurred by the regular transactions of the same, as is provided for in this act," means that the bank shall not buy and sell goods, wares, or merchandise for the purpose of gain, or do the ordinary business of a merchant or trader or engage in the business of broker or commission merchant. Bates *v.* Bank, 2 Ala. 451.

A contract, by which the State Bank lent a large sum of money, taking bills of exchange at nine months for payment thereof, and receiving at the time, and as one of the conditions of the loan, a quantity of cotton, with authority to ship it to a foreign port, and sell it for the account and at the risk and expenses of the owners, and to credit his bill with the amount of the net proceeds, adding the difference of exchange between this state and the place where the cotton was sold, is not dealing in "goods, wares, or merchandise," within this section of the charter. Bates *v.* Bank, 2 Ala. 451.

The act prohibiting banks from trading in bonds or judgments and purchasing pre-existing debts did not prohibit a bank, which was closing its business, from taking an assignment of a judgment against a third person in part payment for the sale of its banking house. Harwood *v.* Ramsey (Pa.), 15 Serg. & R. 31.

Charter provision authorizing buying, receiving and holding.—A bank, under a provision of its charter that "it is made capable of buying, receiving, and holding property and estate of whatsoever nature, and the same to alien and dispose of at pleasure," may receive cotton as collateral security, and ship and sell the same. Commercial Bank *v.* Nolan (Miss.), 7 How. 508.

5. **Personal property generally.**—Farmers', etc., Bank *v.* Detroit, etc., R. Co., 17 Wis. 372.

6. **State stocks and bonds.**—Talmage *v.* Pell, 7 N. Y. 328.

time with the comptroller.[7]

§ 94 (2) Disposal of Property.—A banking corporation may sell any of its property, when not restricted by charter or previous law, as freely as an individual, when not involved in the transaction of unauthorized branches of business.[8] And the assets of an unincorporated bank may be lawfully disposed of by the owner to secure or pay the just claims of any of his just creditors.[9]

Transfer of Assets in Consideration of Assumption of Liabilities.—An agreement by which one bank assigns and transfers to another all its assets in consideration of the latter's assumption of all its liabilities is valid, where the assets transferred are sufficient to satisfy all the debts assumed.[10]

7. **Right to acquire and hold stocks for deposit with comptroller.**—The general banking law, in its provision for the deposit, from time to time, with the comptroller, of state stocks to an unlimited amount, assumes, and therefore, in legal intendment, declares, that the associations to be formed under it, and who were to make such deposits, had, and were intended to have, authority, in virtue either of the specific or of the incidental banking powers expressly conferred upon them, to acquire and hold such stocks in the same manner, and for the like purpose, as other individuals, whether singly or in partnership, carrying on business as private bankers. Curtis *v.* Leavitt (N. Y.), 17 Barb. 309. See also, Comstock *v.* Willoughby (N. Y.), Lalor's Supp. (Hill & Denio) 271; Tracy *v.* Talmage, 18 Barb. 456, 9 How. Prac. 530.

8. **Disposal of property.**—Planters' Bank *v.* Sharp (U. S.), 6 How. 301, 12 L. Ed. 447.

The sale by a bank of a quantity of butter, which it had received in settlement of a debt due to it is no violation of the provision in its charter that it shall not, directly or indirectly, deal or trade in buying or selling any goods, wares, merchandise, or commodities whatever, unless in selling the same when truly pledged by way of security for debts due to the said corporation; and the purchase of the butter by another bank having a similar restrictive clause in its charter, it appearing to be an isolated transaction of buying on the part of such bank, is not within the restriction which prohibits dealing or trading in buying and selling any goods, etc., but is a lawful transaction. Sacket's Harbor Bank *v.* Lewis County Bank (N. Y.), 11 Barb. 213.

A banking corporation may make a valid transfer of a security held by it to secure a debt owing by such corporation. Gillett *v.* Campbell (N. Y.), 1 Denio 520.

Release of mortgage.—A mortgage to a bank is released, without being delivered up, where the directors of the bank pass a resolution releasing it, holding the personal security only, to enable the mortgagor to improve the property, and he does so and conveys the property, and no claim is made on the mortgage till ten years later, and then by the bank's assignee. In re Bank, 109 Wis. 672, 85 N. W. 501.

9. **Assets of unincorporated bank.**—Longfellow *v.* Barnard, 58 Neb. 612, 79 N. W. 255, 76 Am. St. Rep. 117, affirmed on rehearing in 59 Neb. 455, 81 N. W. 307.

10. **Transfer of assets in consideration of assumption of liabilities.**—Mitchell *v.* Beckman, 64 Cal. 117, 28 Pac. 110.

The City Bank of New Orleans, three days before the expiration of its charter, in good faith, sold and transferred all its banking assets, by assignment, to the Louisiana State Bank, in consideration of an undertaking by the latter bank to discharge all the liabilities of the former, which were warranted not to exceed a specified amount. Held, that this transaction was within the corporate powers of the contracting parties, and that the Louisiana State Bank thereby became an assignee, within the meaning of the statutes of this state, competent to prosecute an action in the name of the City Bank of New Orleans. Stetson *v.* City Bank, 12 O. St. 577.

§ 95. —— Real Property[11]—§ 95 (1) Acquisition and Holding—§ 95 (1a) Right to Acquire and Hold Generally.—While, generally speaking, an incorporated bank may lawfully be the owner of real estate only in the cases and mode allowed by its charter or the law under which it was incorporated,[12] such a bank is usually authorized to take and hold land for its immediate accommodation or to acquire same in satisfaction of debts.[13] And it may take and hold lands as security for debts due it,

11. Power of national bank, see post, "Property and Conveyances," § 259.

12. **Necessity for charter authority.**—Metropolitan Bank *v.* Godfrey, 23 Ill. 579; State Bank *v.* Brackenridge (Ind.), 7 Blackf. 395.

A corporation organized under a private act, and authorized to engage in a general banking and real-estate business, the act providing that the corporation shall be subject to the provisions of any general law hereafter passed on the subject of banking, trust, and deposit companies, is subject to the provisions of an Act, limiting the right of banking corporations to hold real estate, and providing that all corporations with banking powers, existing by virtue of any special charter, shall be subject to the provisions of the act. Henderson Loan, etc., Ass'n *v.* People, 163 Ill. 196, 45 N. E. 141, construing Ill. Act of June 16, 1887.

13. **For immediate accommodation or in satisfaction of debts.**—Banks *v.* Poitiaux, 24 Va. (3 Rand.) 136, 15 Am. Dec. 706; Bennett *v.* Union Bank, 24 Tenn. (5 Humph.) 612; Nashville *v.* Bank, 31 Tenn. (1 Swan) 269.

Where a statute authorizes a bank to hold as much real property as may be requisite for its immediate accommodation, in relation to the convenient transaction of its business, and no more, the bank may purchase more land than is necessary for the erection of a banking house, build fireproof houses on so much as shall not be necessary for the banking house, for the greater security of the bank building, and sell them out to third persons. Banks *v.* Poitiaux, 24 Va. (3 Rand.) 136, 15 Am. Dec. 706.

Ample power for that purpose was conferred by the second section of the charter, by which a bank was authorized at any time, to buy, receive and possess all kinds of property, either real or personal, and to loan, negotiate and dispose of the same, by taking mortgages and by discounting on banking principles, on such security, and at such credit as they shall think advisable, provided it does not exceed in value the double of their capital; and they shall have the power of selling, transferring, and renting said property, and, in short, to enjoy and dispose of it, at their own pleasure and discretion, etc. The fifteenth section of the charter, it is true, limits this general power, by providing that the lands, effects, goods or merchandise whatsoever, which the said corporation shall hold, shall be only such as shall be requisite for the convenient transaction of its business, and such as shall have been bona fide mortgaged or pledged to it by way of satisfaction of debts previously contracted. These sections evidently gave the bank full power to acquire and hold property of every kind, convenient for the transaction of a banking business, or obtained as a security for debts, and were certainly designed to interpose no obstacle to the safe and convenient discharge of all the proper functions of a banking institution, but only to prohibit the bank from engaging in business wholly foreign from the objects and business contemplated by its charter. Stetson *v.* City Bank, 12 O. St. 577.

"**A banking house** has no immediate connection with the privileges granted by the state to the bank, and is only incidentally necessary to their enjoyment." Union Bank *v.* State, 17 Tenn. (9 Yerg.) 490.

A banking corporation has no implied power to buy and sell real estate except to secure buildings in which to transact its business. Thweatt *v.* Bank, 81 Ky. 1, 4 Ky. L. Rep. 557.

Necessity of seal.—A contract made by a bank for the purchase and sale of real estate is not invalid because not made under the common seals of the bank. Banks *v.* Poitiaux, 24 Va. (3 Rand.) 136, 15 Am. Dec. 706, citing Bank *v.* Patterson (U. S.), 7 Cranch 299, 3 L. Ed. 351; Legrand *v.* Hampden Sidney College, 19 Va. (5 Munf.) 324.

In payment of debts.—Banks may receive real estate in payment of debts due. Thomaston Bank *v.* Stimp-

contracted in its legitimate business,[14] and generally may acquire and hold land to secure itself from loss in the transaction of its authorized business, although not expressly authorized to deal in real estate, or prohibited therefrom.[15] But the purchase of property at foreclosure sale under a first mort-

son, 21 Me. 195; Merchants' Bank *v.* Harrison, 39 Mo. 433, 93 Am. Dec. 285; Sherry *v.* State Bank (Ind.), 8 Blackf. 542.

A banking corporation, having by its charter power to acquire real estate in "satisfaction of debts," took from the holder of a sheriff's certificate of sale, after it had become absolute, an assignment of all his right, and then received the sheriff's deed. The assignment was expressed to be "for value received." In the absence of proof of any other consideration, it would be presumed that the corporation had taken the assignment within its proper powers, "in satisfaction of debts," and that it would hold the real estate by virtue of the sheriff's deed. Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347.

Where one conveyed land to a bank in exchange for drafts held by the bank, to which the grantor was not a party, nor in any way interested, such purchase is not authorized by 1 Rev. St., p. 94, authorizing the bank to hold real estate conveyed to it in satisfaction of debts previously contracted in the course of its dealings. State Bank *v.* Coquillard, 6 Ind. 232.

14. As security for debts.—Nashville *v.* Bank, 31 Tenn. (1 Swan) 269; Bennett *v.* Union Bank, 24 Tenn. (5 Humph.) 612; Thomaston Bank *v.* Stimpson, 21 Me. 195; Sparks *v.* State Bank (Ind.) 7 Blackf. 469.

A statute providing that banks shall not own real estate more than sufficient for the conduct of their business, unless taken in payment of debts, does not prevent the taking of real estate as security for loans. Alexander *v.* Brummett (Tenn.), 42 S. W. 63.

Bona fides necessary—Benefit to bank not essential.—An act of incorporation, authorizing a bank to hold such lands as are bona fide conveyed to it in satisfaction of debts, does not prohibit the bank from accepting land in discharge of a debt, though such transaction would not be beneficial to the bank; the intention being only to restrict the right to cases where the loan should be real, and not merely colorable. Baird *v.* Bank (Pa.), 11 Serg. & R. 411.

15. To prevent loss generally.—State Security Bank *v.* Hoskins, 130 Iowa 339, 106 N. W. 764, 8 L. R. A., N. S., 376; Martin *v.* Branch Bank, 15 Ala. 587, 50 Am. Dec. 147.

An act by which banks are permitted to take mortgages or other liens on lands, to secure debts already existing, impliedly permits them to buy in lands on which they hold such liens for the better security of their claims, though an express prohibition exists against their purchasing and holding real estate. Ingraham *v.* Speed, 30 Miss. 410.

Under Missouri Laws 1856-57, regulating banking institutions, a bank may hold such real estate as may be conveyed to it in payment of debts previously contracted in good faith and without a view to the purchase thereof, and may purchase real estate at sales upon judgments and decrees in favor of the bank, where it shall be purchased in order to secure the debt. Merchants' Bank *v.* Harrison, 39 Mo. 433, 93 Am. Dec. 285.

The circumstances that there are incumbrances on the real estate of a person indebted to a bank is no objection to a bona fide purchase of the property by the bank, subject to the incumbrances, in consideration of its own claim on part of it. Sherry *v.* State Bank (Ind.), 8 Blackf. 542.

Under a bank's charter authorizing it to hold real estate "such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings," when property is about to be sold under executions in which the bank is not interested, the execution debtor being also indebted to the bank, such bank may become a purchaser if necessary to secure its own debt, provided the purchase is made bona fide, in consideration of its own debt or some portion of it; but if the purchase be for an amount less than the judgment debts, so that no part of the debt due the bank is extinguished, it is unauthorized. Sherry *v.* State Bank (Ind.), 8 Blackf. 542.

At greater price than necessary to secure debt.—Under a charter authorizing a bank to purchase real estate at sales upon judgments obtained for debts due the bank, it may make such purchase at a greater price than nec-

gage, to protect an unlawful loan made on second mortgage, was unlawful.[16]

Purchase for Purpose of Subsequent Sale.—Where a bank was authorized to hold real estate for the accommodation of its business only, except when received bona fide as security, or in payment of a pre-existing debt, or as purchaser on an execution in its own favor, it was held that the bank had not authority to buy land to sell again, and that a court of equity would not lend its aid to enforce such contract against either party.[17]

Foreign Banks.—Since banks organized under the general law of a sister state are corporations which can exercise only such powers in Illinois as the law of their creation confers, they can not acquire and hold lands in Illinois, except on the terms and conditions imposed by the law of their creation.[18]

§ 95 (1b) Right to Raise Question of Authority.—Where a bank is incompetent by its charter to take a title to real estate, a conveyance to it is not void but only voidable; the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose.[19]

essary to secure its own debt. Sherry *v.* State Bank (Ind.), 8 Blackf. 542.

Want of power of a bank or its trustee to hold real estate.—Want of power of a bank, or of its trustee in insolvency, to purchase and hold real estate, does not render void an arrangement whereby land subject to a lien in favor of the bank and also to other incumbrances, is discharged of those incumbrances, by aid of money advanced from the assets of the bank, and then sold, and the whole proceeds realized for the bank; provided the legal title is not passed through the bank or trustees. Zantzingers *v.* Gunton (U. S.), 19 Wall. 32, 22 L. Ed. 96.

Acceptance of transfer from stockholder to cover deficit in capital.—Acceptance by a bank of real estate transferred to it by a stockholder to cover a deficit in the capital is not ultra vires. Brown *v.* Bradford, 103 Iowa 378, 72 N. W. 648.

16. Purchase to protect unlawful loan.—Williams *v.* McKay, 46 N. J. Eq. 25, 18 Atl. 824.

17. Purchase for purpose of subsequent sale.—Bank *v.* Niles (Mich.), 1 Doug. 401, 41 Am. Dec. 575.

18. Foreign banks.—Metropolitan Bank *v.* Godfrey, 23 Ill. 579.

19. Right to question acquisition of real estate.—Reynolds *v.* Crawfordsville First Nat. Bank, 112 U. S. 405, 28 L. Ed. 733, 5 S. Ct. 213, citing Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. Ed. 188; National Bank *v.* Whitney, 103 U. S. 99, 26 L. Ed. 443; Swope *v.* Leffingwell, 105 U. S. 3, 26 L. Ed. 939. See Zantwingers *v.* Gunton (U. S.), 19 Wall. 32, 22 L. Ed. 96; First Nat. Bank *v.* National Exch. Bank, 92 U. S. 122, 23 L. Ed. 679, 51 How. Prac. 320; Banks *v.* Poitiaux, 24 Va (3 Rand.) 136, 15 Am. Dec. 706.

The disability of a national bank to take and hold property under its charter, can not be made the ground of a writ of error to the decision of the state court by a party seeking to enjoin the completion of the transaction, but setting up no title in themselves. They do not claim for themselves a right, title, privilege or immunity under the national banking law. Miller *v.* Lancaster Bank, 106 U. S. 542, 27 L. Ed. 289, 1 S. Ct. 536.

If a bank buys land outright in violation of statute, a private party can derive no advantage therefrom, since the law imposes no forfeiture for its violation, and the only effect of its transgression would be to subject the bank to proceedings in behalf of the state to vacate its charter. Litchfield *v.* Preston, 98 Va. 530, 37 S. E. 6, construing Va. Code, § 1163.

Where the charter of a bank authorized it to have, hold, purchase, and retain lands, etc., and to sell them, "provided that such lands, which the said corporation are hereby enabled to purchase and hold shall extend only to lots, etc., necessary for the business of the bank," the bank might purchase land in distant county, though it could retain only an estate defeasible by the commonwealth. Leazure *v.* Hillegas (Pa.), 7 Serg. & R. 313.

The validity of a lease executed by a bank can not be assailed as being

§ 95 (1c) Conveyance before Incorporation Complete.—And a conveyance to a bank before its incorporation is complete can not be treated as a nullity by the grantor, but is valid when the government does not complain.[20]

§ 95 (1d) Mortgages.—It seems that a bank, in the absence of any restriction imposed by its charter, may take a mortgage to secure anticipated liabilities as well as pre-existing ones,[21] or it may take an assignment of a

ultra vires as to the bank by one not a party thereto. Lechenger *v.* Merchants' Nat. Bank (Civ. App.), 96 S. W. 638, affirmed in 101 Tex. 646, no op.

Specific performance by bank.—It is no defense to a bill filed by a bank for the specific performance of a contract made with one who had agreed to give his bond and deed of trust for certain lands conveyed to him by the bank, that the charter creating the bank did not confer a right on the plaintiff to make a purchase and sale of the property in question. The creation of a corporation gives to it amongst other powers as an incident to its existence and without any express grant of such powers, that of buying and selling. But its power may be limited, restrained or prohibited, either by the charter creating the corporation, or by a general law. Banks *v.* Poitiaux, 24 Va. (3 Rand.) 136, 15 Am. Dec. 706. Approved in Wroten *v.* Armat, 72 Va. (31 Gratt.) 228.

Quo warranto.—In the Banks *v.* Poitiaux, 3 Rand. 136, it was held, that under an act of assembly authorizing a bank to hold so much real property as may be requisite for its immediate accommodation in relation to the convenient transaction of its business, and no more; the bank may purchase more ground than is necessary for the erection of a banking house, build fire proof houses on the vacant land, for the greater security of the banking house, and sell them out to third persons. And that, even if the bank violated its charter in so doing, the only proceeding against it would be by quo warranto. Wroten *v.* Armat, 72 Va. (31 Gratt.) 228.

Where the law imposes no forfeiture for its violation, the only effect of its transgression in that respect would be to subject the bank to the proceedings in behalf of the state to vacate its charter. Litchfield *v.* Preston, 98 Va. 530, 37 S. E. 6; citing Banks *v.* Poitiaux, 24 Va. (3 Rand.) 136, 15 Am. Dec. 706, as authority. A cause of forfeiture can not be taken advantage of, or enforced against a corporation, collaterally or incidentally, or in any other mode than by direct proceeding, for that purpose, against a corporation, so that it may have an opportunity to answer. And the government creating the corporation can alone institute such proceedings; since it may waive a broken condition of a contract made with it as well as an individual. Greenbrier Lumber Co. *v.* Ward, 30 W. Va. 43, 3 S. E. 227, quoting from Angell and Ames on Corporations (10th Ed.), § 777, and citing Banks *v.* Poitiaux, 24 Va. (3 Rand.) 136, 15 Am. Dec. 706, to sustain the proposition. Banks *v.* Poitiaux, 24 Va. (3 Rand.), 136, 15 Am. Dec. 706, is also cited in Fayette Land Co. *v.* Louisville, etc., R. Co., 93 Va. 274, 24 S. E. 1016; Chesapeake, etc., R. Co. *v.* Walker, 100 Va. 69, 40 S. E. 633.

20. **Conveyance before incorporation complete.**—Although under the act of congress of July 1st, 1863, a bank created by a territorial legislature can not legally exercise its powers until the charter creating it is approved by congress, yet a conveyance of land to it, if the charter authorize it to hold land, can not be treated as a nullity by the grantor who has received the consideration for the grant, there being no judgment of ouster against the corporation at the instance of the government. Smith *v.* Sheeley (U. S.), 12 Wall. 358, 20 L. Ed. 430.

"Conceding the bank to be guilty of usurpation, it was still a body corporate de facto, exercising at least one of the franchises which the legislature attempted to confer upon it, and in such a case the party who makes a sale of real estate to it, is not in a position to question its capacity to take the title, after it has paid the consideration for the purchase." Smith *v.* Sheeley (U. S.), 12 Wall. 358, 20 L. Ed. 430.

21. **Mortgages.**—Crocker *v.* Whitney, 71 N. Y. 161.

mortgage.[22] And a statute giving authority to take a mortgage for a limited time, is directory as to the time, and a mortgage for a longer time is good.[23] A mortgage will be presumed to have been duly executed in accordance with the charter,[24] and a mortgage taken to secure a loan, made at the time, is valid under an authority, in an act of incorporation, to take mortgages to secure debts previously contracted.[25] And a deed of trust to secure a debt is a mortgage, and is embraced by the authority given to a bank in its charter to hold land mortgaged to it as security.[26]

Mortgage Not Raised or Released by Probate Sale.—A probate sale of property so mortgaged, unless with the bank's consent, does not release the incumbrance, which may be enforced against the purchaser.[27]

Foreclosure.—Under a statute providing that it shall be lawful for banks to purchase, hold, and convey real estate mortgaged to them in good faith, and such as it shall purchase at sale under decrees or mortgage foreclosures under securities held by them, a bank can foreclose a mortgage by advertisement.[28] A provision in the charter of a bank, for it to dispose of its se-

22. Assignment.—The provision in the charter of a banking company that "the corporation shall not, directly or indirectly, deal or trade in anything except bills of exchange, promissory notes, gold or silver bullion, or the sale of goods which shall be the produce of its lands," does not restrain the bank from taking an assignment of a mortgage to secure a debt to the bank. Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117.

23. Limitation of duration construed as directory.—The liquidation act authorized the bank of the state to take mortgages to secure doubtful debts, and to extend payment of such debts "not exceeding two years." Where the payment of a note was extended a longer time, and a mortgage taken as security, it was held that the clause in the statute must be considered directory, and that the mortgage was not void. Magruder *v.* State Bank, 18 Ark. 9. Stock mortgages, see ante, "Subscription to and Issue of Stock," § 39.

24. Presumption of due execution.—A note and mortgage, appearing on their face to be executed to the State Bank in its corporate name, will be presumed to have been taken in conformity with the charter of the bank, until the contrary is shown; and, therefore, an objection that they are void, it not appearing that they were received by the bank through the agency of one of its branches, is not tenable. Sparks *v.* State Bank (Ind.), 7 Blackf. 469.

Under New York Banking Act April 18, 1838, § 24, authorizing a banking association to hold such real estate as may be mortgaged to it in good faith, and providing that all conveyances of such real estate shall be made to such officer as shall be indicated for that purpose in the articles of association, a bona fide mortgage made directly to a bank in New York is valid, though the articles designate the president as the officer to take conveyances; the object in permitting conveyances to be made to an officer of the bank was merely to facilitate business, and not to prohibit the bank from taking title. Kennedy *v.* Knight, 21 Wis. 340, 94 Am. Dec. 543.

25. To secure contemporaneous loan.—Silver Lake Bank *v.* North (N. Y.), 4 Johns. Ch. 370; Planters' Bank *v.* Sharp (U. S.), 6 How. 301, 12 L. Ed. 447; Neilson *v.* Lagow, 12 How. 98, 13 L. Ed. 909.

26. Deeds of trust.—Bennett *v.* Union Bank, 24 Tenn. (5 Humph.) 612.

27. Mortgage not raised or released by probate sale.—The rule that a probate sale raises mortgages, attaching them to the proceeds, is inapplicable to the Bank of Louisiana and other banks by whose charters mortgages in their favor are not affected by any sale or change of title, by descent or otherwise. Williams *v.* Bank, 17 La. 378; Citizens' Bank *v.* Buisson (La.), 7 Rob. 506; Union Bank *v.* Marigny (La.), 11 Rob. 209.

28. Foreclosure.—Gage *v.* Sanborn, 106 Mich. 269, 64 N. W. 32, construing Michigan statute.

curities "in all respects as natural persons may do under the common law," abrogates the requirement of an act requiring the intervention of a court of equity to sell mortgaged property.[29]

§ 95 (1e) Leases.—A lease of a building by a bank was not ultra vires, where it was leased to exchange the use of a part of it for a building suitable to its purposes, and which could not be procured otherwise.[30]

§ 95 (2) Disposal of Property.—Power to Sell.—A bank may assign or convey any property held by it, and may enter into the common covenants of guaranty or warranty, on making such assignment or conveyance.[31] Authority given to a bank, by its charter, to take real estate in payment of its debts, either by conveyance or purchase under judgments in its favor, includes the power of selling and conveying the same.[32]

Requisites and Sufficiency of Deed.—In the absence of any statutory requirement to the contrary, a deed of conveyance by a banking corporation is properly executed when its cashier, on behalf of the bank, and by its authority, affixes thereto the corporate seal, and subscribes his name as such cashier; and in such case the cashier is the proper person to acknowledge the deed.[33]

Power to Mortgage.—Where the act of incorporation declares that a bank shall be capable of conveying any real estate in its possession, for the

29. Hahn *v.* Pindell (Ky.), 3 Bush 189.

30. **Leases.**—Lechenger *v.* Merchants' Nat. Bank (Civ. App.), 96 S. W. 638, affirmed in 101 Tex. 646, no op.

31. **Power to sell.**—Talman *v.* Rochester (N. Y.), 18 Barb. 123; People *v.* Brown (N. Y.), 5 Wend. 590.

32. **Under authority to take real estate for debts.**—People *v.* Brown (N. Y.), 5 Wend. 590.

Sale of land by one bank to another.—Where a bank lawfully buys land to secure an existing debt, and conveys it to another bank, a tenant in possession has no right to refuse to deliver the possession, or to enjoin the owner from taking steps to recover the possession, on the ground that the sale from one bank to the other was void. Miller *v.* National Bank, 4 Ky. L. Rep. 25.

33. **Requisites and sufficiency of deed.**—Sheehan *v.* Davis, 17 O. St. 571.

A conveyance sealed by the corporate seal, and signed by the president and cashier, need not, in the absence of any special evidence, be acknowledged on behalf of the corporation by any one except the cashier. Merrill *v.* Montgomery, 25 Mich. 73.

An acknowledgment of a chattel mortgage by the president and secretary of a bank as the mortgagors therein named, is not executed as the statute of Illinois requires, and is invalid against third persons, when the property is to remain with mortgagor. First Nat. Bank *v.* Baker, 62 Ill. App. 154.

Yet where a deed by its terms was made by the Farmers' Bank of Missouri in its corporate name, and was signed by it in the usual form, concluding: "In witness whereof, I, Stephen G. Wentworth, as president of the Farmers' Bank of Missouri, by direction of the board of directors, have hereunto subscribed my name and caused the common seal of the bank to be hereto affixed"—which was signed: "S. G. Wentworth, President of the Farmers' Bank of Missouri," and the official seal of the bank was affixed at the proper place. It was held, that under Wag. St. p. 273, § 5, providing that any private corporation authorized to hold real estate may convey it by deed, sealed with the common seal of the corporation and signed by the president, the deed was that of the bank, and it was unnecessary that it should be signed in the corporate name of the bank by its president. Shewalter *v.* Pirner, 55 Mo. 218.

use of the corporation, the bank may mortgage it to secure the payment of its debts.[34] And a constitutional and statutory general provision will not affect the right of a bank under its prior charter to execute a mortgage, where such right has not been surrendered.[35]

§ 96. With Respect to Contracts in General[35a]—§ 96 (1) Formality and Authentication.—As a general proposition, where the charter of an incorporation prescribes the particular mode in which its contracts shall be made or authenticated, that mode must be pursued.[36] If no definite rule is to be found, either in the charter or by-laws of the institution, in regard to the manner and form in which its acts and contracts shall be evidenced, then it seems general usage, and the course of business of similar institutions is to govern; the officers will be presumed to have been invested with the customary authority, and their acts, within the scope of such usage, practice, and course of business, will be binding on the institution, in favor of the third person having no knowledge to the contrary.[37] There can be no

34. Power to mortgage.—People *v.* Brown (N. Y.), 5 Wend. 590; Ward *v.* Johnson, 95 Ill. 215.

Where a banking corporation was by its charter authorized to purchase, hold, and convey any estate, real or personal, for the use of the corporation, and afterwards the right to hold real estate was restricted to so much as was necessary for its accommodation in the transaction of business, it was held that the corporation had power to mortgage such real estate as was necessary for its accommodation, to secure a debt of the corporation. Leggett *v.* New Jersey Manufacturing, etc., Banking Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

35. Charter rights.—A constitutional provision prescribing the mode in which the indebtedness of corporations is to be incurred, and an act, carrying the same into effect, held not to preclude collection of a mortgage debt of a bank whose charter authorized such debt and mortgage. Ahl *v.* Rhodes, 84 Pa. 319; Lewis *v.* Jeffries, 86 Pa. 340.

As to power to borrow generally, see post, "Borrowing Money," § 97.

35a. In respect to deposits, see post, "Relation between Bank and Depositor in General," § 119, et seq.

In respect to collection, see post, "Relation between Bank and Depositor for Collection," § 156, et seq.

Of national banks, see post, "In General," § 260 (1); "Guaranty or Indemnity," § 260 (4).

Of loan, trust, and investment companies, see post, "Functions and Dealings," § 315.

Representation of bank by officers and agents, see post, "Contracts," § 105.

Estoppel to set up want of power to exempt from liability.—See post, "Estoppel to Deny Authority of Officer or Agent," § 113.

Contract between banks as to disposition of proceeds of discounted paper, see post, "Application of Proceeds," § 182.

Contract for custody and transmission of public funds.—See post, "Special Deposits," § 153.

In respect to exchange, money, securities and investments, see post, "Power to Deal in Exchange, Money, and Securities," § 188, et seq.

In respect to circulating notes, see post, "Nature and Requisites," § 196, et seq.

In respect to loans and discounts, see post, "Power to Make Loans in General," § 176, et seq.

Agreements as to medium in which remittances to be made, see post, "Liability in General," § 169.

Agreements as to liability for shortage and counterfeits in exchanges, see post, "Payment of Forged or Altered Paper," § 190.

Agreement to pay check on condition of payment of drawer's notes, see post, "Notes Payable at Bank," § 144.

36. Formality and authentication.—Northern Bank *v.* Johnson, 45 Tenn. (5 Coldw.) 88; Neiffer *v.* Bank, 38 Tenn. (1 Head) 162.

37. Northern Bank *v.* Johnson, 45 Tenn. (5 Coldw.) 88; Neiffer *v.* Bank, 38 Tenn. (1 Head) 162. See post, "Grounds and Extent of Liability in

doubt, however, that a bank, or other corporation, may be authorized to contract in a prescribed mode, either by its charter or by-laws, or general usage; it may depart from the prescribed mode, and render itself liable upon contracts executed or authenticated in a different mode.[38]

§ 96 (2) Notice of Limitations.—If one deals with a bank, he knows that it is banking business that that bank is authorized to transact, and none other. He has the same general knowledge that the officers of the bank have.[39]

§ 96 (3) Contracts under Seal.—Where the act incorporating a bank contains no express provision authorizing the corporation to make contracts, it follows that, upon principles of the common law, it might contract under its corporate seal.[40] And it may be bound by a contract, though not executed under the corporate seal.[41]

§ 96 (4) Contracts between Banks Entered into by Contracting Officers Common to Both.—Where a majority or all of the contracting officers of two banks were common to both, that fact alone does not make a contract between the two banks, entered into by such contracting officers, absolutely void and incapable of ratification, but such contract will be subject to close judicial scrutiny when questioned at the proper time, and will be set aside upon the appearance of unfairness.[42]

§ 96 (5) Contract to Honor Drafts.—A bank's letter promising to honor drafts has been held to constitute a continuing contract to do so until revoked or canceled.[43]

General," § 102, et seq., as to representation of bank by officers and agents.

38. Neiffer *v.* Bank, 38 Tenn. (1 Head) 162.

39. **Notice of limitations.**—First Nat. Bank *v.* Commercial Nat. Bank, 99 Tex. 118, 87 S. W. 1032.

40. **Power to contract under seal.**—Bank *v.* Patterson (U. S.), 7 Cranch 299, 3 L. Ed. 351.

41. **Seal not essential.**—Bank *v.* Guttschlick (U. S.), 14 Pet. 19, 10 L. Ed. 335.

42. **Contracts between banks entered into by contracting officers common to both.**—City Nat. Bank *v.* Merchants', etc., Nat. Bank (Civ. App.), 105 S. W. 338.

Where the president and cashier of the defendant bank solicited the plaintiff bank to deposit its money with defendant bank and agreed to pay the plaintiff bank 2 per cent per annum on daily balances it was held that in the absence of evidence tending to show concealment, deception or fraud, or that defendant's officers who were in control of its business did not have actual knowledge of the transaction, the fact that the president of defendant bank was also vice-president of plaintiff bank did not render the contract void on the ground that his interest was adverse to the stockholders in defendant bank. City Nat. Bank *v.* Merchants', etc., Nat. Bank (Civ. App.), 105 S. W. 338.

43. **Contract to honor drafts.**—In February, 1883, plaintiff bank wrote to defendant bank: "G. was at our office to-day, and arranged for us to cash his stock tickets, and draw on him for the amount and exchange with the tickets attached. He referred us to you, saying you would say such drafts would be paid through your bank all right. Please advise us regarding it and oblige." Defendant replied February 19, 1883: "We will pay your drafts on G. with his stock tickets attached." Thereafter the plaintiff cashed such of G.'s stock tickets as were presented, and drew on him for the amounts, and forwarded the drafts with the tickets attached for collection of defendant. These transactions took place two or

§ 96 (6) Subscription Contract.—A subscription to an enterprise for building a creamery made by the president and directors of a bank for the bank is ultra vires, and, if canceled before the enterprise is carried out, is not enforceable against the bank.[44]

§ 96 (7) Illegal Contracts.—Illegal Contracts Relating to Circulating Notes.—Contracts by a bank with corporations which could not lawfully emit bills or notes for circulation, to receive and put into circulation such bills and notes, have been held illegal so far as they contemplated putting such paper into circulation, but legal so far as the mere receipt of such paper was concerned.[45] And a note to a bank, made to give it a false credit, is unenforcible by the bank.[46]

§ 96 (8) Ultra Vires Contracts.—The burden of showing illegality rests on the party alleging it.[47]

Agreement to Procure Release of Mortgage.—An agreement by a bank to procure a release of a mortgage held by a third person upon lands on which the bank also had a mortgage, although not primarily an agreement relating to banking, yet, when made to secure payment of the debt due the bank, is not ultra vires.[48]

three times a week, and sometimes less frequently. The drafts varied from $300 to $12,000, and the aggregate from February 19, 1883, to November 8, 1888, was over $600,000. The defendant paid the drafts and charged them to G., whether his account was good for them or not, but it refused to pay the two drafts in suit drawn November 7 and 8, 1888, for $389.92 and $4,789.05, respectively. It was held that, considered with reference to the situation of the parties, and their subsequent acts evincing their own understanding, the letter of February 19, 1883, must be construed as a continuing promise, and not merely as one to pay drafts for stock tickets which the plaintiff had already cashed, or arranged to cash; and that the consideration was sufficiently disclosed to satisfy the statute of frauds. Drovers' Nat. Bank *v.* Albany County Bank, 44 Fed. 183.

44. Subscriptions.—Holt *v.* Winfield Bank, 25 Fed. 812.

45. Illegal contracts relating to circulating notes.—Whetstone *v.* Bank, 9 Ala. 875, affirming Branch Bank *v.* Crocheron, 5 Ala. 250.

As to circulating notes, see post, "Nature and Requisites," § 196, et seq.

46. Note made to bank to give it false credit.—If a note be made to a bank, without consideration, for the purpose of enabling the corporation, by including it as a part of its funds, to make a colorable and false statement of its actual position, although it might have been a just cause for the revocation of its charter, and, perhaps, of indictment of the persons concerned for a conspiracy to defraud, yet the bank can not maintain an action on such note. Agricultural Bank *v.* Robinson, 24 Me. 274, 41 Am. Dec. 385.

47. Ultra vires contracts—Burden of showing illegality.—An agreement between a banking corporation, located in Wisconsin, and commission merchants in the city of New York, by which the former is to consign produce to the latter for sale on commission, against which drafts are to be drawn, and to keep the drawees in funds to meet the same, in cases where consignments are not made, is not necessarily illegal, in the absence of anything to show what powers are possessed by the bank, by virtue of its charter. Perkins *v.* Church (N. Y.), 31 Barb. 84.

Effect of ultra vires contracts.—See post, "Effect of Acts Ultra Vires," § 101.

Representation of banks by officers and agents and estoppel of bank to deny authority. See post, "Grounds and Extent of Liability in General," § 102, et seq.; "Estoppel to Deny Authority of Officer or Agent," § 113.

48. Agreement to procure release of mortgage.—McCraith *v.* National Mohawk Valley Bank, 104 N. Y. 414, 10 N. E. 862.

Shipment of Stock, on Which Bank Has Advanced Money, in Bank's Name.—Stock may be shipped in the name of a bank which has advanced money thereon, for its protection, without infringing a prohibition against employing its moneys in trade or commerce by buying and selling chattels.[49]

Execution of Undertakings in Judicial Proceedings.—It is not within the powers of an incorporated state bank to pledge its credit as a mere matter of accommodation by executing undertakings in judicial proceedings.[50]

§ 96 (9) Termination.—A contract between a bank and a partnership is terminated by the subsequent admission of new members without bank's consent.[51]

§ 97. Borrowing Money.[52]**—Power of Bank to Borrow.**—Under the decisions of the federal courts, the borrowing of money is not out of the usual course of banking business, but the existence of such power is a question of fact, to be resolved by the usage of the parties or of the community.[53]

49. Shipment of stock, on which bank has advanced money, in bank's name.—Where a bank carried a person for the money he used in buying and shipping stock to market, and returns for the sales were made to the bank, and the statement for money received placed to his credit, and certain stock belonging to him was shipped in the name of the bank for its protection against loss for money furnished to buy stock, the bank, at the most, was merely acting as agent for the other, and the transaction was not within Missouri Rev. St. 1899, § 1291, prohibiting a bank from employing its moneys in trade or commerce by buying and selling chattels. Griffin *v.* Wabash R. Co., 115 Mo. App. 549, 91 S. W. 1015.

50. Execution of undertakings in judicial proceedings.—Sturdevant *v.* Farmers', etc., Bank, 62 Neb. 472, 87 N. W. 156, affirmed on rehearing in Sturdevant Bros. & Co. *v.* Farmers', etc., Bank, 69 Neb. 220, 95 N. W. 819.

51. Termination.—A firm authorized a bank to cash drafts drawn on it by its agent. It thereafter notified the bank that it would pay drafts on actual consignments. The cashier answered, promising to require a shipping bill. The firm did not reply, but continued to accept and pay drafts drawn by the agent and cashed by the bank, without requiring a bill of lading. Held, that any contract in regard to requiring bills of lading was made with the then existing firm, and ceased on the subsequent admission of two clerks as members, without the consent of the bank. National Bank *v.* Hall, 101 U. S. 43, 25 L. Ed. 822.

Where the bank acted in good faith, and the agent absconded with the proceeds of two drafts, in an action by the firm to recover the amount thereof from the bank, it was held, that the letters constituted no contract, and the bank was not responsible to the firm for cashing the drafts without bills of lading attached. National Bank *v.* Hall, 101 U. S. 43, 25 L. Ed. 822.

52. Borrowing money.—See, also, post, "Bonds, Assignments and Negotiable Instruments," § 98 (2), as to bonds and notes, etc.

As to power to mortgage, see ante, "Disposal of Property," § 95 (2).

As to custom of borrowing money on time notes, see ante, "Admissibility of Evidence and Its Sufficiency," § 89 (1).

53. Power to borrow.—Of national banks, see post, "Banking Powers," § 258.

Power to borrow as a question of fact.—Auten *v.* United States Nat. Bank, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628; Aldrich *v.* Chemical Nat. Bank, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

A power so useful can not be said to be illegitimate, and declared as matter of law to be out of the usual course of business and to charge everybody connected with it with knowledge that it may be in excess of authority. It would seem, if doubtful at all, more like a question of fact, to be resolved in the particular case by the usage of the parties or the usage of communi-

And the weight of authority is that a bank with general powers may borrow money,[54] under an incidental and auxiliary power, not expressed, but implied from those which are expressed.[55] But it has been held that a bank that

ties. It is important also to observe that the court said that Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572, was not to be regarded as an adjudication to the contrary. Aldrich *v.* Chemical Nat. Bank, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

"The very object of banking is to aid the operation of the laws of commerce by serving as a channel for carrying money from place to place, as the rise and fall of supply and demand require, and it may be done by rediscounting the bank's paper or by some other form of borrowing." Auten *v.* United States Nat. Bank, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628.

It was said in an earlier case that while a bank, in certain circumstances, may become a temporary borrower of money, yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money. Here a loan of $200,000, negotiated by the vice president, was held to be unauthorized. Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572.

In Aldrich *v.* Chemical Nat. Bank, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498, commenting on and distinguishing this case, it was said: "In the view we take of the present case it is not necessary to extend this opinion by a review of the numerous authorities which, it is contended, support the general proposition that a national bank is entitled under the law of its creation and in the conduct of its business to borrow money, and that the lender is not obliged to show that the officer or agent acting for the bank had special authority to negotiate the loan. If the present case depended upon that question it might be necessary to consider whether the language in Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572, required modification."

"In Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572, the defendant bank did not receive or get the benefit of the money alleged to have been loaned to it at the instance of its vice president. This court took care in that case to say that it did 'not appear that the bank ever got a penny of the borrowed money or any benefit or advantage whatever by reason of the transaction.'" Aldrich *v.* Chemical Nat. Bank, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

"All their deposit certificates, or bank book credits to individuals are debts of the bank, and which it is a legitimate and appropriate part of its business as a bank to incur and to pay. The same may be said, also, of all its bank notes, or bills, they being merely promises or debts of the bank, payable to their holders, and imperative on them to discharge. See Bank *v.* Patterson (U. S.), 7 Cranch 299, 3 L. Ed. 351; Bank *v.* Earle (U. S.), 13 Pet. 519, 10 L. Ed. 274." Planters' Bank *v.* Sharp (U. S.), 6 How. 301, 12 L. Ed. 447.

54. Tuttle *v.* National Bank, 48 Ill. App. 481; Ringling *v.* Kohn, 6 Mo. App. 333; Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165; Leavitt *v.* Yates (N. Y.), 4 Edw. Ch. 134; Leavitt *v.* Blatchford (N. Y.), 5 Barb. 9; Curtis *v.* Leavitt, 15 N. Y. 9, affirming 17 Barb. 309; Barnes *v.* Ontario Bank, 19 N. Y. 152; Safford *v.* Wyckoff (N. Y.), 4 Hill 442.

55. An incidental implied power.—Curtis *v.* Leavitt, 15 N. Y. 9.

The power expressed in a bank charter to receive deposits is, by necessary implication, power to receive money as a loan, and to assign or mortgage negotiable instruments. Ward *v.* Johnson, 95 Ill. 215; Curtis *v.* Leavitt (N. Y.), 17 Barb. 309, affirmed with modification in 15 N. Y. 9.

Massachusetts.—Under the Massachusetts statute, a bank is not prohibited from borrowing of another bank money payable on demand with interest, but is prohibited from borrowing money of another bank payable at a future day certain. Commonwealth *v.* Bank (Mass.), 4 Allen 1. See now Rev. Laws of Mass. 1902, Ch. 115, § 40.

New York.—The power to borrow money and to give appropriate assurances for the payment of the debt is incidental to corporations, and especially banking corporations. Curtis *v.* Leavitt, 15 N. Y. App. 9.

Laws 1829, c. 94, § 35, forbidding banks, "subject to the provisions of this act," from issuing notes or bills, unless payable on demand and without

borrows money upon which it pays interest is competing with its customers, and engaged in operations quite foreign from the object of its organization. Legitimate banking is lending, and never borrowing, on interest.[56]

Estoppel to Deny Power.—But when the bank receives and uses the proceeds of such a loan, by its being placed to its credit with notice to it, it can not deny its liability to account therefor.[57]

Rediscount of Paper.—A rediscount by a bank of its bills receivable, though it indorses the same, and becomes contingently liable for their payment, is not a borrowing of money by the bank, but has more the characteristics of a sale, and the bank may be estopped, by allowing such a practice, to deny authority therefor.[58]

Secret Loans.—If, for the purpose of enabling a bank to borrow without having its printed statements show it as a borrower, another bank credits

interest, has no application to banking associations formed under the law of 1838; and does not, therefore, render void bonds given for money borrowed and payable at a future time. Curtis *v.* Leavitt, 15 N. Y. 9, affirming but modifying 17 Barb. 309. See, also, Leavitt *v.* Yates (N. Y.), 4 Edw. Ch. 134; Leavitt *v.* Blatchford (N. Y.), 5 Barb. 9; Barnes *v.* Ontario Bank, 19 N. Y. 152.

56. Not an ordinary banking power.—Stark County Bank *v.* McGregor, 6 O. St. 45.

57. Receipt of proceeds of loan by bank makes it liable.—A national bank having used in its business money which its vice president obtained as a loan to it from another national bank can not deny all liability to account for the same upon the ground that the loan was not negotiated by it or by its direction, as well as upon the ground that it could not itself have legally borrowed the money from the other bank. The statutes relating to national banking associations do not require that such a defense be sustained. Aldrich *v.* Chemical Nat. Bank, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498; Wyman *v.* Wallace, 201 U. S. 230, 50 L. Ed. 738, 26 S. Ct. 495; Frenzer *v.* Wallace, 201 U. S. 244, 50 L. Ed. 742, 26 S. Ct. 498; Poppleton *v.* Wallace, 201 U. S. 245, 50 L. Ed. 743, 26 S. Ct. 498.

"The fact that after the Fidelity Bank had been credited on the books of the Chemical Bank with the $300,000, H. (its vice president) fraudulently caused himself to be credited on the books of the Fidelity Bank with a like sum, is a matter with which the Chemical Bank had no connection and can not affect its right to demand a return of the money which went (as the Chemical Bank in good faith supposed it would) into the treasury of the Fidelity Bank and was by it used in meeting its current obligations. The dishonesty of H. in his management of the affairs of the Fidelity Bank did not discharge that bank from the obligation under which it came by using in its business the money obtained by its vice president under the guise of a loan to the bank." Aldrich *v.* Chemical Nat. Bank, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

"In Merchants' Bank *v.* State Bank, 10 Wall. 604, 644, 19 L. Ed. 1008, in which one of the questions was as to the liability of a bank on account of certain certificates issued by its cashier and of certain purchases of gold made by him, the court said that if the certificates and the gold actually went into the bank which the cashier assumed to represent, then the bank was liable for money had and received, whatever may have been the defect in the authority of the cashier to make the purchase." Aldrich *v.* Chemical Nat. Bank, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498.

And a long habit of a bank, in common with other banks of same locality, of rediscounting its bills receivable in large amounts through the president and cashier, with the knowledge of the directors of the practice, will estop the bank from denying their authority in the premises, there being no attendant circumstances to arouse suspicion. United States Nat. Bank *v.* First Nat. Bank, 24 C. C. A. 597, 79 Fed. 296.

58. Rediscount of paper.—United States Nat. Bank *v.* First Nat. Bank, 24 C. C. A. 597, 79 Fed. 296. See preceding paragraph.

a sum to the borrower's account, and charges the same to a special account, and takes an individual guaranty note from the borrower's directors, amounts drawn on the credit constitute a loan to the bank, and not to its directors.[59]

Right Unaffected by Insolvency.—An incorporated bank may borrow money in the prosecution of its business and secure its payment by collaterals or otherwise, and the fact that it is insolvent at the time the loan is obtained does not impair or deprive the bank of its power or the right to negotiate the loan and secure payment thereof, unless it is forbidden by statute.[60]

Usury.—Loans to banks are subject to the usury laws.[61]

§ 98. Bonds, Assignments and Negotiable Instruments[62]—§ 98 (1) Bonds and Assignments.—A bank may give bonds and assignments for the purpose of meeting its lawful obligations.[64]

§ 98 (2) Negotiable Instruments[65]—§ 98 (2a) Power to Make and Issue.—It is difficult to deduce any general rule as to the power of a bank to make or issue negotiable paper, controlled as the question is by constitutional and statutory provisions,[66] although the power to give notes

59. Secret loans.—American Exch. Nat. Bank *v.* First Nat. Bank, 27 C. C. A. 274, 82 Fed. 961.

60. Right unaffected by insolvency.—Harris *v.* Randolph County Bank, 157 Ind. 120, 60 N. E. 1025.

61. Loans subject to usury laws.—A banking corporation having suspended payment, a committee was appointed to procure a loan sufficient to enable the bank to resume business. It made application to a trust company for aid to enable it to resume specie payments. The company agreed to issue its certificate of deposit for £48,000 sterling, payable in London, with interest at 5 per cent, the banking company to deliver bills of credit for £50,000, payable to the trust company in sterling money, at $5 to the pound, with interest at 6 per cent per annum. The agreement was carried out accordingly. Held, that the transaction was in substance a loan of money by the trust company to the bank, and was therefore subject to the statutes prohibiting usury. Dry Dock Bank *v.* American Life Ins., etc., Co., 3 N. Y. 344.

62. Bonds, assignments and negotiable instruments.—Authority of officers or agents, see post, "Bills, Notes, and Securities," § 109.

General power to borrow, see ante, "Borrowing Money," § 97.

64. Bonds and assignments.—"This court, in the United States *v.* Robertson (U. S.), 5 Pet. 641, 8 L. Ed. 257, has expressly recognized the authority of a bank to give bonds and assignments to pay its deposit debtors. In that case, 'the directors agree to pledge to the government of the United States the entire estate of the corporation as a security for the payment of the original principal of the claim,' etc. (p. 648). And such a pledge or transfer was held there to be valid." Planters' Bank *v.* Sharp (U. S.), 6 How. 301, 12 L. Ed. 447.

Power to borrow money.—See ante, "Borrowing Money," § 97.

Power to loan and discount.—See post, "Power to Make Loans in General," § 176; "Power of Discount," § 177.

Right and mode of exercise of powers.—See post, "Grounds and Extent of Liability in General," § 102, et seq.

65. Negotiable instruments.—As to bill drawn by bank in violation of charter being void, see post, "Effect of Acts Ultra Vires," § 101.

Effect of ultra vires, see post, "Effect of Acts Ultra Vires," § 101.

66. Controlled by constitutional and statutory provisions.—Under a constitution prohibiting the legislature from establishing or incorporating any bank or banking company or moneyed institution, for the purpose of issuing bills of credit, or bills payable to order or bearer, except under the conditions prescribed, no corporation has authority to issue promissory notes unless given it expressly or by impli-

would usually go with the power to borrow money.[67] But some statutes merely prohibit or restrict the issue of notes intended to be used as money, and authorize the issue of notes in the ordinary form for the purpose of legitimate banking business,[68] and such a distinction has been read into a statute where it was not expressed.[69] In New York the old statute of 1840 invalidated all notes of a banking association unless payable on demand and without interest, and a guaranty of such note was likewise void.[70] Where a statute enacted that all notes issued by unincorporated banking companies should be void, and not recoverable, and a later act repealed so much of the former act as prevented the holder of such notes from recovering against the drawers, the holder of such note, issued after the former act and before the latter, might recover against the members of the company.[71]

cation, as incident to the purpose of its creation. James *v.* Rogers, 23 Ind. 451, construing Indiana Constitution, Art. 11, § 1.

A note by a bank organized under the laws of the territory of Oklahoma as subscription to secure the construction of a railroad is ultra vires and void, as in violation of Wilson's Rev. & Ann. St. 1903, § 242, setting forth the business which a bank may be permitted to lawfully conduct. Arkansas, etc., R. Co. *v.* Farmers', etc., Bank, 21 Okl. 322, 96 Pac. 765.

67. Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572.

68. Notes issued in transaction of legitimate business.—Under Rev. St. of Wisconsin, 1858, c. 71, banking associations are authorized to issue bills and notes in the ordinary form for the purposes of their legitimate business, but are prohibited by the tenth section of the act from issuing them to be circulated as money. Rockwell *v.* Elkhorn Bank, 13 Wis. 653.

69. Rev. St. of Wisconsin, 1858, c. 71, § 10, providing that the bills and notes of any banking association intended to be put in circulation as money shall be payable on demand, and without interest, where the bank's business is conducted, does not apply to a promissory note given in the ordinary course of business. Rockwell *v.* Elkhorn Bank, 13 Wis. 653. See contra Swift *v.* Beers (N. Y.), 3 Denio 70, construing New York statute.

70. New York.—Under the Act of 1840, all promissory notes, made by a banking association, unless made payable on demand and without interest, though not intended to circulate as money, are illegal and void, and a guaranty of such a note is likewise void. Swift *v.* Beers (N. Y.), 3 Denio, 70; Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Ontario Bank *v.* Schermerhorn (N. Y.), 10 Paige 109; Leavitt *v.* Blatchford, 17 N. Y. 521.

Associations under the general banking law have no authority to make bills of exchange, or issue any negotiable paper, except under the sanction of the comptroller, and in the form required by statute. Safford *v.* Wyckoff (N. Y.), 1 Hill 11, reversed on other grounds in 4 Hill 442.

Post notes, issued by banking associations, having been decided to be absolutely void, it was held that an assignment of securities, made by a banking association to trustees, as a collateral security for such post notes, was also void, and transferred no title to the assignees. Tylee *v.* Yates (N. Y.), 3 Barb. 222.

Trust deed to secure illegal notes also illegal.—A bank organized under the general law issued negotiable promissory notes payable in twelve months, with interest, and delivered them to a creditor on account of a previous liability of the bank. The bank executed a trust deed at the same time to secure the payment of the notes. The notes were illegal and void, under St. 1840, p. 406, § 4, prohibiting banks from issuing any note unless payable on demand without interest. Held, that the trust deed was also illegal and void. Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Leavitt *v.* Blatchford, 17 N. Y. 521, reversing 5 Barb. 9.

71. Retrospective validating act.—Hess *v.* Werts (Pa.), 4 Serg. & R. 356, construing old Pennsylvania statute.

§ 98 (2b) Power to Deal Therein.[72]**—In General.**—It may be stated that the power to deal in promissory notes falls under general banking powers, unless prohibited by law,[73] and the fact that a charter prescribes the kinds of paper in which a bank may deal, in the ordinary course of its business, does not prohibit it from taking paper of other descriptions, where it becomes necessary to secure a debt previously contracted, and which could not be collected in the usual way.[74]

Taking Note as Deposit Conditionally.—A note deposited with a bank with the understanding that, in certain contingencies, it is to be delivered back to the maker, is a transaction ultra vires, where charter provides that the bank shall have power "to carry on the business of receiving money on deposit and to allow interest thereon, giving the person depositing credit therefor."[75]

Power to Purchase.—Power to discount notes imports power to purchase them.[76] A banking corporation engaged in the general banking business has, in the absence of any restriction in its charter, the power to buy

72. Purchase of bills of exchange by foreign corporation, see ante, "Foreign Banks," § 18.

As to recovery on note acquired through unauthorized indorsement, see post, "Effect of Acts Ultra Vires," § 101.

As to recovery on note purchased without authority, see post, "Effect of Acts Ultra Vires," § 101.

73. Power to deal in promissory notes.—State Bank *v.* Criswell, 15 Ark. 230.

Dealings in exchange and securities, see post, "Power to Deal in Exchange, Money, and Securities," § 188; "Purchase and Sale of Exchange," § 192; "Purchase and Sale of Stock or Securities," § 194; "Dealings in Exchange, Money, and Securities," § 271.

Notes intended to circulate as money, see post, "Power to Issue or Circulate," § 197; "Restrictions upon Issue or Circulation," § 198; "Circulating Notes," § 272.

Power of bank to discount paper, see post, "Power of Discount," § 177.

Purchasing notes signed by officers and others, see post, "Requisites and Validity of Loan or Discount," § 178.

A bank prohibited by its charter from making loans at a greater rate of discount than one-half of 1 per centum for thirty days, and also from dealing in anything but bills of exchange, gold or silver bullion, bank stock, United States stock, treasury notes, and goods really pledged for money lent, and not redeemed in time, is not prohibited from dealing in promissory notes, provided the rate of discount is limited to the rate fixed by its charter. Commonwealth *v.* Commercial Bank, 28 Pa. 391.

A statute prohibiting corporations not expressly incorporated for banking purposes from "discounting bills, notes, or other evidences of debt," and from "buying and selling bills of exchange," being penal in its nature, must be strictly construed; and hence the prohibition against buying and selling "bills of exchange" will not be extended to promissory notes. American Life Ins., etc., Co. *v.* Dobbin (N. Y.), Labor's Supp. (Hill & Denio) 252. Construing old New York statute.

74. Lagow *v.* Badollet (Ind.), 1 Blackf. 416, 12 Am. Dec. 258.

The charter provision restraining the Farmers' & Mechanics' Bank of Indiana from trading in anything but bills of exchange, etc., does not prohibit it from taking a promissory note, payable in two years to the president and directors at their office of discount and deposit, to secure the payment of a debt owed by the maker. John *v.* Farmers', etc., Bank (Ind.), 2 Blackf. 367, 20 Am. Dec. 119.

75. Taking note as deposit conditionally.—First Nat. Bank *v.* Citizens' Bank, Fed. Cas. No. 4,802. See, also, post, "Deposit Other than Money," § 122.

76. Power to purchase.—Pape *v.* Capitol Bank of Topeka, 20 Kan. 440, 27 Am. Rep. 183; Atlantic State Bank *v.* Savery, 82 N. Y. 291, affirming 18 Hun 36. See contra, Farmers' & Mechanics' Bank *v.* Baldwin, 23 Minn. 198, 23 Am. Rep. 683.

notes outright.[77] And the power is given by a charter authorizing the purchase of chattels and effects of whatsoever kind,[78] unless specifically restrained.[79]

Power to Transfer and Assign.—Where there is no evidence to show that the charter of a bank contains any restriction or limitation on the bank's power of negotiating or indorsing notes or bills of exchange, the presumption will be that the bank has power.[80] A bank may sell and transfer a negotiable note discounted by it either before or after maturity, the same as any other holder.[81] And under a charter authorizing a bank to hold any property of any kind whatever, and to dispose of the same for its good, the bank may transfer notes made to it,[82] or under a charter authorizing discounts,[83] and the contract between the maker of a note and the payee, a bank, must be governed, as to the latter's right to transfer the note, by the

77. Salmon Falls Bank *v.* Leyser, 116 Mo. 51, 22 S. W. 504.

78. Bank *v.* Norton (Ky.), 3 A. K. Marsh 422; Bank *v.* Price, 1 Mo. 54.

But where power was given to a railroad and banking company to hold land and personal estate of any kind whatever, the general words were held to embrace only estate of the same nature as that previously indicated—that is, such as was required for the purposes of a railroad, and for the ordinary business of banking—and not to embrace promissory notes, which were to be presumed not to be referred to by that section, because expressly provided for in another section. McIntyre *v.* Ingraham, 35 Miss. 25.

79. **Where specifically restrained.**—Under an act incorporating a bank, and authorizing it to purchase and possess lands, tenements, goods, chattels, and effects, of whatsoever kind or quality, and restraining it from trading, except in bills of exchange, gold and silver, etc., the bank has no power to purchase promissory notes. Bank *v.* Simpson, 1 Mo. 184

80. **Power to transfer and assign.**—Robb *v.* Ross County Bank (N. Y.), 41 Barb. 586; Myers *v.* De Lee (La.), 1 Rob. 516; Crocket *v.* Young (Miss.), 1 Smedes & M. 241.

A bank may, by the indorsement, transfer a negotiable note in payment of its liability. Crocket *v.* Young (Miss.), 1 Smedes & M. 241. See contra Payne *v.* Baldwin (Miss.), 3 Smedes & M. 661, where it is held that where the right to transfer notes by indorsement is not expressly conferred upon a bank by its charter, as it is not essential to enable the bank to carry on its banking operation, it is not necessarily implied by its charter. Payne *v.* Baldwin (Miss.), 3 Smedes & M. 661.

And a bank charter providing that the corporations shall have power to "purchase and possess lands, tenements, and hereditaments, and personal estate of any kind whatever, * * * and to sell and dispose of the same," does not authorize the bank to assign promissory notes. McIntyre *v.* Ingraham, 35 Miss. 25.

And a grant of all the rights and privileges necessary to construct and operate a railroad, and to conduct a banking business, with power to "deal in exchange, and in bank and other public stocks," and "to issue notes," etc., does not carry with it implied authority to assign promissory notes. McIntyre *v.* Ingraham, 35 Miss. 25.

But a statute prohibiting banks from assigning notes which they have discounted, does not apply to a case where a note is not paid by the maker at maturity, and the bank assigns it to the indorser, and payment is made by him. Wade *v.* Thrasher (Miss.), 10 Smedes & M. 358.

81. Marvine *v.* Hymers, 12 N. Y. 223.

And a bank may legally transfer an overdue promissory note discounted and owned by the bank, and which has not been paid at maturity. Marvine *v.* Hymers, 12 N. Y. 223.

82. **Charter authorizing acquisition and disposition of property generally.**—Planters' Bank *v.* Sharp (U. S.), 6 How. 301, 12 L. Ed. 447, where it is held that a subsequent statute attempting to take away this right impairs the obligation of a contract.

83. **Charter authorizing discounts.**—Planters' Bank *v.* Sharp (U. S.), 6 How. 301, 12 L. Ed. 447.

law existing at the time of the making of the note.[84]

§ 99. Guaranty and Suretyship.[85]—Power to Guaranty.—The guaranty by a bank, without benefit to itself, of the debt of another in which it has no interest, is beyond its powers.[86] For a bank has no power to make a guaranty except for the protection of its own rights, or as an incident to the transaction of its own business, unless specially authorized by law.[87] But for its own protection or incidentally to transacting its own business, it may give a guaranty.[88]

84. Law in force when note executed governs.—Planters' Bank *v.* Sharp (U. S.), 6 How. 301, 12 L. Ed. 447.

85. Guaranty and suretyship.—Guaranty of note, see ante, "Negotiable Instruments," § 98 (2).

By national bank, see post, "Guaranty or Indemnity," § 260 (4).

Applying bank deposit to liability as guarantor or surety.—See post, "Applying Deposit to Liability as Indorser, Guarantor, or Surety," § 134 (3).

86. Power to guaranty.—Mine, etc., Supply Co. *v.* Stockgrowers' Bank, 98 C. C. A. 229, 173 Fed. 859; Bowen *v.* Needles Nat. Bank, 36 C. C. A. 553, 94 Fed. 925; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125.

87. Ayer *v.* Hughes, 87 S. C. 382, 69 S. E. 657; Bacon, etc., Co. *v.* Farmers' Bank, 79 Mo. App. 406; Seligman *v.* Charlottesville Nat. Bank, 3 Hughes 647, Fed. Cas. No. 12,642; Johnston *v.* Charlottesville Nat. Bank, 3 Hughes 657, Fed. Cas. No. 7,425.

"Such a corporation exceeds its powers when it becomes the mere surety for another, upon a contract in which it has no interest, or lends its credit in any form for the exclusive benefit of other parties. Such a contract is ultra vires, and can not be enforced against the bank by any person cognizant of the facts." Farmers', etc., Bank *v.* Butchers, etc., Bank, 16 N. Y. 125.

A bank, in selling bonds which do not belong to it, may contract with the purchaser to repurchase them at par on demand; but it can not give a valid guarantee of their payment. First Nat. Bank *v.* Schaeffer, 16 O. C. C. 457, 9 O. C. D. 182.

88. For its own protection and interest.—Ayer *v.* Hughes, 87 S. C. 382, 69 S. E. 657; Talman *v.* Rochester City Bank (N. Y.), 18 Barb. 123; People's Bank *v.* National Bank, 101 U. S. 181, 25 L. Ed. 907; Commercial Nat. Bank *v.* Pirie, 27 C. C. A. 171, 82 Fed. 799; Thomas *v.* City Nat. Bank, 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263.

Guaranty of bond and mortgage.—A bank may guaranty the payment of a bond and mortgage to a party who has advanced money upon them, where it is agreed that the proceeds thereof shall belong to the bank, although they may not have been assigned to the bank. Talman *v.* Rochester City Bank (N. Y.), 18 Barb. 123.

Guaranty of paper sold.—L. as cashier of defendant, proposed, by letter, to sell plaintiffs a bill of exchange drawn by B. & Co. for $5,000, at the price of principal, interest, and current rate of exchange of the same. S. & Co. by letter, accepted the proposition, and forwarded the money in payment. L. received the money, and gave credit as expressed by letter to plaintiffs, inclosing a bill by F. & Co., strangers to plaintiffs (and indorsed without recourse by M., a stranger, and not indorsed by defendant), for $5,000, charging therefor the same price, informing them the B. & Co. bill was gone, and adding, but this bill is perfectly safe. To which the plaintiffs replied by letter—"Your favor with stated inclosure is received, and is very satisfactory." S. & Co. were unable by use of due diligence to collect the bill. It was held that the cashier L. was to be regarded as the agent of the defendant, in the transaction. The affirmation of the cashier, accompanying the bill sent to the plaintiffs, that the "bill is perfectly safe," amounted to a warranty, or a representation in the nature of a guaranty, on the part of the defendant, that the bill was collectible. Sturges & Co. *v.* Bank, 11 O. St. 153, 78 Am. Dec. 296. See, also, Union Nat. Bank *v.* First Nat. Bank, 45 O. St. 236, 13 N. E. 884.

A note payable to a national bank was indorsed by a state bank which was in process of dissolution, and to whose business the national bank succeeded. The name of the national bank had been substituted for that of the state bank in its note blanks, and the note was written on a blank so

Accommodation Indorsement or Guaranty.—No banking or other corporation is authorized to make an accommodation indorsement, nor is such binding, unless it appear that plaintiff discounted in good faith, and on representation that the property in the note was in the corporation.[89]

Power to Guarantee Payment of Draft for Accommodation.—It is against public policy for a bank to guaranteee the payment of drafts for the purpose of accommodation only. Under this rule, a bank in Cincinnati having guaranteed a draft sent to South Carolina, in payment for melons which were to be of a certain grade delivered in Cincinnati, and discounted by payer, is not liable thereon, the melons having been found to be of inferior grade and purchaser having notified the Cincinnati bank to refuse payment of the draft.[90]

Obtaining, Negotiating and Guarantying Mortgage Loans.—Obtaining, negotiating, and guarantying mortgage loans is not a banking business.[91]

Estoppel to Deny Liability.—There is authority for holding that the bank may be estopped to deny its liability on the guaranty, notwithstanding the contract was ultra vires, as when the other party relied and acted thereon to his injury.[92]

Cashier's Check.—But a cashier's check, issued by a bank to pay the

changed. There was an agreement between the banks that notes held by the state bank, and guarantied by it, should be received by the national bank. Several purchases of notes had been made by the national bank under the agreement, and some notes had been selected by a committee, but the note in question did not appear in the list of those so purchased or selected. The note was made by a depositor in the state bank to satisfy an overdraft. The overdraft was satisfied on its books, and the note was credited to the state bank on the books of the national bank. It was held, that a judgment in favor of the national bank against the state bank, as guarantor of the note, on the ground that the note was originally given to the state bank, and transferred to the national bank pursuant to the agreement, would not be disturbed. DeSellem *v.* Iowa City Bank, 101 Iowa 566, 70 N. W. 702.

State bonds issued through bank.—Where a state made a loan on bonds issued by it through a bank, it was within the scope of the powers of the bank to guaranty the bonds. Dabney, etc., Co. *v.* Bank, 3 S. C. 124.

Bonds of railroad controlled by it.—The Central Railroad & Banking Company of Georgia, which was given by its charter full banking powers, which it exercised, had power thereunder to guaranty the bonds of a railroad company of which it owned a majority of the stock, where such guaranty was made for its own purpose and advantage. Central R., etc., Co. *v.* Farmers' Loan, etc., Co., 52 C. C. A. 149, 114 Fed. 263.

89. **Accommodation indorsement or guaranty.**—Central Bank *v.* Empire Stone Dressing Co. (N. Y.), 26 Barb. 23; Morford *v.* Farmers' Bank (N. Y.), 26 Barb. 568; Bacon, etc., Co. *v.* Farmers' Bank, 79 Mo. App. 406.

A bank, and therefore its cashier, has no authority to guaranty commercial paper or to become an accommodation indorser thereon, even though the party accommodated uses the money borrowed for the payment of a demand due the bank. Bacon, etc., Co. *v.* Farmers' Bank, 79 Mo. App. 406.

90. **Power to guarantee payment of draft.**—National Bank *v.* City Hall Bank, 9 O. Dec. 827.

91. **Obtaining, negotiating and guarantying mortgage loans.**—Kiggins *v.* Munday, 19 Wash. 233, 52 Pac. 855.

92. **Estoppel to deny liability.**—Bowen *v.* Needles Nat. Bank, 36 C. C. A. 553, 94 Fed. 925. See contra, as to national banks, Merchants' Bank *v.* Baird, 160 Fed. 642. See, also, Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125; National Bank *v.* Atkinson, 55 Fed. 465; People's Bank *v.* National Bank, 101 U. S. 181, 25 L. Ed. 907.

debt of another, is presumptively within its powers, and the legal presumption is that the bank and its officers have discharged their duty and acted within their powers. And where a bank in making a loan agreed with the loanee and one of the loanee's creditors to pay a debt of the former to the latter by delivering to the creditor its cashier's check and a note with some cash, and charge the amount against the loan, and the cashier's check only was delivered, it was held, upon the bank's repudiation of the whole transaction as ultra vires, that the cashier's check evidenced, not a guaranty of another's debt, but an original contract of the bank made to serve its own interest in consideration of its receipt of the commercial paper of the loanee or other adequate security for the repayment of that amount and interest.[93]

§ 100. Torts.[94]—Fraud Generally.—A bank may legitimately receive on deposit the moneys of a gambler, with reason to believe that it was won in gaming; but when, with knowledge that such depositor is obtaining the money by fraud, it acts in aid of the wrongful means by which the money is obtained, it is liable therefor.[95]

Deceit in Making False Statement as to Financial Condition of Customer.—If a bank, in order to increase its deposits or to sell its collateral, through its board of directors makes or causes to be made false statements concerning the financial condition of one of its customers, to a third person, for the purpose of misleading him, it is liable for deceit if loss results; or if, having made such statements, it conspires with its customer to make the same public, to accomplish the same purpose, it is liable to one who acts upon it to his injury.[96]

Liability for Negligence in Bidding on Bonds.—A firm dealing in bonds at Cleveland, Ohio, requested a bank at Victoria, Texas, to deposit $1,000 with a certain county board at that place, to protect the firm's bid on certain bonds, advertised for sale by the board. The bank complied with the request, but, before doing so, had notice of such facts as would have informed an ordinarily prudent person that there was a mistake in the bid,

93. **Cashier's check.**—Mine, etc., Supply Co. *v.* Stockgrowers' Bank, 98 C. C. A. 229, 173 Fed. 859.

94. **Torts.**—Wrongful acts of officers and agents, see post, "Wrongful Acts," § 112.

95. **Liability for money fraudulently obtained.**—Wright *v.* Stewart, 130 Fed. 905, affirmed in 77 C. C. A. 499, 147 Fed. 321.

Where a banking corporation, knowing that defendant B. and his associates were engaged in a confidence game, assisted in the furtherance of the scheme, both by representing to the victims as they were brought in that B. was a man of standing, entitled to credit, and by lending B. banking facilities, with which alone he was enabled to conduct his scheme and collect drafts, etc., drawn by the victims before payment could be stopped, and the officers of the bank themselves, with knowledge that the victims were to be defrauded, drew drafts for such victims, and telegraphed to other banks to ascertain the victim's responsibility, the bank as a corporation was liable as a party to the scheme, and an action will lie against the bank to recover back the money so obtained. Stewart *v.* Wright, 77 C. C. A. 499, 147 Fed. 321.

96. **Deceit in making false statement as to financial condition of customer.**—Judgment 86 Fed. 1013, reversed in Hindman *v.* First Nat. Bank, 39 C. C. A. 1, 98 Fed. 562, 48 L. R. A. 210.

and that the deposit would be of no avail to the firm. It was held that the loss, if any, should be borne by the bank.[97]

Nondisclosure to Heir of Ancestor's Deposit and Retention Thereof no Tort.—A banker is not liable in damages to the heir of a depositor because, though knowing that the heir had no knowledge of the deposit, he volunteered no information to the heir, but accepted her check on another bank in payment of a valid claim held by him against her as heir. There was no tort, and even a breach of contract would only have arisen upon the refusal, upon demand, to pay over the deposit.[98]

Malicious Prosecution—Wrongful Arrest.—A bank is not liable for the false arrest of a depositor which is not the proximate result of a breach of contract caused by the dishonoring of a check of the depositor.[99]

§ 101. Effect of Acts Ultra Vires[1]—§ 101 (1) In General.—Ultra vires acts, even where prohibited by statute without imposing any penalty or forfeiture, are not necessarily invalid as to private parties,[2] for the

97. **Liability for negligence in bidding on bonds.**—First Nat. Bank *v.* Hayes, 64 O. St. 100, 59 N. E. 893. See, also, post, "Effect of Acts Ultra Vires," § 101, as to liability for negligence in performing ultra vires act.

98. **Nondisclosure to heir of ancestor's deposit and retention thereof no tort.**—Hamilton *v.* Toner, 17 Ind. App. 389, 46 N. E. 921.

99. **Malicious prosecution—Wrongful arrest.**—A depositor in the W. bank drew his check for the amount of his deposit and forwarded it through the H. bank for collection with the understanding that he would not draw any cash on it until the check was reported paid. The check was reported paid, whereon the depositor checked out of the H. bank the amount thereof. Subsequently the H. bank was notified that the check had been dishonored by the W. bank for want of funds as shown by its books. The cashier of the H. bank reported the matter to the sheriff and county attorney, and the depositor was arrested for swindling. The check was dishonored because defendant bank had credited deposit by plaintiff to the wrong account. The arrest of the depositor was without the knowledge of the W. bank. After the arrest, the W. bank informed the officer holding the depositor that the check was dishonored for want of funds. The officer holding the depositor under arrest would have released him only on orders from the sheriff. It was held, that the W. bank was not liable for the false arrest of the depositor because the arrest was not the proximate result of the breach of the contract caused by the dishonoring of the check. Western Nat. Bank *v.* White (Tex. Civ. App.), 131 S. W. 828.

1. **Effect of acts ultra vires.**—Contracts and notes of persons engaged in unauthorized banking, see ante, "Validity of Transactions and Liabilities Incurred," § 9.

Effect of ultra vires discount or loan, see post, "Requisites and Validity of Loan or Discount," § 178.

National banks, see post, "Statutory Provisions," § 234; "In General," § 261 (1).

Savings banks, see post, "Powers in General," § 295.

Validity of security for notes illegally taken or issued by banks, see ante, "Bonds, Assignments and Negotiable Instruments," § 98.

With respect to contracts in general, see ante, "With Respect to Contracts in General," § 96.

As to liability of bank for acts of officers and agents, see post, "Estoppel to Deny Authority of Officers or Agent," § 113.

As to acquiring and holding property, see ante, "Acquisition and Holding," § 94 (1); "Right to Raise Question of Authority," § 95 (1b).

As to ultra vires loans, see post, "Power to Make Loans in General," § 176.

2. **Ultra vires acts not necessarily invalid.**—It has been held repeatedly that where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable

doctrine of ultra vires has no application in favor of banking corporations for wrongs committed by them.[3]

§ 101 (2) Rights Acquired by Bank.—While a bank derives no rights of any kind under action taken in express violation of its charter,[4] and the same is true where an act is declared by statute to be a misdemeanor, although not in express terms prohibited or declared void,[5] yet, where such action is not expressly prohibited, but merely unauthorized, the bank may acquire rights thereunder.[6]

to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties. Thompson *v.* St. Nicholas Nat. Bank, 146 U. S. 240, 36 L. Ed. 956, 13 S. Ct. 66, citing Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. Ed. 188; National Bank *v.* Whitney, 103 U. S. 99, 26 L. Ed. 443; First Nat. Bank *v.* Stewart, 107 U. S. 676, 27 L. Ed. 592, 2 S. Ct. 778; Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 35 L. Ed. 107, 11 S. Ct. 496. See Schuyler Nat. Bank *v.* Gadsden, 191 U. S. 451, 48 L. Ed. 258, 24 S. Ct. 129; Scott *v.* Deweese, 181 U. S. 202, 45 L. Ed. 822, 21 S. Ct. 585; McBroom *v.* Scottish Mortg., etc., Co., 153 U. S. 318, 38 L. Ed. 729, 14 S. Ct. 852; Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. Ed. 648; Fortier *v.* New Orleans Nat. Bank, 112 U. S. 439, 28 L. Ed. 764, 5 S. Ct. 234; Reynolds *v.* Crawfordsville First Nat. Bank, 112 U. S. 405, 28 L. Ed. 733, 5 S. Ct. 213; Lantry *v.* Wallace, 182 U. S. 536, 45 L. Ed. 1218, 21 S. Ct. 878.

As to certification of checks, see post, "Certified Checks or Notes," § 145.

As to national banks, see post, "In General," § 261 (1), et seq.

3. Ultra vires doctrine inapplicable.—First Nat. Bank *v.* Graham, 100 U. S. 699, 25 L. Ed. 750.

But a national bank may plead the nullity of an ultra vires act. California Bank *v.* Kennedy, 167 U. S. 362, 42 L. Ed. 198, 17 S. Ct. 831; First Nat. Bank *v.* Hawkins, 174 U. S. 364, 43 L. Ed. 1007, 19 S. Ct. 739.

The only penalty prescribed by banking act for ultra vires acts of a national bank, is a revocation of its charter. National Bank *v.* Whitney, 103 U. S. 99, 26 L. Ed. 443. See post, "Effect of Acts Ultra Vires," § 261, et seq.

Acts of officers and agents.—See post, "Grounds and Extent of Liability in General," § 102; "Estoppel to Deny Authority of Officer, or Agent," § 113.

Acceptance of special deposits without charter authority.—See post, "Grounds and Extent of Liability in General," § 102; "Estoppel to Deny Authority of Officers or Agent," § 113.

4. No rights acquired by bank under action prohibited by charter.—Davis *v.* Bank, Fed. Cas. No. 3,626, 4 McLean 387; Swindell & Co. *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13; Interstate Trust, etc., Co. *v.* Reynolds, 127 La. 193, 53 So. 520; Franklin Bank *v.* Commercial Bank, 36 O. St. 350, 38 Am. Rep. 594.

A bill drawn by a bank, in express violation of its charter, is void, and can not be set up by such bank in payment. Davis *v.* Bank, Fed. Cas. No. 3,626, 4 McLean 387.

Notes discounted contrary to charter.—Where a corporation was forbidden by charter to discount notes or exercise any banking privilege, it can not recover on a note so discounted. Philadelphia Loan Co. *v.* Towner, 13 Conn. 249.

Purchase of property contrary to law as exception.—See ante, "Right to Raise Question of Authority," § 95 (1b).

5. Action made criminal by statute.—Pinney *v.* First Nat. Bank, 68 Kan. 223, 75 Pac. 119.

6. Where action unauthorized, not expressly prohibited.—Neillsville Bank *v.* Tuthill, 4 Dak. 295, 30 N. W. 154; Metropolitan Trust Co. *v.* McKinnon, 172 Fed. 846; Miller *v.* National Bank, 4 Ky. L. Rep. 25; Barrow *v.* Bank, 2 La. Ann. 453; Farmers', etc., Bank *v.* Harrison, 57 Mo. 503; Gloversville Bank *v.* Burr (N. Y.), 27 Hun 109; Lechenger *v.* Merchants' Nat. Bank (Civ. App.), 96 S. W. 638, affirmed in 101 Tex. 646, no op.; Wroten *v.* Armat, 72 Va. (31 Gratt.) 228; Banks *v.* Poitiaux, 24 Va. (3 Rand.) 136, 15 Am. Dec. 706; Litchfield *v.* Preston, 98 Va. 530, 37 S. E. 6.

Recovery on note purchased without authority.—In an action by a banking corporation on a note, against the maker, it is no defense that the bank

§ 101 (3) Rights Acquired against Bank.—Notice of Limitations on Power.—One purchasing notes of a bank organized under a public law is chargeable with notice of the limitation fixed by the law on the power of the bank to issue the notes.[7] And it has been held that where a person sells bonds or stocks to a bank in the teeth of a positive prohibition of such purchases by the bank, the seller can not recover the price of the bank.[8] But

has no authority to purchase the note. Black *v.* First Nat. Bank, 96 Md. 399, 54 Atl. 88.

A bank may recover on a note purchased by it, though the transaction is ultra vires, if it appears to have been a "discount," within the usual acceptation of the term. Neillsville Bank *v.* Tuthill, 4 Dak. 295, 30 N. W. 154.

Where a bank indorsed a certain note for a commission, got it discounted, and, upon nonpayment by the maker, paid the note and had it reindorsed to itself, held, that the bank, having received the money thereon, was entitled as owner to maintain suit on the note, although its indorsement was ultra vires. Gloversville Bank *v.* Burr (N. Y.), 27 Hun 109.

Ultra vires transfer of note.—Generally, one who is not a party to a contract can not attack it as ultra vires, and the maker of a note transferred by one banking corporation to another (for the purpose of liquidating the affairs of the corporation originally named in the note as payee) can not defend in an action thereon on the ground that the contract whereby the note was transferred was ultra vires. Quinn *v.* First Nat. Bank, 8 Ga. App. 235, 68 S. E. 1010.

An accommodation indorser of a note, which has been transferred by the holder, an insolvent bank, to trustees, for the benefit of creditors, who afterwards renews the note in the hands of the trustees, can not question the power of the bank to transfer the note under the charter, for he was a debtor and not a creditor interested in the assets of the bank, and, as such, entitled to interfere. Housum *v.* Rogers, 40 Pa. 190.

Negotiation of water bonds—Recovery of profits.—The negotiation of water bonds by a bank, if ultra vires, is not malum in se, and can only be taken advantage of by the state. The cashier, through whom the contract was made, can not set it up in defense of an action by the bank to recover the profits of the transaction. Mt. Vernon Bank *v.* Porter, 52 Mo. App. 244.

Carrying on business purchased for self-protection.—The right of a bank to purchase under execution a stock of raw material for its protection, and continue the business of manufacturing, in the name of a trustee, can not be collaterally attacked; the ultra vires acts of the bank, which are voidable only, can only be impeached by the government. Lippincott *v.* Longbottom, 6 Pa. Co. Ct. Rep. 503. Ultra vires lease by bank, see ante, "Leases," § 95 (1e).

Ultra vires partnership, see ante, "Partnerships and Joint-Stock Companies," § 24.

Sales of land by one bank to another, see ante, "Disposal of Property," § 95 (2).

As to acquisition of stock contrary to law, see ante, "Purchasing and Holding Stock in Other Corporations," § 92.

7. Rights acquired against bank—Notice of limitation on power.—Root *v.* Wallace, Fed. Cas. No. 12,039, 4 McLean 8.

There can be no recovery on the notes against the bank, nor can the notes or their contracts be received in evidence to support an action by the indorsee against the indorser. Root *v.* Wallace, Fed. Cas. No. 12,039, 4 McLean 8.

8. Sale of bonds or stocks against positive prohibition.—Where a bank is authorized by law to purchase stocks necessary for deposit as security for its circulating notes, and all other purchasers are declared to be invalid, a person who sells bonds to the bank is bound to know the purpose for which the bank is buying them, and can not recover the price if the contract is prohibited. Tracy *v.* Talmage (N. Y.), 2 Edm. Sel. Cas. 467.

Banking associations have no other authority than to carry on the business of banking, and therefore, when such an association buys state stocks to sell again, and this is known to the vendor, and gives for them its certificates of deposits, and assigns mortgages as security for the payment thereof, such transaction being illegal,

under the statutes of New York prohibiting a banking institution from issuing a draft payable at a future time, where money is advanced upon such a draft, in good faith, by a corporate body of another state, who are not presumed to have notice of such statutes, they are entitled to recover the same back; the money thus advanced being considered as having been paid without consideration.[9]

Prohibitory Statute Not Retroactive.—Where a banking association, being indebted to its agent abroad, executed bonds payable in England at a future time, and secured by an assignment of certain property in trust, and prior to the date when a statute forbidding banks to issue notes or bills payable at a future time, took effect, transmitted the bonds to the agent, to be sold in order to protect the existing indebtedness of the association, and to secure future advances by its agents, and, until such sale, to be held in pledge for the same purposes, it has been held, that such of the bonds as had been delivered by the pledgees to creditors of the company as security for a pre-existing debt were valid in the hands of such creditors.[10]

Estoppel to Plead.—Where a contract between a national bank and another party has been fully performed, and the bank has received a benefit from such performance, it is held estopped to plead that the contract is ultra vires as being in excess of its charter powers.[11]

the assignment of the mortgages is void. Talmage *v.* Pell, 7 N. Y. 328.

And the bank, or a receiver thereof, may set up the bank's want of authority to enter into such transaction to impeach the mortgages, as the express grant of the power to deal in certain kinds of personal property and evidences of debt is a prohibition of a general power of trading in stocks. Talmage *v.* Pell, 7 N. Y. 328.

Where, upon the deposit of money in a bank, the depositor received a book containing the cashier's certificate thereof, stating that the deposit was to remain for a certain time, it was held that such agreement was illegal and void, under Rev. St., c. 36, § 57, prohibiting contracts by banks for the payment of money at a future day certain, and that no action could be maintained against the bank upon such express contract. White *v.* Franklin Bank (Mass.), 22 Pick. 181.

But the money might be recovered in an action commenced before the expiration of the time named, without any previous demand, the parties not being in pari delicto and the action being in disaffirmance of the illegal contract. White *v.* Franklin Bank (Mass.), 22 Pick. 181.

9. **Recovery of money advanced in good faith as paid without consideration.**—Bank *v.* Dodge (N. Y.), 8 Barb. 233.

10. **Prohibitory statute not retroactive.**—Curtis *v.* Leavitt, 15 N. Y. 9, construing a New York Act of 1840.

11. **Estoppel to plead.**—First Nat. Bank *v.* Greenville Oil, etc., Co., 24 Tex. Civ. App. 645, 60 S. W. 828.

A bank after receiving property contracted for by its president, while enjoying the fruits of the transaction, can not be absolved from the performance of its obligation to others assumed by its officers as a means of getting possession of the property, on the plea that its acts were ultra vires. Panhandle Nat. Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23.

A bank acting in connection with the payee of certain notes, and sharing the profits arising from the transaction in which they were given, is estopped from denying its power to contract such partnership relation, when attempting to reap the benefits arising therefrom by enforcing the collection of the notes through the courts. Gill *v.* First Nat. Bank (Tex. Civ. App.), 47 S. W. 751.

Where a bank solicits deposits from another bank and agrees to pay two per cent per annum on daily balances, it will not, after receiving and retaining such deposits for several months, be allowed to repudiate the contract

Recovery on an Assumpsit.—Recovery has been allowed upon an assumpsit on the ground that, although the security be void, yet the transaction is only forbidden as to the bank and not as to the other party.[12]

Recovery by Party without Notice of Irregularities or Want of Authority.—Where persons have been induced to lend money, or part with valuable securities, on the notes of a bank, which on their face appear to be within the legitimate business of banking, such persons ought to be protected by a court of equity.[13]

and refuse to pay the interest merely because one of its managing officers was common to both. City Nat. Bank *v.* Merchants', etc., Nat. Bank (Tex. Civ. App.), 105 S. W. 338

12. Recovery on an assumpsit.—One who receives a postdated draft issued by a banking association, taking effect upon delivery, in consideration of a loan made by him, can recover the amount on an assumpsit, even though the security be void, because the statute only forbids the bank to issue, and not the lender to receive, such drafts. Oneida Bank *v.* Ontario Bank, 21 N. Y. 490.

And the transferee of a draft, void as above, succeeds to the payee's right of action against the drawer. Oneida Bank *v.* Ontario Bank, 21 N. Y. 490.

Money received under ultra vires contract never performed.—Where money is deposited with the cashier of a bank under an agreement that it shall be invested by the bank in bonds and stocks, the bank is liable for the return of the money, no investment having been made, though the agreement for its investment by the bank was ultra vires. L'Herbette *v.* Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354. See, also, White *v.* Franklin Bank (Mass.), 22 Pick. 181, for right to recover deposit made under illegal contract. See this case, set out supra.

Liability for proceeds of illegal sale of bonds.—A bank holding funds, the proceeds of bonds sold by it for a customer, must account to him therefor, although a sale of bonds by it was unlawful. Smith *v.* Philadelphia Nat. Bank (Pa.), 34 Leg. Int. 86.

13. Recovery by party without notice of irregularities or want of authority.—Leavitt *v.* Yates (N. Y.), 4 Edw. Ch. 134; Safford *v.* Wyckoff (N. Y.), 4 Hill 442.

In ultra vires cashier's check.—Where a national bank issues its cashier's check to a county treasurer, who is short in his official accounts, to enable him to make a settlement with the county, and the check is turned over to the county commissioners, who deposit it with another bank in regular course of business without notice of irregularities in its issue, in an action by the latter bank on the check the bank which issued the check can not assert a want of power to issue it, nor the existence of any fact that might be a defense as between itself and the county treasurer in his individual capacity. Sioux Falls Nat. Bank *v.* First Nat. Bank, 6 Dak. 113, 50 N. W. 829.

The bank with which the same is deposited in the regular course of business, and which has no notice of irregularities, is entitled as a matter of law to a verdict in an action thereon. Sioux Falls Nat. Bank *v.* First Nat. Bank, 6 Dak. 113, 50 N. W. 829.

Loans in excess of limit.—One lending money to a bank limited by its articles of incorporation to the borrowing of money not in excess of a specified sum, to an amount less than the specified sum, without having reason to know that the limit has been exceeded by other loans made to it when added to the loan made, is not affected by the limitation in the articles. Citizens' Bank *v.* Bank, 31 Ky. L. Rep. 365, 103 S. W. 249.

Liability for general deposit received after powers ended.—Where a statute, provides that any bank which may desire to close the business of circulating its bills may file a certificate of the fact with the auditor. Section 4 provides that, after filing such certificate, the bank shall cease to do any banking business, or to have any banking powers except to wind up its concerns, collect and pay debts, and to sue and be sued for such debts, it was held, that where a bank, after filing such certificate, accepts a deposit from one who has no notice of the certificate, such depositor's right to recover against the bank is not affected

Liability Incurred Where Action Merely Ultra Vires, Not Prohibited.—As between a bank and those who contract with it in an unauthorized business, the new enterprise would become a part of its appropriate business, in the conduct of which it would be liable for the acts of its agents.[14]

Particularly Where the Transaction Has Been Fully Performed by the Other Party.—Where a contract was not immoral, was fully performed by the other party, and the bank received and retained the benefits, the plea of ultra vires is unavailing.[15]

by section 4. Northern Bank *v.* Zepp, 28 Ill. 180, construing Illinois statute.

Liability for special deposits received without authority.—Notwithstanding the act of incorporation gives no authority to a bank to receive special deposits, and although there is no regulation in its by-laws relative to such deposits, yet where they are regularly received, with the knowledge of the directors, the bank, and not its agents, will incur the liabilities of bailee. Foster *v.* Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.

14. Liability incurred where action merely ultra vires, not prohibited.—Hagerstown Bank *v.* Loudon Sav. Fund Soc. (Pa.), 3 Grant Cas. 135.

Unauthorized issue of negotiable paper.—Where an association having no authority, under the general banking law, to issue negotiable paper, nevertheless issues the same in ordinary form, it will be binding on the association in favor of a bona fide indorsee, and this notwithstanding it be signed by the cashier only. Safford *v.* Wyckoff (N. Y.), 4 Hill 442, reversing 1 Hill 11.

Semble that a negotiable note or bill of exchange, though given by a banking corporation having only an incidental right of issuing such paper in certain special cases, must be presumed to have been legally issued until the contrary appear. Safford *v.* Wyckoff (N. Y.), 4 Hill 442.

It seems that it would be otherwise, however, as between the association and one not occupying the position of a bona fide holder, if it appeared that the draft or bill was issued by way of loan, or for the purpose of being put in circulation as money. Safford *v.* Wyckoff (N. Y.), 4 Hill 442.

How far these associations may, as incidental to the general powers expressly conferred on them by statute, issue negotiable paper, without the sanction of the comptroller; e. g., for the payment of their debts, the transfer of their funds, etc., is discussed and considered in Safford *v.* Wyckoff (N. Y.), 4 Hill 442. See, also, ante, "Power to Make and Issue," § 98 (2a), as to power to make and issue negotiable instruments.

Liability on subscription to stock in another bank.—The defense of ultra vires is not open to a bank against a liability in subscribing to the stock of another bank, when the contract has been fully executed by the other bank, and is not malum in se or malum prohibitum. City of Goodland *v.* Bank, 74 Mo. App. 365.

15. Transaction fully performed by other party.—Tootle *v.* First Nat. Bank, 6 Wash. 181, 33 Pac. 345, citing 2 Morse on Banks, § 740.

A bank receiving from a debtor property valued at much more than the debt, under an agreement by its officers to pay the surplus to other creditors of the debtor, can not set up the defense of ultra vires in an action by the creditor to recover his share of the surplus. Tootle *v.* First Nat. Bank, 6 Wash. 181, 33 Pac. 345.

While an arrangement between the cashier of a bank and a depositor, whereby the bank was to pay the latter's overdraft for stock purchased, covering the same by passing the draft on to the commission company to which the stock was shipped, was in excess of the charter powers given banks by Rev. St. 1899, c. 12, art. 8, yet, when executed by the drawing of checks and the giving of drafts for an amount sufficient to cover the checks, it would be upheld and enforced by the courts. York *v.* Farmers' Bank, 105 Mo. App. 127, 79 S. W. 968.

An ultra vires contract whereby a banking institution agreed to sell plaintiff's stock within a year for a certain sum, and pay such sum to plaintiff, which does not appear to be illegal, immoral, or against public policy, and

Liability on Ground of Negligence.—Where the premium on the mortgagor's life insurance is included in the mortgage as a part of the principal, and the mortgagee neglects to keep the policies alive, he himself becomes the insurer; and if the mortgagee is a bank, and can not be an insurer for want of power, it may be held liable on the ground of negligence.[16]

Liability on Collateral Contract.—The fact that a bank's charter prohibited the loan of moneys on stocks and other personal securities will not avoid a pledge of stock so as to defeat the action of a broker who was employed by the bank to sell the stock.[17]

which is fully performed by plaintiff, can not be repudiated by the bank. Gause *v.* Commonwealth Trust Co., 44 Misc. Rep. 46, 89 N. Y. S. 723, case reversed in 100 App. Div. 427, 91 N. Y. S. 847, on ground that the complaint was insufficient.

Where a bank has received the proceeds of a sale of bonds held by it for speculative purposes, effected by means of fraud on the part of its managing officer, it can not avoid liability for his fraud on the purchaser on the ground that its business of buying and selling bonds was ultra vires. Judgment, 23 Misc. Rep. 368, 52 N. Y. S. 61, affirmed. Carr *v.* National Bank, etc., Co., 43 App. Div. 10, 59 N. Y. S. 618, judgment affirmed in 167 N. Y. 375, 60 N. E. 649, 82 Am. St. Rep. 725.

16. Liability on ground of negligence.—Soule *v.* Union Bank (N. Y.), 45 Barb. 111. See, also, ante, "Torts," § 100, as to torts generally.

17. Liability on collateral contract.—Sistare *v.* Best, 88 N. Y. 527.

CHAPTER VIII.

B. Representation of Bank by Officers and Agents.

§ 102. Grounds and Extent of Liability in General.
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- § 102 (3) Manner of Prescribing Powers and Duties.
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- § 102 (5) Representative Capacity of Particular Officers Considered.
  - § 102 (5a) Directors.
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§ 103. Statutory Provisions.

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- § 104 (7) Acquisition of Property by Officers for Bank.

§ 105. Contracts.
- § 105 (½) General Principles.
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§ 106. Deposits.
- § 106 (1) In General.
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§ 108. Loans and Discounts.
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§ 108 (5) Cashier.
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B. REPRESENTATION OF BANK BY OFFICERS AND AGENTS.

§ 102. Grounds and Extent of Liability in General—§ 102 (1) General Principles upon Which Bank Held Liable to Third Persons.—Banking corporations are subject to the general principles which govern the relation of principal and agent as between individuals, and like individuals they must be held to a just responsibility for the acts of their agents done

within the scope of their authority, real or apparent, and for their frauds and torts perpetrated in the performance of or connected with the business of their agency, observing, of course, the difference as to the manner in which the corporation acts, and taking into consideration the fact that it can act only through its officers and agents.[1] The officers and agents of a bank are held out to the public as having authority to act according to the general usage, practice, and course of their business, and their acts within the scope of such usage, practice and course of business, will, in general, bind the bank in favor of third persons having no knowledge and charged with no notice to the contrary. The presumption is that they have been invested with all the authority customarily exercised by such officers and agents, and all their acts within the scope of such usage, practice, and course of business will bind the bank in favor of third persons having no knowledge to the contrary.[2] Stating the proposition conversely, banking corporations, like natural persons, are, in general, bound by the acts and contracts of their agents only when such agents are acting within the scope of their actual authority, or when such acts and contracts are within the general scope and apparent sphere of their duties. For acts and contracts not within the general scope and sphere of the agent's duties, the bank is not liable unless there has been a previous special authority or a subsequent ratification.[3]

When Bank Bound by Acts and Contracts beyond Apparent Scope of Agent's Authority.—Under some circumstances, the bank may be bound upon the acts and contracts of its agents even though they go beyond the

1. **General principles upon which bank held liable to third persons.**—Goddspeed *v.* East Haddam Bank, 22 Conn. 530; Sturges & Co. *v.* Bank, 11 O. St. 153, 78 Am. Dec. 296; Wheless *v.* Second Nat. Bank, 60 Tenn. (1 Baxt.) 469; Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 30 Tenn. (11 Humph.) 1; Jackson Ins. Co. *v.* Cross, 56 Tenn. (9 Heisk.) 283.

2. **Authority of officer or agent—Presumption—Notice.**—Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47; Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695; Creswell *v.* Lanahan, 101 U. S. 347, 25 L. Ed. 853; United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130; United States *v.* Robertson (U. S.), 5 Pet. 641, 8 L. Ed. 257, per Baldwin, J., dissenting. Bank *v.* Jones (U. S.), 8 Pet. 12, 8 L. Ed. 850; Bank *v.* Dandridge (U. S.), 12 Wheat. 64, 6 L. Ed. 552; National Bank *v.* Atkinson, 55 Fed. 465; Rich *v.* State Nat. Bank, 7 Neb. 201, 29 Am. Rep. 382; Thomas *v.* City National Bank, 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263; Eastman *v.* Coos Bank, 1 N. H. 23; Lloyd *v.* West Branch Bank, 15 Pa. 172, 53 Am. Dec. 581; Neiffer *v.* Bank, 38 Tenn. (1 Head) 162.

3. **Acts must be within real or apparent scope of authority.**—National Bank *v.* Atkinson, 55 Fed. 465; Reed *v.* Powell (La.), 11 Rob. 98; State *v.* Commercial Bank (Miss.), 6 Smedes & M. 218, 45 Am. Dec. 280; Jones *v.* First Nat. Bank, 3 Neb. (Unof.) 73, 90 N. W. 912; Rich *v.* State Nat. Bank, 7 Neb. 201, 29 Am. Rep. 382; Thomas *v.* City Nat. Bank, 40 Neb. 501, 58 N. W. 943, 24 L. R. A. 263; Bank *v.* Hooke, 41 Tenn. (1 Coldw.) 156; Northern Bank *v.* Johnson, 45 Tenn. (5 Coldw.) 88; Neiffer *v.* Bank, 38 Tenn. (1 Head) 162.

The powers and duties of bank officers being defined by its charter and by-laws, they will, when acting within their sphere, represent the corporation, and bind it by their acts; but in other matters they can only represent or act for it when authorized by a resolution of the board of directors. Reed *v.* Powell (La.), 11 Rob. 98.

Acts of a bank officer outside the usual scope of his authority in a matter to which the bank is not a party and of which it had no notice are not binding on the bank. Jones *v.* First Nat. Bank, 3 Neb. (Unof.) 73, 90 N. W. 912.

usual and apparent scope of the duties ordinarily incident to the position, as where it has allowed a cashier or other officer to exercise a general authority for a considerable length of time in respect to the business of the bank which would not ordinarily come within the scope of his duties as such cashier or agent. Nor is there any incongruity or departure from general principles in this, since it is merely the application of the very general principle that as regards third persons the officers and agents must be deemed clothed with whatever powers the bank has held them out as possessing in the same degree as if the authority had been expressly granted.[4] But where, under the general statutes or under the act of incorporation, the general management of the business of the bank and the interests of the shareholders is confided to the board of directors, with power to them to elect or appoint the president and cashier and define their duties, it will be presumed, in the absence of anything in the act of incorporation to the contrary, and in the absence of anything in the record to show whether such duties have ever been defined, that the president and cashier are clothed with only such powers as are usually and ordinarily incident to their respective offices, and that all other powers needful to the management of the bank and its business reside in the board of directors alone;[5] and in order that the circumstances of a particular case may be sufficient to raise a presumption of authority in a president, cashier, or other agent to bind the bank in matters beyond the scope of his usual authority, it must be shown that his act was in some way authorized by the board of directors, or that the bank was in some manner a party to the circumstances, or chargeable with knowledge of them.[6] If the transaction itself is not in the usual course of business or is one which required specific authority on the part of the cashier or other agent to perform it, the person dealing with him will be required to show either that he, in fact, had authority to do the act, or that he was held out as having it; otherwise, it will be held to have been done without authority.[7]

Same—Ultra Vires Acts.—Of course, if the act done by the cashier or other officer is such that the directors, under the charter and general laws of the state, could not confer upon him the power to do, or such an act as the

4. **When bound upon acts beyond apparent scope of agent's duties.**—Sherwood *v.* Home Sav. Bank, 131 Iowa 528, 109 N. W. 9; Wing *v.* Commercial, etc., Bank, 103 Mich. 565, 61 N. W. 1009; Tourtelot *v.* Whithed, 9 N. Dak. 407, 84 N. W. 8.

Where the members of the board of directors of a bank have for months ceased to exercise the functions of their offices, and have abandoned the management and control of the corporate business entirely to the president of the bank, it will be presumed that such officer was authorized to do, in the name of the bank, whatever the bank might lawfully do, and no special authorization or ratification of his acts need be shown. Tourtelot *v.* Whithed, 9 N. Dak. 407, 84 N. W. 8.

5. **President and cashier presumed to have only powers ordinarily incident to position.**—Hodge *v.* First Nat. Bank, 63 Va. (22 Gratt.) 51. To the same effect, see Neiffer *v.* Bank, 38 Tenn. (1 Head) 162; Northern Bank *v.* Johnson, 45 Tenn. (5 Coldw.) 88.

6. **Same—Circumstances raising presumption of authority in matters beyond ordinary scope of duties.**—Wheat *v.* Bank, 9 Ky. L. Rep. 738, 5 S. W. 305; Ex parte Rickey, 31 Nev. 82, 100 Pac. 134.

7. **Same—What third person required to show.**—Lamb *v.* Cecil, 28 W. Va. 653.

directors themselves could not do, then no such authority could be presumed, no matter if it were shown that the officer habitually exercised such powers.[8] Persons dealing with the bank are bound to take notice of all restrictions upon the powers of its officers and agents contained in its charter or in the general statutes;[9] and while the public is not supposed to have notice of the apportionment of duties relating to bank matters among the bank officers,[10] it is presumed to know the extent of the general powers of a cashier.[11]

Operation of Restrictions upon Agent's Apparent Powers.—If the bank undertakes to restrict the powers of an officer or agent so that he does not possess all the power ordinarily incident to his position, such restriction, in order to be available as against third persons, must be brought to their notice. In other words, as to them, the rule is that where the agency or authority is special and limited, they must ascertain its existence and extent; but where the agent is held out as being possessed of certain powers or occupies a position to which certain powers are usually and ordinarily incident, then they have the right to rely upon the presumption that he actually has the authority which he is held out as having, or which would ordinarily be implied from his occupancy of such position, and they are not affected by any secret restrictions of which they have no notice.[12]

8. Ultra vires acts.—First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Hodge *v.* First Nat. Bank, 63 Va. (22 Gratt.) 51.

This was the case in Hodge *v.* First Nat. Bank, 63 Va. (22 Gratt.) 51, Judge Moncure there saying: "The directors of a bank can not release without consideration a debt due the bank; and a fortiori they can not empower the president so to do." First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

But see Hagerstown Bank *v.* Loudon Sav. Fund Soc. (Pa.), 3 Grant Cas. 135, in which it was held that acts of the cashier of a bank in pursuance of authority from the board of directors, although in violation of the law of its existence, bind the bank.

9. Same—Third persons bound with notice of charter restrictions.—Northern Bank *v.* Johnson, 45 Tenn. (5 Coldw.) 88; Neiffer *v.* Bank, 38 Tenn. (1 Head) 162.

10. Notice of third persons as to apportionment of duties among officers.—City Nat. Bank *v.* Martin, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632.

11. Presumption as to knowledge of extent of duties of cashier.—Farmers', etc., Bank *v.* Troy City Bank (Mich.), 1 Doug. 457.

12. Operation of restrictions upon agent's apparent powers.—Merchants' Nat. Bank *v.* State Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; First Nat. Bank *v.* First Nat. Bank, 116 Ala. 520, 22 So. 976; Citizens' Bank *v.* Bank, 31 Ky. L. Rep. 365, 103 S. W. 249; State *v.* Commercial Bank (Miss.), 6 Smedes & M. 218, 45 Am. Dec. 280; Caldwell *v.* Nat. Mohawk Valley Bank (N. Y.), 64 Barb. 333; Tourtelot *v.* Whithed, 9 N. Dak. 407, 84 N. W. 8; Citizens' Sav. Bank *v.* Blakesley, 42 O. St. 645; Hodge *v.* First Nat. Bank, 63 Va. (22 Gratt.) 51.

A cashier's act within the scope of the ordinary course of business is binding upon the bank, though he was acting beyond the scope of the express authority conferred by it. First Nat. Bank *v.* First Nat. Bank, 116 Ala. 520, 22 So. 976.

A bank may restrict the authority of its cashier, and, when this is done, it is bound to those having notice, actual or constructive, of the restriction, to the extent of the cashier's actual authority. Citizens' Bank *v.* Bank, 31 Ky. L. Rep. 365, 103 S. W. 249.

The acts of a cashier of a bank are only binding upon the bank when he acts within the sphere of his agency. If there be no express regulation or restriction, all acts which appertain to his office will affect the bank; if he be restricted or limited, his acts in violation of the restriction, or beyond the limit, will not be the acts of the bank. State *v.* Commercial Bank (Miss.), 6 Smedes & M. 218, 45 Am. Dec. 280.

In all transactions in which a bank

Presumption as to Existence of Circumstances Authorizing Contract.—If the contract is within the authority of the officers, and would be valid and bind the bank under any circumstances, an innocent party has a right to presume the existence of such circumstances, and the bank is estopped to deny them.[13] This implies that those dealing with a bank in good faith have the right to presume not only the existence of the authority which would ordinarily be implied from a previous course of dealing and holding out, but integrity on the part of its officers when acting within the apparent sphere of their duties, and the bank is bound accordingly, there being nothing in the known state of affairs of the bank or his relations to it to excite suspicion.[14] Conversely, the cashier or other agent is bound on his part to act in good faith in the transaction of the business of the bank, and those who deal with him are affected by any bad faith or want of authority of which they have knowledge.[15] But where the validity of the transaction depends upon whether the person dealing with the bank through its agents had actual knowledge of their want of power or good faith, it is to be judged by what such person knew at the time of the original transaction, and not by knowledge acquired subsequently, but before he undertook to renew or secure the evidence of the obligation arising out of such transaction.[16]

Province of Court and Jury as to Existence and Scope of Powers.—The extent of the general authority of the cashier of a bank is a question of

may lawfully engage, the cashier is its managing agent, and speaks for the corporation. A verbal understanding between him and the directors will not avail to limit his authority, when his acts are performed over the counter of the bank, and are of a public character, and numerous and long-continued. In such a case it is reasonable to presume that his acts are in conformity with the instructions of the directors; and, if the directors, either through inattention or otherwise, suffer the cashier to pursue a particular line of conduct for a considerable period, without objection, the bank will be bound by his acts. Caldwell *v.* National Mohawk Valley Bank (N. Y.), 64 Barb. 333.

13. **Presumption as to existence of circumstances authorizing contract.**—Citizens' Sav. Bank *v.* Blakesly, 42 O. St. 645.

14. **Same—As to integrity of officer or agent.**—Chemical Nat. Bank *v.* Armstrong, 76 Fed. 339; Armstrong *v.* Chemical Nat. Bank, 27 C. C. A. 601, 83 Fed. 556, affirmed in Aldrich *v.* Chemical Nat. Bank, 176 U. S. 618, 44 L. Ed. 611, 20 S. Ct. 498; Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

15. **Third persons affected by bad faith or want of authority of which they have knowledge.**—Lamb *v.* Cecil, 28 W. Va. 653.

The fact that a lender of money to a bank, through its cashier, held a majority of the bank's stock as collateral security for a loan to the cashier, did not apprise the lender that there were no directors or that the stockholders were taking no interest in the management of the bank, and the bank was liable for the amount of the loan. Citizens' Bank *v.* Bank, 31 Ky. L. Rep. 365, 103 S. W. 249.

16. **Same—As dependent upon time of acquisition of knowledge.**—Citizens' Bank *v.* Bank, 31 Ky. L. Rep. 365, 103 S. W. 249.

The validity of transactions resulting in the making of a loan to a bank and receiving its notes as collateral security must be judged by what the lender knew when it lent the money in the first instance, and not by what it learned afterwards and before it took a renewal note. Citizens' Bank *v.* Bank, 31 Ky. L. Rep. 365, 103 S. W. 249.

law;[17] but whether the cashier was authorized to exercise a particular power not coming within the general scope of his duties, or whether, as to third persons, he was held out as having authority to exercise certain powers in any given case, is a question for the jury.[18]

Must Have Been Representing Bank—Officers in More than One Bank or Corporation.—In order that the bank may be bound by the acts, contracts, or knowledge of its officers and agents, they must have been representing the bank in the transaction in which such act or contract was done or made, or in which such knowledge was acquired. In other words, a bank is not bound by any act nor chargeable with the knowledge of any of its officers or agents, unless such act be done or such knowledge be acquired by such officer or agent while acting in his official or representative capacity.[19] Thus a person can not deal with the cashier as an individual in securing a draft and thereafter claim that it was a transaction with the bank;[20] and a payment made to the president of a bank, outside the usual course of business, which the bank does not receive, and from which it derives no benefit, is not a payment that binds the bank.[21] As a general rule, acts done by an officer of a bank away from its place of business, and not authorized or ratified, are not binding upon it.[22] And where such officer or agent is acting adversely to the bank, either in the furtherance of

17. **Province of court and jury as to existence and scope of powers.**—Peninsular Bank *v.* Hanmer, 14 Mich. 208; Farmers', etc., Bank *v.* Troy City Bank (Mich.), 1 Doug. 457.

18. **Same—As to existence of special authority.**—Merchants Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

Upon the subject of the authority of the cashier of a bank to make a purchase of gold, if the certificates and the gold actually went into the said bank, as was admitted by its cashier to the president of the plaintiff bank, then the former bank was liable for money had and received, whatever may have been the defect in the authority of the cashier to make the purchase, and this question should have been submitted to the jury. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

It should have been left to the jury to determine whether, from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred that the cashier had authority to bind the defendant by the contract which he made with the plaintiff bank. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

"All the evidence relevant to the acts and authority of the cashier, either inherent and exercised strictly virtute officii, or as an agent, general or special, of the bank, under either the authority of its charter or by its by-laws, and proof, if any, of the ratification or rejection by the bank of this or of similar acts of the cashier, should have been fully brought out, to be passed upon by the jury under instructions from the court, or in the mode of a certificate of division, in the event of a disagreement between the judges." United States *v.* City Bank (U. S.), 19 How. 385, 15 L. Ed. 662.

19. **Must have been representing bank—Officers in more than one bank or corporation.**—Franklin Bank *v.* Commercial Bank, 5 O. Dec. 339.

20. **Dealing with officer in individual capacity.**—Campbell *v.* Manufacturers' Nat. Bank, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438.

21. **Payment to president outside usual course of business.**—Tulley *v.* Citizens' State Bank, 18 Ind. App. 240, 47 N. E. 850.

22. **Acts done away from place of business.**—Jones *v.* First Nat. Bank, 3 Neb. (Unof.) 73, 90 N. W. 912; Merchants' Bank *v.* Rudolph, 5 Neb. 527.

his own interests or as the representative of third persons with respect to the immediate business in hand, the bank is not bound either by his knowledge or his acts.[23] This doctrine extends to negligence, acts of omission, and acts of positive misfeasance, as well as to matters ex contractu, the bank not being liable for the negligence or misfeasance of an officer who does not act as the agent of the bank in the particular transaction complained of.[24] The bank is not chargeable with notice of the fraudulent act of its employee, outside the scope of his authority, and in furtherance of his personal designs, for the sole reason that he is an employee.[25] While the knowledge of the agent is ordinarily imputed to the principal, it is well established that an exception exists in those cases where the conduct of the agent is such as to raise a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent is engaged in perpetrating.[26]

Officers of National Banks Must Act in Their Capacity as Officers.—The liabilities for which a national bank must respond are such only as are created or incurred by its officers, acting in the capacity of officers of the bank alone, and not in connection with other trustees or officers of other

23. Officer acting collusively or adversely to bank.—Burris *v.* Bank, 70 Mo. App. 675; Jones *v.* First Nat. Bank, 3 Neb. (Unof.) 73, 90 N. W. 912.

Where a depositor authorized the cashier to draw a check in his name for a certain amount, upon the delivery to him of certain deeds to real estate, and the check was drawn and paid by the cashier before the condition was complied with, the bank is not liable to the depositor, the cashier being the agent of the depositor in drawing the check. Burris *v.* Bank, 70 Mo. App. 675.

A cashier of a banking corporation who takes an acknowledgment of a lease on property on which the bank has a lease does not act for the bank, but only in his official capacity as notary. People's Bank *v.* Bennett, 159 Mo. App. 1, 139 S. W. 219.

24. Doctrine extends to negligent and tortious acts.—Jones *v.* First Nat. Bank, 3 Neb. (Unof.) 73, 90 N. W. 912; Thatcher *v.* Bank, 7 N. Y. Super. Ct. 121.

25. Bank not chargeable with notice of fraudulent acts outside scope of duty.—Louisville Trust Co. *v.* Louisville, etc., R. Co., 22 C. C. A. 378, 75 Fed. 433; School Dist. *v.* DeWeese, 100 Fed. 705; City Elect. St. R. Co. *v.* First Nat. Bank, 65 Ark. 543, 47 S. W. 855; First Nat. Bank *v.* Bevin, 72 Conn. 666, 45 Atl. 954; Innerarity *v.* Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; State Sav. Bank *v.* Montgomery, 126 Mich. 327, 85 N. W. 879; Graham *v.* Orange County Nat. Bank, 59 N. J. L. 225, 35 Atl. 1053.

26. Same.—Innerarity *v.* Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; Jones *v.* First Nat. Bank, 3 Neb. (Unof.) 73, 90 N. W. 912.

Thus, an assistant cashier knowing that there had been on deposit to plaintiff's credit for some time a considerable sum of money, of which deposit plaintiff was entirely ignorant, entered into a plot with a third person, whereby it was represented to plaintiff that he had a claim against the bank of some nature, and negotiations were entered into with the result that plaintiff, for a small consideration, was induced to sign a paper whose nature and purport he did not understand, but which proved to be a check for the entire amount, which check the assistant cashier and his co-conspirator cashed and divided the proceeds between them. It was held that the assistant cashier did not represent the bank in such transaction, and that the bank was not liable even though he had taken advantage of what he had learned in its employment for the furtherance of his own fraudulent designs to his personal gain. Jones *v.* First Nat. Bank, 3 Neb. (Unof.) 73, 90 N. W. 912.

companies. Were it otherwise, the other trustees or officers might outnumber the officers of the bank, and impose burdens on the bank which would ruin it; and thus the bank would be controlled, not by its officers, but by outsiders. The officers of a bank can not delegate their powers to others. It is clear, therefore, that a national bank can not be a partner in a copartnership, and can not incur a partnership liability.[27]

§ 102 (2) Power of Directors to Define and Fix Duties.—When the act of incorporation contains no regulations as to the duties of the cashier or other officers, it rests with the directors to prescribe their duties.[28]

§ 102 (3) Manner of Prescribing Powers and Duties.—The provisions of a charter and the by-laws of a bank, requiring the directors to prescribe the duties of its officers, and the further provision of the charter that the directors shall keep a book, "in which shall be entered and faithfully recorded a journal of all their proceedings," are merely directory; and the prescription of certain duties of the cashier by the board of directors may be presumed from the acts of the board and of the cashier, and need not be established by order, resolution, or vote, recorded in the journals.[29] There is nothing in the word "prescribe" indicative of a written rather than an oral prescription. The words "mark out," or "assign," would convey the same meaning; and one of the words no more imports a written prescription than the other. The prescription of duty need not necessarily be in writing, in the form of an order, resolution or vote, spread on the journal, nor in any other particular form.[30] A cashier, by assuming and performing certain duties in connection with his office, estops himself from denying that they have been prescribed by the board of directors.[31] As to third persons the authority of a bank officer need not be proven by showing that it was expressly conferred by the board of directors, but may be proven by showing the existence of such facts as constitute clearly a public holding out that the particular act done or contract entered into was within the scope of his legitimate delegated authority.[32] The inference that such authority has been impliedly conferred may be legitimately drawn by proving that he was in the habit of doing acts or working contracts of the same general character as the particular act or contracts which he has done or

27. **Officers of national banks must act in their capacity as officers.**—Merchants' Nat. Bank *v.* Wehrmann, 69 O. St. 160, 68 N. E. 1004.

28. **Duties fixed by directors.**—United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130; Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631. See, also, Baldwin *v.* Bank, 1 Wall. 234, 17 L. Ed. 534.

29. **Manner of prescribing powers and duties.**—Durkin *v.* Exchange Bank (Va.), 2 Pat. & H. 277.

30. **Same—Necessity for writing or record.**—Durkin *v.* Exchange Bank (Va.), 2 Pat. & H. 277.

A verbal direction from the directors of a bank to the cashier, without any recorded vote of the board, is a sufficient authority to guide him in the application of moneys officially received by him. Stamford Bank *v.* Benedict, 15 Conn. 437.

31. **Estoppel of officer to deny that duties were prescribed by board.**—Durkin *v.* Exchange Bank (Va.), 2 Pat. & H. 277.

32. **Proof of authority of officer or agent.**—First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

made, and that these acts or contracts, which he was in the habit of doing, though applied to different subjects, involved the same general power, except when the acts and contracts which he was in the habit of doing or making were so very numerous and variant in their character as clearly to justify the inference that he was impliedly authorized to do all acts and make all contracts which the directors had the power to do or make, and to confer upon the officer or agent the right to do or make.[33]

§ 102 (4) Manner of Contracting or Representing.—Custom and Usage.—If no definite rule is to be found, either in the charter or by-laws of the institution, in regard to the manner and form in which its acts and contracts shall be evidenced, then, it seems, general usage, and the course of business of similar institutions is to govern; the officers will be presumed to have been invested with the customary authority, and their acts within the scope of such usage, practice, and course of business, will be binding on the institution, in favor of the third person having no knowledge to the contrary.[34] But the customs, by-laws and regulations of a bank are, in many respects, but intended to direct the action and conduct of its officers, and it is liable for the just responsibility of its acts in the same degree as an individual, notwithstanding its officers and agents may not have proceeded in strict accord with the by-laws, customs or usages of the bank.[35]

Contracts in Writing or Parol—Express or Implied.—Whenever a banking corporation aggregate is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which, an action lies.[36]

Necessity for Use of Seal.—Banks and other commercial corporations may bind themselves by the acts of their authorized officers and agents, without the corporate seal.[37] In respect to banks, from the very nature of

33. **Same—Habit, custom, and course of dealing.**—First Nat. Bank *v.* Kimberlands, 16 W. Va. 555. See, also, Hodge *v.* First Nat. Bank, 63 Va. (22 Gratt.) 51.

34. **Manner of contracting or representing—Custom and usage.**—Northern Bank *v.* Johnson, 45 Tenn. (5 Coldw.) 88; Neiffer *v.* Bank, 38 Tenn. (1 Head) 162.

35. **Same.**—Jackson Ins. Co. *v.* Cross, 56 Tenn (9 Heisk.) 283.

Thus, if a teller receive money without a "deposit ticket," or "pass book," required by custom or by a rule of the bank, and, by mistake, credit the wrong person, the bank is liable. The nonobservance of its rules and customs by its officers will not absolve it from liability. Jackson Ins. Co. *v.* Cross, 56 Tenn. (9 Heisk.) 283.

36. **Contracts in writing or parol—Express or implied.**—Bank *v.* Patterson (U. S.), 7 Cranch 299, 3 L. Ed. 351.

In Bank *v.* Hatch (U. S.), 6 Pet. 250, 8 L. Ed. 387, it was held that an agreement made by the agent and the attorney of a bank to continue a cause for a term without the judgment that would otherwise have been entered, was binding on the bank.

37. **Necessity for use of seal.**—Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631; Chesapeake, etc., Canal Co. *v.* Knapp (U. S.), 9 Pet. 541, 9 L. Ed. 222; Commercial, etc., Ins. Co. *v.* Union Mut. Ins. Co. (U. S.), 19 How. 318, 15 L. Ed. 636; Bank *v.* Guttschlick (U. S.), 14 Pet. 19, 10 L. Ed. 335.

their operations in discounting notes, in receiving deposits, in paying checks, and other ordinary and daily contracts, it would be impracticable to affix the corporate seal as a confirmation of each individual act.[38]

§ 102 (5) Representative Capacity of Particular Officers Considered—§ 102 (5a) Directors.—The power to direct and control the affairs of a banking corporation is usually vested in a board of directors;[39] though unless required by charter or statute it is not absolutely essential that a bank should have a board of directors, but may conduct its business through such officers and agents as it may lawfully appoint.[40] From their number the directors elect the president. The president and directors thus elected and qualified constitute the board of directors, which has control and management of the affairs of the bank.[41] So organized, the board of directors is a body recognized by law, and, to all purposes of dealing with others, constitutes the corporation.[42]

Directors to Act as a Board—Not as Individuals.—Regarded as individuals, the directors are not, properly speaking, officers of the bank, nor have they, individually, any power to control its management. They act collectively and at stated times as a board, and are not its mandatories or agents.[43] Hence, in order to bind the bank, their action must be taken at a lawful meeting at which a legally constituted quorum was present.[44] But where a thing is ordered to be done at a meeting of the directors of a bank, and no objection is subsequently made to the regularity of the meeting by any person who is interested in the direction of the bank, such meeting can not be objected to in a suit in equity to test the legality of the thing done, on the ground of irregularity, although the power to do the thing is in such a case a question properly before the court.[45]

Board May Confer Special Powers upon Individual Directors.—While directors, as individuals, are not agents of the bank, and have no implied power from the mere fact of being directors, to represent or bind the bank in their individual capacities, there is nothing to prevent the board

38. Same.—Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631.

39. Representative capacity of particular officers—Directors.—Percy *v.* Millaudon, 3 La. 568.

40. Necessity for board of directors.—Gillett *v.* Campbell (N. Y.), 1 Denio 520.

41. President and directors constitute managing board.—Brown *v.* Farmers', etc., Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359, reversing 31 S. W. 216.

42. Directors constitute corporation for what purpose.—Burrill *v.* Nahant Bank (Mass.), 2 Metc. 163, 35 Am. Dec. 395.

43. Directors act as board, not as individuals.—Louisiana State Bank *v.* Senecal, 13 La. 525.

44. Same—Necessity for action to be taken at lawful meeting.—Leary *v.* Interstate Nat. Bank (Tex. Civ. App.), 63 S. W. 149.

Where at a meeting of the directors of a bank to consider the sale of certain property, five of the six directors were present, two of whom were disqualified from acting in the transaction, it was held that since only three of the six directors were present who could act for the bank, a quorum was wanting and their action in regard to the sale was not binding on the bank. Leary *v.* Interstate Nat. Bank (Tex. Civ. App.), 63 S. W. 149.

45. Same—Who entitled to question regularity of meeting.—Leavitt *v.* Yates (N. Y.), 4 Edw. Ch. 134.

from conferring special powers upon one of their number and thus authorizing him to represent the bank as a special agent with respect to that particular business or transaction.[46]

General Nature and Scope of Authority.—Directors are given authority to transact the usual and ordinary business of the bank, and obviously this power may be exercised in all usual transactions through the executive officers of the bank without consultation with the stockholders.[47] But however broad their powers of direction may be they are not unlimited, but must receive a rational exposition.[48] They can not bind the bank by any act of fraud, departure from duty, or other illegal act, done by themselves, or by their connivance and permission, however sanctioned by the uniform usage of the board.[49] They can not create a special or unusual corporate liability without special power so to do; and their confessions, admissions or knowledge, while not engaged in the precise business intrusted to them, can not affect the corporation.[50]

Delegation of Powers.—Directors are not required to devote themselves to the details of the business, which may be left to the president and cashier and their assistants.[51] It is their duty to know the condition of the corporation whose affairs they voluntarily assume to control, and they are presumed to know that which it is their duty to know, and which they have

46. Board may confer special powers upon individual directors.—Waxahachie Nat. Bank *v.* Vickery (Tex. Civ. App.), 26 S. W. 876.

Thus, where a director is especially delegated by a bank to settle a claim against it, an agreement entered into by him, under the direct advice of the president, is binding on the bank. Waxahachie Nat. Bank *v.* Vickery (Tex. Civ. App.), 26 S. W. 876.

47. General nature and scope of directors' power.—Commercial Nat. Bank *v.* Weinhard, 192 U. S. 243, 48 L. Ed. 425, 24 S. Ct. 253.

48. Powers to be given rational exposition.—Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

49. No power to bind bank by illegal and fraudulent acts.—United States *v.* Robertson (U. S.), 5 Pet. 641, 8 L. Ed. 257, per Baldwin, J., dissenting.

50. Declarations, confessions and admissions as binding bank.—Loomis, etc., Co. *v.* Eagle Bank, 1 Disn. 285, 12 O. Dec. 625.

Regulation concerning transfer of stock.—Where the articles of a banking association confer upon the directors the power of making regulations for the government of their agents and the management of the business, this power is not broad enough to authorize a regulation concerning the transfer of stock. Bank *v.* Manufacturers, etc., Bank, 20 N. Y. 501.

51. Delegation of powers by directors.—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Mason *v.* Moore, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

In the general power given to the directors to appoint officers to do the ordinary business of the bank, they have an authority to appoint a cashier, and such an appointment is a limitation of that officer's executive function in doing the business of the bank. United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130.

In Fleckner *v.* Bank of United States, 8 Wheat. 338, 356, 357, 5 L. Ed. 631, the court said that the charter authorized the president and directors to appoint a cashier and other officers of the bank, and gave the president and directors, or a majority of them, full power and authority to make all such rules and regulations for the government of the affairs and conducting the business of said bank, as should not be contrary to the act of incorporation. United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130.

the means of knowing.[52] As directors, it is their duty to know the system of management of the bank and its daily workings, and the bank can not escape liability by showing that they were ignorant of the business of the corporation with respect to those matters which it was their duty to know. If they negligently entrust such matters to others, and loss is thereby incurred, it should fall upon them and the bank, and not upon innocent third persons.[53] Those powers which are of a personal nature, however, or which, under the charter, the directors are required to exercise in person, can not be delegated.[54] The bank transacts its business only through its board of directors and its regularly constituted officers, and hence can not appoint a general agent to transact its business.[55]

§ 102 (5b) President—Vice-President.—The president of a bank is generally, if not always, a member of the board of directors, and chosen by the board from their own number. He is expected to preside at meetings of the board of directors, and ordinarily the position is one of dignity and of indefinite general responsibility, rather than of any great and accurately known power. He is usually expected to exercise a more constant, immediate and personal supervision over the daily affairs of the bank than is required of any other director; but the authority inherent in the office itself is very small, and it is difficult to say precisely how or where it is much in excess of that which can be exercised by any other single director. Indeed, it is said that the entire collection of judicial authorities justifies the enunciation of only one function as falling within the properly inherent power of the president, namely, to take charge of the litigation of the bank. There is no question that this matter belongs to him by virtue of his office.

52. Duty to know condition of bank—Presumption.—Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592. See, also, Giddings *v.* Baker, 80 Tex. 308, 16 S. W. 33.

53. Ignorance of directors no excuse to the bank.—Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428; Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Auten *v.* United States Nat. Bank, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628; German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60; Meisse *v.* Loren, 6 O. Dec. 258, 4 N. P. 100; Lane & Co. *v.* Bank, 56 Tenn. (9 Heisk.) 419; Warren *v.* Robison, 19 Utah 289, 57 Pac. 287, 75 Am. St. Rep. 734; Marshall *v.* Farmers', etc., Sav. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Zinn *v.* Mendel, 9 W. Va. 580; Wolfe *v.* Second Nat. Bank, 54 W. Va. 689, 47 S. E. 243; Elliott *v.* Farmers' Bank, 61 W. Va. 641, 57 S. E. 242.

That which directors ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business. Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428; Auten *v.* United States Nat. Bank, 174 U. S. 125, 43 L. Ed. 920, 19 S. Ct. 628; Seale *v.* Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592.

54. Nonassignable duties.—First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Ex parte Rickey, 31 Nev. 82, 100 Pac. 134.

55. Power to appoint general agent or manager.—Murphy *v.* Gumaer, 12 Colo. App. 472, 55 Pac. 951.

As to the powers of directors of national banks to delegate their authority under the words "or duly authorized officers or agents subject to law," inserted in § 5136 of the Rev. Stats., by the amendment of 1873-74, see Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924.

He may institute and carry on legal proceedings and collect demands or claims of the bank; he may appear, answer and defend in suits against the bank; and to the accomplishment of these purposes he may retain and employ counsel on behalf of the bank.[56] But while the powers inherent in the office of president are very few, he may be authorized by the directors to do anything within the authority of the bank's charter which the directors themselves might do, except such positive requirements as the charter may make personal to the directors and which can not be delegated.[57] Such authority need not be proven by showing that it was expressly conferred by the board of directors. Usage or directorial votes may confer upon him special functions, and may extend his authority to correspond with the increase of active duties. To prove the existence of such increased or special authority, therefore, it is sufficient to show the existence of such facts as constitute clearly a public holding out that the particular act done or contract entered into was within the scope of his legitimate delegated authority.[58] It will be readily seen from the foregoing that the nature and extent of the duties imposed upon the president may vary in different associations

56. Inherent powers and representative capacity of president.—Merchants' Nat. Bank *v.* Eustis, 8 Tex. Civ. App. 350, 28 S. W. 227; Farmers' Nat. Bank *v.* Templeton (Tex. Civ. App.), 40 S. W. 412; Commercial Nat. Bank *v.* First Nat. Bank, 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879; Hodge *v.* First Nat. Bank, 63 Va. (22 Gratt.) 51; First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

The president of a bank, and in his absence the vice president or other person acting in the place of the president, has, within the scope of his general authority, the right to employ counsel to represent the bank in pending or prospective litigation. Russell *v.* Washington Sav. Bank, 23 App. D. C. 398.

In California, however, the president of a bank has no ex officio power to bind it for the services of an attorney, and unless he has been empowered to hire an attorney under its by-laws, as authorized by Civ. Code, § 303, or his contract for an attorney's services was authorized by resolution of the directors, or ratified or sanctioned by their words or conduct, the bank is not liable therefor. Pacific Bank *v.* Stone, 121 Cal. 202, 53 Pac. 634.

57. Powers conferred upon president by directors.—Wheat *v.* Bank, 9 Ky. L. Rep. 738, 5 S. W. 305; Ex parte Rickey, 31 Nev. 82, 100 Pac. 134; Merchants' Nat. Bank *v.* Eustis, 8 Tex. Civ. App. 350, 28 S. W. 227; Farmers' Nat. Bank *v.* Templeton (Tex. Civ. App.), 40 S. W. 412; Commercial Nat. Bank *v.* First Nat. Bank, 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879; Hodge *v.* First Nat. Bank, 63 Va. (22 Gratt.) 51; First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

58. Proof of powers conferred by directors.—Merchants' Nat. Bank *v.* Eustis, 8 Tex. Civ. App. 350, 28 S. W. 227; Hodge *v.* First Nat. Bank, 63 Va. (22 Gratt.) 51; First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

The inference, that such authority has been impliedly conferred, may be legitimately drawn by proving that he was in the habit of doing acts or making contracts of the same general character as the particular act or contracts which he has done or made, and that these acts or contracts, which he was in the habit of doing, though applied to different subjects, involved the same general power, except when the acts and contracts, which he was in the habit of doing or making, were so very numerous and so variant in their character as clearly to justify the inference, that he was authorized impliedly to do all acts and make all contracts, which the directors had the power to do or to make, and to confer on the president the right to do or to make. First Nat. Bank *v.* Kimberlands, 16 W. Va. 555. See, also, Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

according to the usages and by-laws of each,[59] and that when he goes beyond the scope of his usual authority, it must be shown in some way that his act was authorized by the directors, or that he was held out as having authority to do those things which he has assumed to do.[60] In order that the circumstances of a particular case may be sufficient to raise a presumption of authority in a bank president to bind the bank in matters beyond the scope of his usual authority, the bank must in some manner be a party to the circumstances, or must be chargeable with knowledge of them.[61]

Under the custom and usage of modern banking the president has been so generally clothed with power and authority beyond that ordinarily inherent in his office, as outlined above, that such custom and usage has been judicially recognized, and in some jurisdictions he is no longer looked upon as a sort of figure head having only the powers of a director, but as the chief executive officer of the bank, having great influence upon the policy of the bank and the conduct of the various employees in the discharge of their duties, and, as regards third persons, authorized to represent the bank in many transactions without special or express authority from the directors.[62]

Power with Respect to Particular Matters.—The president has no power to bind the bank except in the discharge of his ordinary duties, and it is not one of his ordinary duties, nor a power inherent in his office, to release debtors of the bank from the payment of their obligations to it without consideration. Authority to surrender or release the claims of the bank against any one can only be derived from the charter, from a vote of the board of directors, or from their assent, express or implied. Certainly, neither the president nor the cashier nor both combined can, virtute officii, give up a debt or liability to the bank without consideration, nor bind the bank by any agreement that the maker or indorser of a promissory or other instrument shall not be liable according to the tenor of the instrument.[63]

59. **President's powers may vary in different banks.**—Merchants' Nat. Bank *v.* Eustis, 8 Tex. Civ. App. 350, 28 S. W. 227.

60. **Proof of special or unusual power.**—Ex parte Rickey, 31 Nev. 82, 100 Pac. 134.

61. **Circumstances necessary to raise presumption of authority.**—Wheat *v.* Bank, 9 Ky. L. Rep. 738, 5 S. W. 305.

62. **Judicial recognition of president's powers under modern custom and usage.**—Bartlett Estate Co. *v.* Fraser, 11 Cal. App. 373, 105 Pac. 130; Morgan & Co. *v.* Merchants' Nat. Bank, 81 Tenn. (13 Lea) 234; Brown *v.* Farmers', etc., Bank, 88 Tex. 265, 31 S. W. 285, 33 L. R. A. 359, reversing 31 S. W. 216.

The president of a bank being its executive head under the usages and customs of modern banking, the rule that his power is limited to transactions expressly authorized by the directors no longer obtains. Bartlett Estate Co. *v.* Fraser, 11 Cal. App. 373, 105 Pac. 130.

63. **Power with respect to particular matters—Releasing bank's debtors—Guaranty and accommodation agreements.**—Bank *v.* Jones (U. S.), 8 Pet. 12, 8 L. Ed. 850; Bank *v.* Dunn (U. S.), 6 Pet. 51, 8 L. Ed. 316; Swindell & Co. *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13; Olney *v.* Chadsey, 7 R. I. 224; Hodge *v.* First Nat. Bank, 63 Va. (22 Gratt.) 51; Bank *v.* Wetzel, 58 W. Va. 1, 50 S. E. 886. See, also, United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130; and Potts *v.* Wallace, 146 U. S. 689, 36 L. Ed. 1135, 13 S. Ct. 196.

In Bank *v.* Dunn (U. S.), 6 Pet. 51, 8 L. Ed. 316, it was held, that "an

He has no authority, by virtue of his office, to release a debt due the bank on payment of part only.[64] He can not enter into an accord and satisfaction of a debt due the bank by the acceptance of any order on a third party in full satisfaction and discharge of the debt, unless he is authorized so to do by the board of directors.[65] Nor has he any implied authority to agree to a composition between a firm and its creditors, the bank being one of the creditors.[66] But when authorized by the charter or by the board of directors, as where they have turned the entire management of the bank over to him or ratified similar acts through a course of dealing extending over a number of years, he may bind the bank by a partial release of a judgment lien upon lands, the judgment note having been taken in his name;[67] by an agreement to accept an assignment of a judgment in settlement of a claim of the bank, provided such agreement is carried into effect;[68] or by an agreement, on sufficient consideration, to enter a remittitur of a judgment in favor of the bank.[69] It has also been held, under a general authority of this kind, that he might accept property, other than cash, in settlement of paper due the bank;[70] and in Texas it has been held that he not only has power to accept payment in property other than cash, but that he has authority by virtue of his office to compromise or release debts due the bank.[71] The vice-president of a bank, who is in charge thereof, has au-

agreement by the president and cashier of the Bank of the United States, that the endorser of a promissory note shall not be liable on his indorsement, does not bind the bank. It is not the duty of the cashier and president to make such contracts; nor have they the power to bind the bank, except in the discharge of their ordinary duties. All discounts are made under the authority of the directors, and it is for them to fix any conditions which may be proper in loaning money." Accord, Hodge *v.* First Nat. Bank, 63 Va. (22 Gratt.) 51.

64. Same—Same.—State Sav. Loan, etc., Co. *v.* Stewart, 65 Ill. App. 391.

65. Same—Accord and satisfaction.—First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

66. Same—Composition agreements.—Wheat *v.* Bank, 9 Ky. L. Rep. 738, 5 S. W. 305.

A banking corporation was a creditor to a large amount of a firm, and its president, without express authority, and without advising the directors, agreed to a composition between the firm and its creditors The directors held meetings between the time of the failure of the firm and the proposal of a composition, and also between the time of the proposal and the time of the acceptance of the composition. The board took no action in the matter, but at its meetings each member had expressed opposition to a compromise. There was no evidence of any custom of the president to act in such matters. Held, that the action of its president was not binding on the bank. Wheat *v.* Bank, 9 Ky. L. Rep. 738, 5 S. W. 305.

67. Same—Release of judgment lien.—Winton *v.* Little, 94 Pa. 64.

68. Same—Accepting assignment of judgment in payment of claim.—First Nat. Bank *v.* New, 146 Ind. 411, 45 N. E. 597.

69. Same—Remittitur of judgment.—Case *v.* Hawkins, 53 Miss. 702.

70. Same—Accepting property in lieu of cash.—Merchants' Nat. Bank *v.* Camp, 110 Ga. 780, 36 S. E. 201.

71. Same—Same—Compromise or release of debt, Texas decisions.—Farmers' Nat. Bank *v.* Templeton (Tex. Civ. App.), 40 S. W. 412, citing and approving Panhandle Nat. Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23.

Where a bank holds a claim, the president may, for the purpose of making the debt, take from the debtor cattle encumbered by other debts; such act binds the bank, and upon its disposing of the property it is liable to the prior lienholders for such cattle. Panhandle Nat. Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23.

thority to bind the bank by extending the time of the payment of a demand note for a specified time and for a specified consideration, and suspending the right to sell collateral until the expiration of the extended time.[72] But where the directors of a bank have not authorized its president to make an agreement to extend time to a debtor or to refrain from selling pledged stock for the liquidation of the debt, and the circumstances raise no implication of authority, and such agreement by the person who was president is never ratified, the bank is not bound thereby.[73] Without authority from the charter or from the board of directors he has no power to stay the collection of an execution against the estate of a debtor of the bank; and if the sheriff omits to levy an execution, in consequence of such an order from the president, it will not become dormant so as to lose its lien.[74] In the absence of authority by charter, resolution, or by-law, it will not be presumed that he is authorized to waive conditions of a contract for the sale of land.[75] The president of a banking corporation has no implied power as a matter of law to either lease the bank's real estate or cancel its outstanding leases thereof or enter into new ones for it as lessee.[76] He has no inherent authority to endorse or transfer negotiable notes belonging to the bank, nor has any other officer this inherent power except the cashier.[77] But the inference that such authority has been conferred upon the president may be legitimately drawn from proof that he was in the habit of doing acts of the same general character though applied to a different subject, and especially where such acts were the exercise of still greater power, as the assignment of other choses in action, such as bonds and judgments.[78] But such power could not be legitimately inferred from proof that he was in the habit of receiving deposits or payments of notes, or proof that he was

72. Power of vice president to extend payment of note.—Wyckoff *v.* Riverside Bank, 135 App. Div. 400, 119 N. Y. S. 937.

73. Power of president to extend time or refrain from selling collateral.—Arbogast *v.* American Exch. Nat. Bank, 60 C. C. A. 538, 125 Fed. 518.

74. Power to stay proceeding on execution.—Spyker *v.* Spence, 8 Ala. 333.

75. Waiver of conditions in contract for sale of land.—Chadbourne *v.* Stockton Sav., etc., Soc., 101 Cal. xvii, 36 Pac. 127.

76. Power to lease, or cancel lease.—People's Bank *v.* Bennett, 159 Mo. App. 1, 139 S. W. 219.

The lease of an elevator, included in a chattel mortgage to a bank, to be binding on the bank, must be authorized by the directors; authorization by the president alone being insufficient. Tulley *v.* Citizens' State Bank, 18 Ind. App. 240, 47 N. E. 850.

The president of a bank leased premises consisting of banking rooms and a hotel to the bank for a specified term, with the privilege of renewal. The bank sublet the hotel to a third person for the same term, with privilege of renewal. The bank renewed its lease, and the third person remained in possession after his term and paid to the bank the prescribed monthly rental. Thereafter the president executed a new lease to the third person for the entire premises, and arranged for free rent for the bank. He gained a profit resulting from an increase of rent. Held, that the president's new lease was not valid as against the bank, which could repudiate it, and hold the third person as its tenant, unless the bank consented to a surrender of the premises and the new lease, or committed acts amounting to an estoppel. People's Bank *v.* Bennett, 159 Mo. App. 1, 139 S. W. 219.

77. Power to transfer negotiable paper.—Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

78. Same—Special authority—Proof, custom, usage.—Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

authorized to receive generally deposits and payments made to the bank.[79] He has no power to bind the bank by representations as to the genuineness of the signatures to a note;[80] nor has he any power inherent in his office to bind the bank by the execution of a note in its name, though the power to do so may be conferred upon him by the board of directors, either expressly, by resolution to that effect, by subsequent ratification, or by acquiescence in transactions of a similar nature, and of which the directors have knowledge.[81] There is no inherent power in his office authorizing him to borrow money on the bank's credit.[82] But a bank is liable for interest on a deposit secured through the president's promise that interest would be paid thereon, where in making the promise he acted within the scope of his authority, in the absence of proof that he was without such authority and that the depositor knew it when he deposited.[83] And where the president has the power to take a claim against the bank out of the operation of the statute of limitations, the power may be exercised out of the state wherein the bank is situated as well as in it, and is not affected by the fact that he is, in his individual capacity, a guarantor of the debt.[84] In an action against a bank for repairs to an automobile used by its vice president in attending to the bank's business, even if the president of the bank could not authorize such expenditures, the bank is liable for services rendered upon the automobile at the instance of the vice president after the adoption of a resolution by the board of directors authorizing him to employ all per-

79. **Same.**—Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

80. **Representations as to genuineness of signature.**—Commercial Nat. Bank *v.* First Nat. Bank, 97 Tex. 536, 80 S. W. 601, 104 Am. St. Rep. 879.

81. **Execution of note in name of bank.**—National Bank *v.* Atkinson, 55 Fed. 465.

82. **Borrowing money on bank's credit.**—Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572; Ridgway *v.* Farmers' Bank (Pa.), 12 Serg. & R. 256, 14 Am. Dec. 681.

The vice-president and general executive officer of a national bank has no power to borrow so large a sum as $200,000 at four months' time for the bank in the absence of special authority from the board of directors, and persons dealing with him are presumed to know the extent of his powers in this regard. Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572.

The president of a bank incorporated by the Pennsylvania general statute of 1814 is not thereby empowered to raise money by drafts on the bank. Ridgway *v.* Farmers' Bank (Pa.), 12 Serg. & R. 256, 14 Am. Dec. 681.

83. **Promise to pay interest on deposit.**—Boyd *v.* First Nat. Bank, 32 Ky. L. Rep. 1323, 108 S. W. 360.

84. **Power to take claim against bank out of statute of limitations.**—Morgan & Co. *v.* Merchants' Nat. Bank, 81 Tenn. (13 Lea) 234.

The president and manager of a bank executed an agreement in its behalf that, if plaintiff would refrain for six months from bringing an action against it to enforce a stockholder's liability, it would not plead the statute of limitations thereto. The directors never ratified the agreement, and it did not appear that they knew of its existence. The president had for years had entire management of the bank; not reporting his actions to the directors, nor asking ratification thereof, nor obtaining authority before performing particular acts. A by-law of the bank provided that the manager should perform all duties which the bank's interest required, limited only by the by-laws and instructions of the board of directors. Held, that the court was justified in finding the agreement to have been executed by the bank. Wells, Fargo & Co. *v.* Enright, 127 Cal. 669, 49 L. R. A. 647, 60 Pac. 439.

sons necessary to resume and conduct the business, which has been temporarily suspended.[85]

§ 102 (5c) Cashier—§ 102 (5ca) General Nature and Extent of Cashier's Powers and Duties.—The powers of the cashier of a bank are such as are incident to, and implied in, his official character, as generally understood, as cash keeper, cash receiver, or payer, as negotiator and correspondent for the corporation, or as agent for various acts that are necessary and appropriate to the functions of such an officer, and inseparable from the operations of the bank; or those powers and duties may be created by a general or special authority declared in the charter or in the by-laws of the corporation.[86] He is the executive officer of the bank by whom its debts are received and paid and its securities taken and transferred, and through whom the whole financial operations of the bank are conducted. His ordinary duties are to superintend the books and transactions of the bank, under the orders of the directors; to keep all the funds of the bank, its notes, bills and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers of the bank, all moneys and notes of the bank, delivers up all discounted notes, collateral pledges and other securities when they have been paid, draws checks to withdraw the funds of the bank where they have been deposited, and, as the executive officer of the bank, transacts most of its business.[87] Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged.[88]

85. Repairs to automobile used in bank's business.—Seadale *v.* Montgomery, 113 N. Y. S. 600.

86. Nature and extent of cashier's powers.—United States *v.* City Bank (U. S.), 19 How. 385, 15 L. Ed. 662; Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631; West St. Louis Sav. Bank *v.* Shawnee County Bank, 95 U. S. 557, 24 L. Ed. 490.

87. Same.—Bank *v.* Dunn (U. S.), 6 Pet. 51, 8 L. Ed. 316; United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130; Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631; First National Bank *v.* Stewart, 114 U. S. 224, 29 L. Ed. 101, 5 S. Ct. 845; Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695; Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; West St. Louis Sav. Bank *v.* Shawnee County Bank, 95 U. S. 557, 24 L. Ed. 490; United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130; Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428; United States *v.* City Bank (U. S.), 19 How. 385, 15 L. Ed. 662; Merchants' Bank *v.* Rawls, 7 Ga. 196; Mott *v.* Semmes, 24 Ga. 540; Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506; Squires *v.* First Nat. Bank, 59 Ill. App. 134; Wakefield Bank *v.* Truesdell (N. Y.), 55 Barb. 602; Bissell *v.* First Nat. Bank, 69 Pa. 415; Morgan & Co. *v.* Merchants' Nat. Bank, 81 Tenn. (13 Lea) 234; Northern Bank *v.* Johnson, 45 Tenn. (5 Coldw.) 88; Rosenberg *v.* First Nat. Bank (Tex. Civ. App.), 27 S. W. 897; First Nat. Bank *v.* Ledbetter (Tex. Civ. App.), 34 S. W. 1042; Durkin *v.* Exchange Bank (Va.), 2 Pat. & H. 277; Bank *v.* Wetzel, 58 W. Va. 1, 50 S. E. 886.

88. Same—Subordinate officers under his direction.—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; West St. Louis Sav. Bank *v.* Shawnee County Bank, 95 U. S. 557, 24 L. Ed. 490; United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130; Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631; Martin *v.* Webb, 110 U. S. 7, 28 L. Ed.

Inherent Powers Greater than Those of the President.—The powers and duties of a cashier, in virtue of his office, are much greater than the president's though his office is strictly executive.[89]

Exercises the Functions of a Treasurer.—He exercises the functions of a treasurer, and is to all intents and purposes one, though called by a different name.[90]

Power to Bind the Bank—Restrictions Requiring Signature of President and Cashier.—By virtue of his office, he is generally intrusted with the notes, securities, and other funds of the bank, and is held out to the world as its general agent in the negotiation, management and disposal of them, with authority to receive offers for their purchase and give information relative thereto.[91] As the executive officer of the bank, through whom all its moneyed operations are transacted, he has full power within the just scope of his authority, according to the general usage, practice and course of business in such case.[92] and may bind the funds of the bank in matters of contract springing out of his legitimate and ordinary duties as cashier; and restrictions in the charter, requiring the signature of the president and cashier, do not apply to such contracts as the drawing and indorsing of bills of exchange, drafts and checks, which are implied by law as a part of the ordinary duties of the cashier: and for such acts he can not be held individually responsible for the payment of the checks or drafts.[93]

49, 3 S. Ct. 428; Rosenberg *v.* First Nat. Bank (Tex. Civ. App.), 27 S. W. 897.

89. Inherent powers greater than president's.—Hodge *v.* First Nat. Bank 63 Va. (22 Gratt.) 51; Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

90. Exercises functions of a treasurer.—Rosenberg *v.* First Nat. Bank (Tex. Civ. App.), 27 S. W. 897.

91. Care and custody of securities—Power to negotiate, dispose, or give information concerning same.—First Nat. Bank *v.* Stewart, 114 U. S. 224, 29 L. Ed. 101, 5 S. Ct. 845; Northern Bank *v.* Johnson, 45 Tenn. (5 Coldw.) 88.

His statement to a person who was in treaty to purchase, that the bank was not the owner of a certain security in his manual possession as cashier, is clearly within the line of his duty, and therefore, binding on the bank. First Nat. Bank *v.* Stewart, 114 U. S. 224, 29 L. Ed. 101, 5 S. Ct. 845.

92. Same.—Bank *v.* Wetzel, 58 W. Va. 1, 5, 50 S. E. 886; Wakefield Bank *v.* Truesdell (N. Y.), 55 Barb. 602.

93. Restrictions requiring signature of president and cashier.—Mechanics' Bank *v.* Bank (U. S.), 5 Wheat. 326, 5 L. Ed. 100; Carey *v.* Giles, 10 Ga. 26; Wakefield Bank *v.* Truesdell (N. Y.), 55 Barb. 602; Maxwell *v.* Planters' Bank, 29 Tenn. (10 Humph.) 507; Northern Bank *v.* Johnson, 45 Tenn. (5 Coldw.) 88.

A president and directors are not necessary to the validity of any act of the cashier which he, virtute officii, may do. And the payment of a debt due by the bank, or securing the same by a transfer of the securities of the bank, is an act which belongs to his office, and which he may rightfully do. Carey *v.* Giles, 10 Ga. 9.

A bank is liable on a check drawn by its cashier alone in due course of business, notwithstanding a clause in the charter of the bank, providing that "all bills, bonds, notes, and every contract on behalf of the company shall be signed by the president, and countersigned and attested by the cashier; and the funds of the company shall in no wise be held responsible for any contract, unless the same be executed as aforesaid." Northern Bank *v.* Johnson, 45 Tenn. (5 Coldw.) 88.

Charter of the Mechanics' Bank of Alexandria, § 17, which provides that "all bills, bonds, notes and every other contract or agreement on behalf of the corporation, shall be signed by the president, and countersigned by the cashier; and the funds of the corporation shall in no case be liable for any contract, or engagement, un-

Representative of the Bank, Not of the Directors.—While the cashier is elected by the directors, his office is one created by the charter, and not by any ordinance or by-law of the directors. Within the scope of his powers, therefore, he is the agent, not of the directors, but of the bank. The charter and the corporation hold him out to the public as such. His duties do not spring out of his election by the board of directors, but out of the nature and functions of his office as defined by the general law. That law defines his duties, unless they are made different by the charter and by-laws of the bank. Certain things he can not do without the order of the board of directors, but such acts as appertain generally to his office, he may do independently and irrespective of the board, and with respect to such matters, his agreements in behalf of his principal are binding upon it to the same extent as if made by a resolution of the board of directors.[94] A fortiori, the acts of the cashier carrying into execution a lawful contract entered into by the bank through its board of directors are the acts of the bank itself, for which it is responsible to all parties aggrieved by them.[95]

Powers of Cashier Previous to Bank's Going into Operation.—The cashier has no ex officio power until the bank, of which he is the cashier, goes into operation. Until then he is the limited agent of the corporation, governed strictly by its legally expressed orders and authority. He is clothed with ex officio powers when the bank begins business from the necessity of the case. There is no such necessity before.[96]

Ex Officio Powers Not Unlimited.—Finally, it should be observed that the ex officio powers of the cashier are by no means general or unlimited. They are limited to such matters and things as are embraced within the duties of his office, and in relation to which he must be presumed to have authority to act.[97] His power does not extend, for example, to giving out the capital stock, the money or effects of the bank held as capital stock prior to the bank's going into operation; for although elected cashier, he is not held out to the community as having authority of any sort before the bank commences business.[98]

§ 102 (5cb) Applicability of the Rules of Agency.—General Rules of Agency Apply.—The cashier of a bank is its agent, and the same

less the same shall be signed and countersigned as aforesaid"—does not extend to checks drawn upon another bank, in which case the cashier's signature is sufficient. Mechanics' Bank *v.* Bank (U. S.), 5 Wheat. 326, 5 L. Ed. 100.

94. Representative of the bank—Not of the directors.—Baldwin *v.* Bank (U. S.), 1 Wall. 234, 17 L. Ed. 534; Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; Carey *v.* Giles, 10 Ga. 9; Squires *v.* First Nat. Bank, 59 Ill. App. 134; Wakefield Bank *v.* Truesdell (N. Y.), 55 Barb. 602; Bank *v.* Schuylkill Bank (Pa.), 1 Pars. Eq. Cas. 180; Bissell *v.* First Nat. Bank, 69 Pa. 415; Durkin *v.* Exchange Bank (Va.) 2 Pat. & H. 277.

95. Acts of cashier, the acts of the bank.—Bank *v.* Schuykill Bank (Pa.), 1 Pars. Eq. Cas. 180.

96. Powers previous to bank's going into operation.—Mott *v.* Semmes, 24 Ga. 540.

97. Ex officio powers not unlimited.—Mott *v.* Semmes, 24 Ga. 540.

98. Same.—Mott *v.* Semmes, 24 Ga. 540.

rules of agency must be applied to him as to other persons occupying fiduciary relations.[99] As the agent of the bank, his acts bind the bank when performed within the scope of his agency; but it is certainly true that the authority of the cashier and other officers of the bank is restricted to such modes of binding the association as fall within the scope of his agency.[1]

Presumed to Have Authority Incident to Office—Third Persons without Knowledge Not Bound by Limitations upon Powers.—He is held out to the public as having authority to act according to the general usage, practice and course of business conducted by such institutions; and his acts, within the scope of such usage, practice, and course of business, will in general bind the bank in favor of third persons possessing no other knowledge. Third persons and the public at large usually have no other knowledge of the powers of a cashier than what is derived from such usage, practice and course of business, and are warranted in believing that the cashier is duly authorized to perform any customary duty falling within the scope of that category, and may to that extent hold the bank responsible, as if he were so authorized, however the fact may be, save only in cases where his want of authority is affirmatively proved and actual knowledge of that fact brought home to third persons. The law admits of no such injustice as the bank's setting up secret instructions and restrictions limiting his authority, either in a particular case or in respect to the general authority inherent in his position as cashier, for the purpose of defeating its liability for his acts and contracts as its agent, when the party dealing with him had no knowledge of such restrictions upon his authority.[2]

Bank Bound upon Such Additional Authority as He Is Held Out to Possess.—In addition to the authority ordinarily inherent in his position, the cashier must be deemed to possess, as regards third persons, such other authority, if any, as he has been held out to possess. Thus if a cashier is allowed to exercise general authority in respect to the business of the bank

99. Cashier as agent—Applicability of rules of agency.—Campbell *v.* Manufacturers' Nat. Bank, 67 N. J. L. 301, 91 Am. St. Rep. 438, 51 Atl. 497.

1. Same—Limited to scope of his agency.—Maxwell *v.* Planters' Bank, 29 Tenn. (10 Humph.) 507.

2. Presumption as to extent of powers—Secret limitations.—Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695; Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47; Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008, per Clifford, J., dissenting; Mott *v.* Semmes, 24 Ga. 540; Burnham *v.* Webster, 19 Me. 232; Badger *v.* Bank, 26 Me. 428; Cooper *v.* Townsend, 59 Hun 624, 13 N. Y. S. 760, 37 N. Y. St. Rep. 122; Lloyd *v.* West Branch Bank, 15 Pa. 172, 53 Am. Dec. 581; Rosenberg *v.* First Nat. Bank (Tex. Civ. App.), 27 S. W. 897; First Nat. Bank *v.* Ledbetter (Tex. Civ. App.), 34 S. W. 1042.

Where the whole business of the bank is confined entirely to the directors, of course with them it would rest to fix the duties of the cashier or other officers. If whether they have in fact made any regulations on this subject, does not appear, the acts of the cashier, done in the ordinary course of the business actually confided to such an officer, may well be deemed prima facie evidence that they fell within the scope of his duty. Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631; United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130.

for a considerable time—in other words, if he is held out to the public as having authority in the premises—the bank is bound by his acts, not ultra vires, as in case of an agent of any other corporation, by whatever name he may be designated, in the same manner as if authority were expressly granted.[3] It is not necessary, of course, that such authority, extending to transactions beyond his ordinary duties, should be in writing, or that it should appear upon the record of the proceedings of the board of directors. It may be by parol and collected from circumstances, or it may result merely from usage and tacit approval. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation as represented by the board of directors.[4] Where the authority is left to be inferred from powers usually exercised by the agent, it is enough if the transaction in question involves precisely the same general powers, though applied to a new subject matter.[5]

When Previous Sanction or Subsequent Ratification Required to Be Shown.—As for those acts and contracts not within the scope of the power and authority ordinarily inherent in his office as cashier, and which the bank has not held him out to the public as possessing, the bank is not

3. Cashier held out as possessed of additional authority.—Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428, Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506; Sherwood *v.* Home Sav. Bank, 131 Iowa 528, 109 N. W. 9; Wing *v.* Commercial, etc., Bank, 103 Mich. 565, 61 N. W. 1009; Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582.

Where the entire control of the affairs of a bank is left with the cashier, his acts, and the acts done with his authority by his subordinates, are binding on the corporation. Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582.

4. Same—Proof of additional or unusual authority.—Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428; Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506.

Evidence of powers habitually exercised by a cashier of a bank with its knowledge and acquiescence, defines and establishes, as to the public, those powers, provided that they be such as the directors of the bank may, without violation of its charter, confer on such cashier. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

When, during a series of years or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428.

5. Same—Application of powers to new subject matter.—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

Thus, if in the case of a bank having power by its charter to buy and sell exchange, coin and bullion, its cashier has habitually, with the knowledge of the bank, dealt with the public as authorized to buy and sell exchange, then the power to buy and sell coin also (the right to do both being conferred by the same clause of the charter), may be inferred by a jury. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

bound unless it is made to appear that it either previously sanctioned or subsequently ratified them.[6]

§ 102 (5d) Teller.—The president and receiving teller of an incorporated bank acting within the scope of their authority are agents of the corporation, and not of each other, and though the president has larger powers than the teller, and may direct his acts, the president is in no sense the principal, but his acts, within the scope of his powers, are the acts of the corporation.[7] There is nothing in the nature of the duties of a teller incompatible with those of a cashier, and it is entirely competent for the directors to require the same person to discharge the duties of both officers.[8] The bank selects its teller and places him in a position of great responsibility. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank and within the scope of his employment, so far as is known or can be seen by the party dealing with him, he is guilty of misrepresentation, the bank ought to be responsible.[9]

§ 103. Statutory Provisions.—Mandatory or Directory.—Some of the provisions of the charter and by-laws may well be deemed directory to the officers, and not conditions without which their acts would be utterly void. What are to be deemed such provisions, must depend upon the sound construction of each regulation with reference to its nature and object, public convenience and apparent legislative intention. If a regulation be merely directory, then any deviation from it, though it may subject the officers to responsibility both to the government and the stockholders, can not be taken advantage of by third persons. In other words, directory provisions addressed to the officers of the bank are not conditions precedent to the validity and binding force of their acts.[10]

6. **Same—Previous sanction or subsequent ratification.**—Bank *v.* Hooke, 41 Tenn. (1 Coldw.) 156; Dycus *v.* Traders Bank, etc., Co., 52 Tex. Civ. App. 175, 113 S. W. 329; Bank *v.* Wetzel, 58 W. Va. 1, 50 S. E. 886.

The act of a bank cashier in regard to a matter which by the bank's charter and by-laws is left to the control of the directors, is not binding upon the bank, where the board of directors have never authorized such action on his part. Dycus *v.* Traders' Bank, etc., Co., 52 Tex. Civ. App. 175, 113 S. W. 329.

7. **Teller's powers and duties.**—Ex parte Rickey, 31 Nev. 82, 100 Pac. 134.

8. **Same—Person acting as cashier and teller.**—Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47.

9. **Liability for misrepresentation by teller.**—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

10. **Statutory provisions—Directory and mandatory provisions.**—United States *v.* Kirkpatrick (U. S.), 9 Wheat. 720, 6 L. Ed. 199; United States *v.* Van Zandt (U. S.), 11 Wheat. 184, 6 L. Ed. 448; Bank *v.* Dandridge (U. S.), 12 Wheat. 64, 6 L. Ed. 552. See Jacksonville, etc., Nav. Co. *v.* Hooper, 160 U. S. 514, 40 L. Ed. 515, 16 S. Ct. 379.

The charter and the by-laws of a bank required that the board of directors should prescribe the duties of its officers, and the charter also required the directors to keep a book, "in which shall be entered and faithfully recorded a journal of all their proceedings." Held, these provisions were merely directory, and the prescriptions of certain duties of the cashier by the board might be inferred and presumed from evidence of acts of the board and of

Retrospective Operation and Validity.—A law regulating the powers of bank officials with respect to the sale, incumbrance, or other disposition of the notes and securities of the bank applies to notes and securities on hand at the time of its taking effect, and is not for that reason retrospective in its operation.[11]

§ 104. Disposition or Encumbrance of Property—Acquisition of Property—§ 104 (1) Power of Directors, Generally.—The control of all the property of a bank is generally vested in the directors of the bank,[12] and they have authority to bind the bank, while acting within the scope of the general usage, practice and course of business of such institution, so far as concerns third persons who have no knowledge to the contrary.[13] No single director has any implied or inherent power by virtue of his position to transfer or pledge the assets of the bank, and least of all for the purpose of paying or securing his individual obligations. Persons receiving the property of the bank under such circumstances with knowledge of the facts acquire no valid title thereto.[14] A statute which declares that any sale or transfer of the assets of the corporation, above a certain value, without the previous authority of a resolution of the board of directors, shall not be valid except as to bona fide purchasers for value and without notice, is a valid legislative enactment and must be observed in order to confer a valid title.[15] Under such a statute, a purchaser accepting property transferred without complying with its provisions is not a purchaser without notice.[16] Such a statute is not applicable to transfers made by corporations which are not required by law to have a board of directors, nor any governing body analogous thereto.[17] As to what constitutes a

the cashier, and a written entry on the journal of a vote, order, or resolution of the board, was not necessary to establish such prescription; that the cashier, by the performance of certain duties in his office of cashier, was estopped to deny that they had been prescribed by the board. Durkin *v.* Exchange Bank (Pa.), 2 Pat. & H. 277.

11. Retrospective operation and validity.—Van Sandt *v.* Hobbs, 84 Mo. App. 628.

Laws 1895, p. 120, declaring that the cashier of a bank has no power to sell the bank's notes until authorized by the directors, applies to notes obtained by the bank before it went into effect, and such application is not retrospective. Van Sandt *v.* Hobbs, 84 Mo. App. 628.

12. Acquisition and disposition of property—Power of directors.—Merchants' Bank *v.* Rawls, 7 Ga. 196.

13. Same—Same.—McDougald *v.* Bellamy, 18 Ga. 411.

14. Same—No inherent power in single director.—New York Life Ins. Co. *v.* Kansas City Nat. Bank, 121 Mo. App. 479, 97 S. W. 195.

A bank, holding a life policy as security for a note, went out of existence. The policy passed to a director and trustee, who assigned it to a third person, in consideration of an indebtedness of the director and trustee to the third person. Held, that the assignment was invalid, for want of authority of the director and trustee to pledge the assets of the bank. New York Life Ins. Co. *v.* Kansas City Nat. Bank, 121 Mo. App. 479, 97 S. W. 195.

15. Same—Necessity for previous resolution.—Gillet *v.* Phillips, 13 N. Y. 114; Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178, affirming 43 Hun 167; Gillett *v.* Campbell (N. Y.), 1 Denio 520; Curtis *v.* Leavitt (N. Y.), 17 Barb. 309; Eno *v.* Crooke, 10 N. Y. 60.

16. Same—Same—Purchaser without notice.—Gillett *v.* Phillips, 13 N. Y. 114.

17. Same—Same—Where corporation not required to have board of direct-

transfer or assignment in violation of such statute with respect to the kind and amount of property involved, see the footnote.[18]

§ 104 (2) Power of President.—As to Personalty and Securities, Generally.—A bank president has no authority as such to sell the corporation's property, and is liable in damages for loss resulting from unauthorized sales.[19] The president is not the receiving officer of the bank; consequently, in the absence of authority in the charter or by-laws of the institution, he has no power to execute a sale of a judgment in favor of the bank and receive the money therefor, unless authorized by the board of directors.[20] Power to dispose of the personal property and securities

ors.—Curtis *v.* Leavitt (N. Y.), 17 Barb. 309.

As no "board of directors," nor any board analogous to a board of directors, was required "by law" for the free banks, the provision of the Revised Statutes forbidding the making of certain transfers by any moneyed corporation without the sanction of a previous resolution of its board of directors or manager is, for that reason, inapplicable; even admitting the association to be, in other respects, a corporation, within the meaning of the statute. Curtis *v.* Leavitt (N. Y.), 17 Barb. 309.

18. Same—Same—What constitutes a transfer within meaning of statute.—An assignment by a banking association of a security held by it of the value of over $1,000, is not within the provisions of 1 Rev. St., p. 591, § 8, forbidding such assignment by a moneyed corporation without a resolution of its board of directors. Gillett *v.* Campbell (N. Y.), 1 Denio 520.

A satisfied judgment constitutes no part of the effects of a bank the transfer of which is, by 1 Rev. St., p. 1115, § 8, prohibited without authority by a previous resolution of the board of directors. Eno *v.* Crooke, 10 N. Y. 60.

Laws 1882, § 186, provides that no conveyance, assignment, or transfer not authorized by a previous resolution of its board of directors shall be made by any banking corporation of any of its real estate or effects, "exceeding the value of $1,000," but that this section shall not apply to the issuing of notes, money, bank bills, etc., in the ordinary course of business; nor shall it be construed to render void any conveyance, assignment, etc., in the hands of a bona fide purchaser without notice. A bank being insolvent, to the knowledge of its officers, received deposits from defendant to the amount of $3,004.22. The next morning, before banking hours, without the consent of the directors, the cashier transferred to defendant six drafts, aggregating $3,180.32, the largest one being for $986.63, and defendant gave its check on the bank for this amount. Held, that as the aggregate amount of the drafts exceeded $1,000, the transfer was prohibited by section 186, though no one of them was of that value. Atkinson *v.* Rochester Printing Co., 114 N. Y. 168, 21 N. E. 178, affirming 43 Hun 167.

19. Powers of president—As to personalty and securities.—First Nat. Bank *v.* Lucas, 21 Neb. 280, 31 N. W. 805; Greenawalt *v.* Wilson, 52 Kan. 109, 34 Pac. 403.

The president of a bank has no power virtute officii to sell the safe of the bank for a debt of the bank. Asher *v.* Sutton, 31 Kan. 286, 1 Pac. 535.

20. President not the receiving officer of the bank.—Merchants' Bank *v.* Rawls, 7 Ga. 196.

Where, in an action against a bank for conversion of certain property pledged, plaintiff claimed that the president of the bank had agreed to sell the property to plaintiff for the price bid therefor at a sale, which the bank subsequently refused to do, and there was evidence that in making the agreement with plaintiff the president purported to act as president of the bank, and that he owned a controlling interest therein, and that the property, which was worth $50,000, was purchased by the bank for $31,700, it was proper for the court to modify a requested instruction that, in the absence of authority, the president of the bank was not authorized to dispose of the bank's property, or release claims of bank, so as to charge that it was without the general scope of a bank president's authority to make such an agreement as plaintiff contended, and unless plaintiff showed authority by the bank

of the bank may be conferred upon the president, however, either by the charter and general banking laws, or by the board of directors, and the general usage and course of business may be such as to raise a presumption in favor of such authority.[21]

President's Powers with Respect to Negotiable Securities.—The president of a bank has no inherent authority to endorse or transfer negotiable notes belonging to the bank, nor has any other officer this inherent power except the cashier.[22] This great power and authority of transferring negotiable paper belonging to the bank is possessed by no other officer by virtue of his office, but the cashier. It is not even possessed by a clerk, who is acting as cashier in the temporary absence of the cashier, though such acting cashier would have power to do all such acts, as were necessary to carry on the usual business of the bank, such as to pay checks and receive payment of notes and deliver them to the persons entitled to them.[23] But the president may be authorized by the board of directors to transfer or assign negotiable bills and notes belonging to the bank;[24] and where the president has authority to indorse a note, he has power to deliver it.[25] Such authority need not be proven by showing that it was expressly conferred by the board of directors, but may be proven by showing the existence of

to the president to make the same, or the bank accepted the benefit of the agreement, the contract would not be binding on the bank. Memphis City Bank *v.* Smith, 110 Tenn. 337, 75 S. W. 1065.

21. Power may be conferred upon president to dispose of property of bank.—Cox *v.* Robinson, 27 C. C. A. 120, 82 Fed. 277; Guernsey *v.* Black Diamond Coal, etc., Co., 99 Iowa 471, 68 N. W. 777; Valk *v.* Crandall (N. Y.), 1 Sandf. Ch. 179; Belden *v.* Meeker (N. Y.), 2 Lans. 470.

The president of a banking association is the proper officer to assign mortgages made to such corporation. Valk *v.* Crandall (N. Y.), 1 Sandf. Ch. 179.

In an action by an assignee of a mortgage to foreclose it, it will be presumed that the president of the bank who made the transfer was duly authorized. Belden *v.* Meeker (N. Y.), 2 Lans. 470.

The president of a bank has authority by virtue of his office to make a valid assignment of a judgment in favor of the bank. Guernsey *v.* Black Diamond Coal, etc., Co., 99 Iowa 471, 68 N. W. 777.

A national bank owner of a judgment for the payment of which defendant was bound, through its vice-president assigned such judgment to defendant; the consideration being the transfer by defendant to the vice-president of another judgment, which the latter had obligated himself individually to pay, but in the interest of the bank. The vice-president had no express authority from the directors to make the assignment, but he was the largest stockholder, a director, and had long been the principal acting officer, of the bank, and general manager of its business, exercising the power of transferring its property and indorsing its notes, with the knowledge and acquiescence of the directors, and he was generally reputed in the community to be its owner. Held, in an action by the receiver of the bank, that the jury were justified in finding that the vice-president had authority to make the assignment, and that the bank received a consideration therefor. Cox *v.* Robinson, 27 C. C. A. 120, 82 Fed. 277.

22. Power of president with respect to negotiable securities.—Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

23. Same.—Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

24. President may be authorized to sell or transfer securities.—Rezner *v.* Hatch, 2 Handy. 42, 12 O. Dec. 320, affirmed in 7 O. St. 249; Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

25. Power to indorse includes power to deliver.—Merrick *v.* Bank (Md.), 8 Gill 59.

such facts as constitute clearly a public holding out that he was authorized to transfer or assign the notes belonging to the bank.[26] The inference that authority has been conferred on the president to transfer a negotiable note of the bank may be legitimately drawn from proof that he was in the habit of doing acts of the same general character though applied to a different subject, and especially where such acts were the exercise of still greater power, as the assignment of other choses in action such as bonds or judgments; but such power could not be legitimately inferred from proofs that he was in the habit of receiving deposits or payments of notes, or that he was authorized to receive generally deposits and payments made to the bank.[27]

Ratification by Board.—The board of directors of a bank may ratify or approve a transfer of a negotiable note of a bank which has been made by the president without authority;[28] and the acceptance and appropriation of the consideration which was received, when the president without authority transferred a negotiable note belonging to the bank, is an implied ratification of his act, when such acceptance and appropriation is made by the directors of the bank after they have been informed of the unauthorized act of the president; and if the acceptance of such consideration and its appropriation have been made by the officers of the bank without the knowledge of the directors, unless the directors return the consideration, when the receipt becomes known to them, the failure and the retention of the consideration by them will be a confirmation of the act of the president.[29]

§ 104 (3) Powers of Cashier.—With Respect to Personalty and Securities Generally.—Prima facie the cashier of a bank has no authority to transfer judgments in its favor, or to dispose of its property. His authority extends only to negotiable instruments and to such securities as he is authorized by virtue of his office to receive and transfer in accordance with the regular usage and custom of banks. The transfer of other property and securities can be legally made only by the president and directors, or pursuant to authority derived from them; and if the cashier acts as their agent in such matter, that fact should be shown in evidence.[30]

26. Proof of president's power.—Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

27. Same.—Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

28. Ratification by board.—Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

29. Same—By acceptance and appropriation of benefits.—Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

30. Power of cashier to dispose of bank's property.—United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130; Greenawalt *v.* Wilson, 52 Kan. 109, 34 Pac. 403; Asher *v.* Sutton, 31 Kan. 286, 1 Pac. 535; Holt *v.* Bacon, 25 Miss. 567; Bank *v.* Hindman (Miss.), 50 So. 65; Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

The cashier has no power to sell the bank safe to pay a debt of the bank. Asher *v.* Sutton, 31 Kan. 286, 1 Pac. 535.

It is not within a bank's usual course of business, or scope of the cashier's authority, to give mortgages on its property and transfer its assets; and such unauthorized acts may be set aside in equity at instance of its receiver. Bank *v.* Hindman (Miss.), 50 So. 65.

Cashier's Powers with Respect to Negotiable Securities.—Prima facie, from the very nature of his office, and the objects and purposes of the bank, the cashier must be deemed to have authority to indorse and transfer negotiable securities held by the bank for its use and in its behalf; and no special authority for this purpose is necessary to be proved. This is one of the general and necessary duties of the cashier as the executive officer of the association, and independent of any special authority from the directors. If any bank chooses to depart from this general course of business, it is at liberty to do so; but in such case it is incumbent upon the bank to show, not only that it has imposed a restriction upon the powers of the cashier, but that such restriction has been brought to the knowledge of persons transacting business with the bank.[31] Clearly no such restriction is imposed with respect to the transfer negotiable securities in the ordinary course of business by a charter provision requiring that all bills, bonds, notes and contracts "on behalf of the company" shall be signed by the president and countersigned or attested by the cashier, and that the funds of the company shall be held responsible for no contracts or engagements, unless executed in the manner prescribed.[32] Since the cashier of a bank may do, independently of a board of directors, whatever properly appertains to his office, one of which functions is to pay the debts of the bank by a transfer of negotiable securities, it is not competent to show that such transfer is void by proof that it was made after the board of directors had resigned and when the presidency of the bank had been assumed by a person neither an officer nor director. A transfer made under such circumstances is valid in law, but evidence is admissible under the allegations of fraud in the bill to prove the resignation of the directors and the usurping of the presidency by such person upon the issue of fraud in fact.[33]

Same—Applies to Cashiers of Private Banks.—The doctrine with respect to the general authority of the cashier to transfer by indorsement negotiable paper held by the bank applies as well to private banks conducted by an individual as to those existing under charters from the government.[34]

31. Cashier's powers with respect to negotiable securities.—Mechanics' Bank *v.* Bank (U. S.), 5 Wheat. 326, 5 L. Ed. 100; Carey *v.* Giles, 10 Ga. 9; Wakefield Bank *v.* Truesdell (N. Y.), 55 Barb. 602; Northern Bank *v.* Johnson, 45 Tenn. (5 Coldw.) 88; Maxwell *v.* Planters' Bank, 29 Tenn. (10 Humph.) 507; Arnold *v.* Swenson (Tex. Civ. App.), 44 S. W. 870, affirmed in 93 Tex. 678, no op.; Lamb *v.* Cecil, 28 W. Va. 653; Lamb *v.* Pannell, 28 W. Va. 663; Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

32. Same—Charter restriction as to countersigning of bills, notes, etc.—Mechanics' Bank *v.* Bank (U. S.), 5 Wheat. 326, 5 L. Ed. 100; Paine *v.* Stewart, 33 Conn. 516; Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Carey *v.* Giles, 10 Ga. 9; Jones *v.* Hawkins, 17 Ind. 550; Allison *v.* Hubbell, 17 Ind. 559; Wakefield Bank *v.* Truesdell (N. Y.), 55 Barb. 602; Maxwell *v.* Planters' Bank, 29 Tenn. (10 Humph.) 507; Northern Bank *v.* Johnson, 45 Tenn. (5 Coldw.) 88.

33. Transfer after resignation of directors—Proof of fraud.—Carey *v.* Giles, 10 Ga. 9.

34. Power of cashier of private bank to transfer negotiable paper.—Arnold *v.* Swenson (Tex. Civ. App.), 44 S. W. 870, affirmed in 93 Tex. 678, no op.

Same—Must Be in Usual Course of Business and in Good Faith. —The cashier's prima facie authority to transfer the negotiable notes and securities of a bank will not make such transfer valid if it be proven that the transferee knew that the transfer was made by the cashier not in the usual course of business and for an improper purpose.[35] No attempted transfer by the cashier of the bills, notes or other securities of the bank will be valid when it appears, either from the nature of the transaction or the facts and circumstances existing at the time and known to the transferee, that the transfer was made in prejudice of the rights and interests of the bank.[36] Thus a transfer of the notes and securities of the bank for the purpose of paying his private debts and obligations is fraudulent and invalid as to all persons participating therein or having notice thereof.[37] Nor has the cashier any authority to assign collaterals belonging to himself, but which were given to secure a loan made by the bank to another person for the cashier's benefit.[38] The power to sell and transfer the discounted bills and notes of the bank does not belong to the ordinary powers of the cashier, but inasmuch as he may do so under some circumstances, a transfer made by him in the usual course of the business of the bank to a person who has no cause to question the propriety or good faith of the transaction will be prima facie valid.[39] A transfer by the cashier of notes

35. Transfers not in usual course of business.—Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

If the transfer by the cashier of a bank of one-third of its negotiable notes was proven to have been made to a third person in a transaction, which was plainly out of the usual course of business, and the transaction on its face showed that the transferee must have known that the cashier was assuming a power and transacting business outside of his duties as cashier, and was transferring a negotiable note of the bank for a purpose for which he as such cashier had no right to transfer a negotiable note belonging to the bank, such transfer would be regarded as unauthorized, and the transferee could not be held to be a bona fide holder, even though he did give a valuable consideration for the note. Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

36. Same—Nature of transaction as notice to third person.—Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688; Lamb *v.* Cecil, 28 W. Va. 653; Lamb *v.* Pannell, 28 W. Va. 663.

37. Same—Transfer in settlement of private obligations.—Anderson *v.* Kissam, 35 Fed. 699, reversed on other points, Kissam *v.* Anderson, 145 U. S. 435, 36 L. Ed. 765, 12 S. Ct. 960; Lamb *v.* Cecil, 28 W. Va. 653; Lamb *v.* Pannell, 28 W. Va. 663.

The cashier of a bank kept an account with defendants, who were brokers and bought and sold stocks for him, and from time to time defendants received checks of his bank on another bank, its correspondent, drawn by him in his official capacity, and collected them and applied them to the cashier's individual account. In an action by a receiver of the bank of the cashier to recover of defendants the amount of the checks received by them, held that, the checks being made payable to the order of defendants for the cashier's individual use, defendants took them under an obligation to ascertain that the cashier had authority outside his ordinary official authority to make the checks, and could not assume that he was acting in the scope of his official duties. Anderson *v.* Kissam, 35 Fed. 699, judgment reversed on other points, Kissam *v.* Anderson, 145 U. S. 435, 36 L. Ed. 765, 12 S. Ct. 960.

38. Transfer of collateral given to secure cashier's debt to bank.—Merchants' Nat. Bank *v.* Demere, 92 Ga. 735, 19 S. E. 38.

39. Power to transfer discounted bills and notes of bank.—Lamb *v.*

of greater amount than $1,000, without a previous vote of the directors as required by statute, is illegal, and the agreement is void, except as to a purchaser without notice.[40]

Presumption That Indorsement Was in Usual Course of Business.—Where the cashier of a bank, by virtue of the custom and course of dealing of the bank, has the power to transfer its paper by endorsement, it will be presumed, where a note was transferred by it endorsed by such cashier as cashier of the bank, that such endorsement was in the usual course of business, and transferred to the holder the legal title to the note.[41] And where a draft is made payable to "J. P. Cash," and is transferred by an indorsement of "J. P. Cash," it will be presumed, prima facie, that J. P. indorsed the same, not as an individual, but in his official position as cashier, and that the indorsement is that of the bank.[42] Where checks are drawn by the cashier payable to fictitious persons, and then transferred by his indorsing their names thereon, they are, in effect, payable to bearer, and payment of such checks by the drawee is binding on the bank, since in transmitting them made and indorsed, the bank is so far concluded by his acts as to be estopped from denying their validity.[43] The fact that the names of payees inserted in the checks, and indorsed thereon by the cashier, were those of customers of the bank, does not vary the rule applicable to paper drawn in the name of fictitious payees, where the cashier had no idea of

Cecil, 28 W. Va. 653; Lamb v. Pannell, 28 W. Va. 663.

Power to pay deposit with discounted bills.—Where the management of the affairs of a banking corporation is entrusted by its charter to a board of directors, unless specially authorized by the charter, the cashier of such banking corporation has no power to assign the discounted bills and notes to a depositor in payment of his deposits without authority from the board of directors. Lamb v. Cecil, 25 W. Va. 288; Lamb v. Pannell, 25 W. Va. 298.

40. Statutory limitations as to amount.—Gillet v. Phillips, 13 N. Y. 114.

41. Presumption as to regularity of indorsement.—Arnold v. Swenson (Tex. Civ. App.), 44 S. W. 870, affirmed in 93 Tex. 678, no op.

42. Same—As to whether indorsement made in private or official capacity.—Collins v. Johnson, 16 Ga. 458; Hobbs v. Chemical Nat. Bank, 97 Ga. 524, 25 S. E. 348.

An indorsement, "A. B., Cashier," binds the bank. Folger v. Chase (Mass.), 18 Pick. 63. And see Spear v. Ladd, 11 Mass. 94; Northampton Bank v. Pepoon, 11 Mass. 288; Hartford Bank v. Barry, 17 Mass. 94; Barney v. Newcomb (Mass.), 9 Cush. 46.

The words "G. B., Cas.," indorsed upon a note, are sufficient in form to bind the bank of which G. B. is cashier. Such indorsement, although made upon a note not belonging to the bank, and merely for the accommodation of the payee or prior indorser, will bind the bank as against a purchaser in good faith, for value, before maturity. Houghton v. First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107.

The firm of C. & C. was proprietor of the Milam County Bank, and carried on the banking business in the name of the firm and as the Milam County Bank. F., one of the partners, acted as cashier, and had the power, as such, by virtue of the custom of the bank, to transfer its paper by indorsement. Held, that where a note to the Milam County Bank, on being transferred to a third person, was indorsed, "F., Cashier," such indorsement was in the usual course of business, and transferred to the holder the legal title to the note. Arnold v. Swenson (Tex. Civ. App.), 44 S. W. 870.

43. Indorsement of check payable to fictitious person.—Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596.

delivering the paper to the customers, but simply used their names to ward off the suspicion which might otherwise arise from drawing checks to the order of persons not known to the other bank officials.[44]

Powers of Cashier with Respect to Transfer of Stock.—The cashier is the proper officer to make a transfer of stock on the books of the bank,[45] and it is within his authority to sign a blank transfer on a certificate of stock held as collateral and deliver the certificate to the pledgor on payment of the loan.[46] He can not, of course, bind the bank by his representations or acts in relation to the transfer of stock in a transaction in which he is acting in his own behalf, to the knowledge of the other party, without ratification by the bank.[47] One who has distinct notice that the surrender and transfer of a former certificate are prerequisites to the lawful issue of a new one, and who accepts a certificate from the cashier without taking any steps to assure himself that the legal prerequisites to the validity of such certificate, which were to be fulfilled by the former owner and not by the bank, have been complied with, does not, as against the bank, stand in the position of one who receives a certificate of stock from the proper officers without notice of any facts impairing its validity.[48] Thus one who has dealt with the cashier individually and lent money to him for his private use, and received from him a certificate which states that the shares are transferable only on the books of the bank and on surrender of former certificates, can not recover from the bank the value of the certificate delivered to him, he not having surrendered any former certificate and there being no evidence of the bank having ratified or received any benefit from the transaction.[49] Evidence that in one or two other instances stock was issued by the cashier without the surrender of old certificates, and that the directors of the bank approved certain transfers to its president of shares once belonging to the cashier, is insufficient to prove that the bank ratified or received any benefit from the issue of the certificate to the plaintiff, or was guilty of any fraud towards him where the action of the directors was adapted to the single purpose of securing payment of a debt due from the cashier to the bank.[50] A bank is bound, however, by the act of its cashier in transferring stock on the books, and thereby waiving the

44. Same—Where fictitious names were those of customers of bank.—Phillips *v.* Mercantile Nat. Bank, 67 Hun 378, 22 N. Y. S. 254, 51 N. Y. St. Rep. 918, affirmed in 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596.

45. Powers of cashier with respect to transfer of stock.—National Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039.

46. Tansfer and redelivery of stock held as collateral.—Matthews *v.* Massachusetts Nat. Bank, Fed. Cas. No. 9,286, Holmes 396, 6 Leg. Gaz. 308.

47. Where cashier transferring stock is acting in his own behalf.—Moores *v.* Citizens' Nat. Bank, 111 U. S. 156, 28 L. Ed. 385, 4 S. Ct. 345.

48. Duty of transferee to see that legal prerequisites have been complied with.—Moores *v.* Citizens' Nat. Bank, 111 U. S. 156, 28 L. Ed. 385, 4 S. Ct. 345.

49. Same—Where cashier is dealing in his individual capacity.—Moores *v.* Citizens' Nat. Bank, 111 U. S. 156, 28 L. Ed. 385, 4 S. Ct. 345.

50. Same—Same—Ratification or receipt of benefits by bank.—Moores *v.* Citizens' Nat. Bank, 111 U. S. 156, 28 L. Ed. 385, 4 S. Ct. 345.

bank's lien for debts due it by the stockholder, though the cashier was a member of the firm holding the stock, which fact was well known to the directors, who had acquiesced in the cashier's performing such function, and it not appearing that the transferee knew such fact, or that the firm was indebted to the bank.[51]

Refusal to Make Transfer.—The cashier's refusal to make or permit a transfer of stock is the refusal of the bank, rendering the bank responsible for whatever liability may attach to such refusal.[52]

Power to Purchase Property.—The power of a bank cashier to purchase for the bank is not implied from his office as cashier.[53]

§ 104 (4) Consideration for Transfer of Bank's Property.—An officer of a bank, either vice-president or other officer, or person who is acting as general manager therefor, has no authority to assign or transfer claims for money due in any event, unless expressly authorized to do so, except upon payment of the amount due on such claim.[54] Thus where a judgment belonging to the bank is transferred without collecting the amount of it in cash, the presumption is that the transfer is unauthorized.[55] But where an authorized assignment of a judgment belonging to a bank is made by one of its officers, in its name, to an individual, who, in consideration thereof, transfers property to the bank officers, such transfer constitutes a valid consideration moving to the bank, since a trust results in its favor as to the property transferred to its officer.[56] According to the doctrine which prevails in New York and a few other states, the transfer or pledge of negotiable securities in payment or security of antecedent debts is not sufficient to constitute the transferee a holder for value.[57] The great

51. Same—Same—Transfer waiving bank's lien for debts owing by stockholder to bank.—National Bank *v.* Watsontown Bank, 105 U. S. 217, 26 L. Ed. 1039.

52. Refusal of cashier to make transfer; liability of bank.—Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695.

53. Power of cashier to purchase property.—Lionberger *v.* Mayer, 12 Mo. App. 575, memorandum. United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130.

54. Consideration for transfer of bank's property.—Cox *v.* Robinson, 70 Fed. 760.

55. Transfer of judgment without collecting cash.—Cox *v.* Robinson, 70 Fed. 760.

56. Assignment of judgment in consideration of property transferred to bank officer.—Cox *v.* Robinson, 70 Fed. 760.

57. Transfer of securities in payment of antecedent debts.—Tennessee *v.* Davis (N. Y.) 50 How. Prac. 447, Coddington *v.* Bay (N. Y.), 20 Johns. 637, 11 Am. Dec. 342; Moore *v.* Ryder, 65 N. Y. 428; Atlantic Nat. Bank *v.* Franklin, 55 N. Y. 235; Wardell *v.* Howell (N. Y.), 9 Wend. 170; McBride *v.* Farmers' Bank, 26 N. Y. 450; Rosa *v.* Brotherson (N. Y.), 10 Wend. 85; Stalker *v.* McDonald (N. Y.), 6 Hill 93; Youngs *v.* Lee (N. Y.), 2 Kern. 551; Commercial Bank *v.* Marine Bank, 42 N. Y. (3 Keys) 337, 1 Abb. Dec. 405, 6 Abb. Prac., N. S., 33, 37 How. Prac. 432; Lindoner *v.* Fourth Nat. Bank (N. Y.), 55 Barb. 75; West *v.* American Exch. Bank (N. Y.), 44 Barb. 175; Starke *v.* United States Nat. Bank (N. Y.), 41 Hun 506, 4 N. Y. St. Rep. 56; Royer *v.* Keystone Nat. Bank, 83 Pa. 348; Cummings *v.* Boyd, 83 Pa. 372; Knox *v.* Clifford, 38 Wis. 651, 20 Am. Rep. 28; Bowman *v.* Van Kuren, 29 Wis. 209, 9 Am. Rep. 554; Heath *v.* Silverthorn Lead Min., etc., Co., 39 Wis. 147.

Although a cashier and president of a bank may, in the ordinary course of business, without the consent of the

weight of authority, however, including that of the supreme court of the United States, is to the contrary.[58] With regard to tangible personalty and nonnegotiable securities, the equities of a bona fide holder for value and without notice, great as they are, can not, in the absence of some element of fraud or estoppel on the part of the true owner, prevail against the legal title.[59]

§ 104 (5) Disposition, Encumbrance, or Lease of Real Estate. —Powers of Directors.—It is not proposed in this place to discuss the general powers of banks to acquire, hold and dispose of real property. Suffice it to say that where the bank owns real property it is within the power of the directors, or of a committee authorized by them, to sell, lease, and, in general, to so manage the same as will most effectively protect and promote the interests of the bank, subject, of course, to the limitation that they can not enter upon speculative enterprises, such as vast schemes of improvement, forbidden by charter or statute.[60]

Powers of Cashier and President with Respect to Real Estate.— Unless the power is expressly given, or is to be implied from a course of dealing, etc., a bank is not bound by its cashier's contract in relation to bargaining and selling real estate.[61] Neither have the president and cashier of a bank any power, as such, to execute a mortgage on the real estate of

board of directors, dispose of the bank's negotiable securities, they are not empowered to pledge its assets for the payment of antecedent debts. State *v.* Davis (N. Y.), 50 How. Prac. 447.

58. Same—Weight of authority.—Oates *v.* First Nat. Bank, 100 U. S. 239, 25 L. Ed. 580; Swift *v.* Tyson (U. S.), 16 Pet. 1, 10 L. Ed. 865; Goodman *v.* Simonds (U. S.), 20 How. 343, 15 L. Ed. 934; McCarty *v.* Roots, 21 How. 432, 16 L. Ed. 162; Railroad Co. *v.* National Bank, 102 U. S. 14, 26 L. Ed. 61; Robinson *v.* Smith, 14 Cal. 94; Roberts *v.* Hall, 37 Conn. 205, 9 Am. Rep. 308; Gibson *v.* Connor, 3 Ga. 47; Kaiser *v.* United States Nat. Bank, 99 Ga. 258, 25 S. E. 620; Manning *v.* McClure, 36 Ill. 490; Mix *v.* National Bank, 91 Ill. 20, 33 Am. Rep. 44; Straughan *v.* Fairchild, 80 Ind. 598; Des Moines Nat. Bank *v.* Chisholm, 71 Iowa 675, 33 N. W. 234; Giavarovich *v.* Citizens' Bank, 26 La. Ann. 15; Maitland *v.* Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620; Fisher *v.* Fisher, 98 Mass. 303; Blanchard *v.* Stevens (Mass.), 3 Cush. 162, 50 Am. Dec. 723; Boatman's Sav. Inst. *v.* Holland, 38 Mo. 49; Railroad Co. *v.* Nat. Bank, 40 Mo. 540; Ringling *v.* Kohn, 4 Mo. App. 59; Armour *v.* Michael, 36 N. J. L. 92; Allaire *v.* Hartshorn, 21 N. J. L. 665, 47 Am. Dec. 175; Bank *v.* Carrington, 5 R. I. 515, 73 Am. Dec. 83; Bank *v.* Chambers (S. C.), 11 Rich. 657; Greneaux *v.* Wheeler, 6 Tex. 515; Atkinson *v.* Brooks, 26 Vt. 569, 62 Am. Dec. 592.

59. Equities of bona fide purchaser as against holder of legal title.—May *v.* LeClaire (U. S.), 11 Wall. 217, 20 L. Ed. 50; Brooke *v.* King, 104 Iowa 713, 74 N. W. 683; Lime Rock Bank *v.* Plimpton (Mass.), 17 Pick. 159, 28 Am. Dec. 286; In re Assignment, 32 Ore. 84, 51 Pac. 87.

60. Disposition, encumbrance, or lease of real estate—Power of directors.—Cockrill *v.* Abeles, 86 Fed. 505, 30 C. C. A. 223; Metropolitan Bank *v.* Godfrey, 23 Ill. 579; First Nat. Bank *v.* Reno, 73 Iowa 145, 34 N. W. 796; Thomaston Bank *v.* Stimpson, 21 Me. 195; Burrill *v.* Nahant Bank (Mass.), 2 Metc. 163, 35 Am. Dec. 395; Ingraham *v.* Speed, 30 Miss. 410; First Presbyterian Church *v.* National State Bank, 57 N. J. L. 27, 29 Atl. 320; Jackson *v.* Brown (N. Y.), 5 Wend. 590; Banks *v.* Poitiaux, 24 Va. (3 Rand.) 136; Roberts *v.* Washington Nat. Bank, 11 Wash. 550, 40 Pac. 225.

61. Powers of cashier and president with respect to real estate.—Winsor *v.* Lafayette County Bank, 18 Mo. App. 665.

the corporation.[62] But where the cashier of a bank, for a number of years, with the knowledge of the directors, has been accustomed to act for the bank in sales of property on which it held mortgages, under contracts approved by him, he may bind the bank in a similar transaction without formal authority from the directors.[63] And where the management of a bank's affairs is intrusted to the president and cashier, and they, with knowledge of the directors, have conveyed land at various times, a conveyance by them is not invalid because not authorized by the directors.[64] Where a bank obtains a judgment against its debtor and purchases his property at execution sale, and the cashier assigns the certificate to the holder of a junior judgment, who afterwards obtains a sheriff's deed, it will be presumed, when the title under said deed is questioned by another judgment creditor upon the ground that said certificate was assigned without authority, that the cashier had authority to make the assignment, even though it be shown that the directors passed no resolution granting it.[65] And the cashier of a bank may, for the purpose of collecting a debt due to the bank, enter into a contract on behalf of the bank to pay one a commission for procuring a purchaser of real estate held by the bank under a mortgage as security for the debt.[66]

Power of Bank's Attorney.—A sale of land belonging to a bank by its general attorney is not binding on the bank where such attorney has no authority to make the sale.[67] Nor has the cashier of the bank authority to ratify such unauthorized sale by the bank's general attorney.[68]

Deed.—An authority from the directors of a bank to a committee to convey land will authorize the agent to execute a deed and affix the corporate seal thereto.[69] Under a charter provision that "the bills obligatory and credit notes, and all other contracts whatever, on behalf of said corporation, shall be binding upon the company, provided the same be signed by the president and countersigned or attested by the cashier of the said corporation," a deed made by the president and countersigned by the cashier is sufficient in point of form and is prima facie a good deed.[70] And it has been held that a deed signed by the vice-president of the bank and

62. **Same—Power of president and cashier to execute mortgage.**—Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Hall *v.* Farmers', etc., Bank, 145 Mo. 418, 46 S. W. 1000.

63. **Same—Sale of property under mortgage held by bank.**—Carpy *v.* Dowell, 115 Cal. 677, 47 Pac. 695.

64. **Where management of bank entrusted to president and cashier.**—Steinke *v.* Yetzer, 108 Iowa 512, 79 N. W. 286.

65. **Assignment of bank's rights under purchase at execution sale—Who may question—Presumption.**—Bank *v.* Warren (N. Y.), 7 Hill 91.

66. **Contract to pay commission for securing purchaser.**—First Nat. Bank *v.* Ratliff, 33 Tex. Civ. App. 279, 76 S. W. 591.

67. **Power of bank's attorney.**—Spinks *v.* Athens Sav. Bank, 108 Ga. 376, 33 S. E. 1003.

68. **Power of cashier to ratify sale by attorney.**—Spinks *v.* Athens Sav. Bank, 108 Ga. 376, 33 S. E. 1003.

69. **Deed—Authorization—Execution.**—Burrill *v.* Nahant Bank (Mass.), 2 Metc. 163, 35 Am. Dec. 395.

70. **Same—Signature, attestation, etc.**—Veasey *v.* Graham, 17 Ga. 99, 63 Am. Dec. 228.

sealed with its corporate seal is prima facie valid.[71] But when it is shown that its execution was without authority from the board of directors, and not in accordance with the statute, such prima facie presumption is overcome, and the deed shown to be invalid and insufficient to pass title.[72] An instrument under seal, executed by the president and cashier, purporting to convey or agreeing to convey, real estate owned by the bank, is not the deed of the corporation where the seal used is the seal of the president and cashier, and not the seal of the corporation.[73] The deed of a banking corporation may be acknowledged by its cashier.[74]

Leasing Tenements—Acts of Secretary of Bank.—Where the secretary of a bank leasing tenements attends generally to the leasing of the premises, the bank is bound by his act in turning off the city water, and refusing its use to a tenant, when done with the knowledge and consent of the bank president.[75]

§ 104 (6) Assignments for Benefit of Creditors.—See ante, "Assignments for Benefit of Creditors," § 78.

§ 104 (7) Acquisition of Property by Officers for Bank.—As to the general powers of banks to purchase and hold real property, see ante, "Real Property," § 95.

Powers of Cashier.—It is no part of the ordinary or implied powers of a cashier to purchase property for the bank.[76] While it is necessary to the validity of a deed that it should be delivered to and accepted by the grantee, it is not necessary, in the case of a conveyance to a bank, that its board of directors should be called together and the deed accepted by a formal resolution. It is sufficient that the cashier, entrusted with the general routine business of the bank, accepts the deed as and for the bank and has the same placed upon record.[77] Any question as to the validity of such an acceptance, however, is absolutely set at rest by the subsequent action of the bank in undertaking to convey the property received under the deed.[78]

71. **Deed signed by vice-president and sealed with corporate seal.**—Hall *v.* Farmers', etc., Bank, 145 Mo. 418, 46 S. W. 1000, citing Leggett *v.* New Jersey Mfg., etc., Co., 1 N. Y. Eq. 541, 23 Am. Dec. 728; St. Louis Public Schools *v.* Risley, 28 Mo. 415.

72. **Same—Evidence changing presumption of validity.**—Hall *v.* Farmers', etc., Bank, 145 Mo. 418, 46 S. W. 1000; McKeag *v.* Collins, 87 Me. 164.

73. **Deed by president and cashier under their individual seals.**—Bank *v.* Guttschlick (U. S.), 14 Pet. 19, 10 L. Ed. 335.

74. **Deed of bank may be acknowledged by cashier.**—Sheehan *v.* Davis, 17 O. St. 571.

75. **Leasing tenements—Acts of secretary of bank.**—West Side Sav. Bank *v.* Newton (N. Y.), 8 Daly 332.

As to the power of the president or cashier with respect to leasing the bank's property or leasing property for the use of the bank, see ante, "President—Vice-President," § 102 (5b); "Cashier," § 102 (5c); post, "Cashier," § 105 (3).

76. **Power of cashier to purchase property for.**—United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130.

77. **Acceptance of deed conveying property to bank.**—Hall *v.* Farmers', etc., Bank, 145 Mo. 418, 46 S. W. 1000.

78. **Same—Doubt as to acceptance removed by subsequent conveyance of property.**—Hall *v.* Farmers,' etc., Bank, 145 Mo. 418, 46 S. W. 1000.

§ 105. Contracts—§ 105 (½) General Principles.—A bank is bound by the contracts of its authorized agents, whether they be directors or other officers, dealing within the usual and ostensible scope of their authority; and it is no defense to the bank that, in making the contract, its agent exceeded his real authority, or that he was really seeking to subserve his individual interests, or that he entertained and subsequently carried out the design of appropriating the proceeds to his own use, unless it can be shown that the other party was also a party to the fraud, or that he had knowledge either of the want of authority or wrongful intent.[79] The bank is not bound, of course, upon the contracts of its agents made entirely without the scope of their authority, unless there has been a previous authorization or subsequent ratification;[80] and where a third person attempts to set up a contract which was clearly beyond the ordinary powers and duties of the officer or agent who is alleged to have executed the same on behalf of the bank, the burden is upon such third person to show the authority of the agent to bind the bank; either that he was expressly authorized to enter into such an agreement in behalf of the bank, that by a previous course of dealing he was held out as having authority to bind the bank in such matters, or that there has been a subsequent ratification.[81] And where one has dealt with the officer of a bank, who is vested with apparent authority to make certain contracts on its behalf, and subsequently circumstances are

79. **Contracts—General principles.**—Chemical Nat. Bank *v.* Armstrong, 8 C. C. A. 155, 59 Fed. 372, 28 L. R. A. 231; Bank *v.* Patchin Bank, 19 N. Y. 312.

A party, receiving and discounting bona fide a bill of exchange dated ten days previous, payable to the order of "A. B. cas," indorsed "A. B. cas," inclosed in a letter dated at the banking house of which A. B. is cashier, and signed "A. B. cas," has a right to recover on such bill as against the banking house, although the bill was indorsed for the accommodation of a third party, and not for the benefit of the banking house. Bank *v.* Patchin Bank, 19 N. Y. 312.

A bank is liable for a loan obtained from another bank, dealing in good faith with its authorized officer, although such officer acts without knowledge of the other bank officials, and appropriates the money to his own use. Chemical Nat. Bank *v.* Armstrong, 8 C. C. A. 155, 59 Fed. 372, 28 L. R. A. 231.

The C. Bank in good faith advanced money on collateral forwarded to it by the vice president of the F. Bank, and charged the loan to the F. Bank. The vice president of the F. Bank directed that the loan be transferred to his individual credit, which was done, whereupon he fraudulently checked out the same for private purposes. Held, that the vice president had authority to negotiate the loan, and that the validity thereof was not affected by his fraud. Chemical Nat. Bank *v.* Armstrong, 50 Fed. 798.

When the cashier of a bank has full charge of its business, and secures loans on notes of the bank signed by him, apparently in the usual course of business, under documents giving him authority from the directors to borrow, the bank is liable on the notes, though such documents afterwards appear to be forgeries, and the proceeds of the loans are used by the cashier for his own benefit. City Nat. Bank *v.* Chemical Nat. Bank, 26 C. C. A. 195, 80 Fed. 859.

80. **Contracts entirely without scope of agent's authority.**—New Hampshire Sav. Bank *v.* Downing, 16 N. H. 187.

A bank is not bound by an agreement, made by one of its officers, not thereto authorized, to notify a surety of the default of the makers of a note left as collateral. New Hampshire Sav. Bank *v.* Downing, 16 N. H. 187.

81. **Burden of proof where contract beyond ordinary powers of officer.**—Citizens' Nat. Bank *v.* Marks, 34 Pa. Super. Ct. 310.

brought to his notice which are sufficient to put him on inquiry as to whether the authority exists, in order to recover on any such contracts made after that time, he must prove actual authorization by the bank.[82]

Fraudulent and Illegal Contracts—Contracts Opposed to Public Policy, etc.—Fraudulent and collusive contracts entered into in violation of the charter of the bank or contrary to its interests and as a fraud upon its rights, or contracts opposed to public policy, either upon principles of general law or because designed to evade wholesome restrictions enacted in the interests of good banking, can not be set up against the just rights of the bank, either as the basis of a cause of action or as a ground of defense.[83] Typical among contracts of this character are those in which the officers and agents of the bank enter into secret agreements with parties to obligations taken in behalf of the bank that they shall not actually be called upon to pay the same according to the tenor of the instrument, but that it shall be met or discharged in some other way. Not only have its officers no power to bind the bank to any such agreement, but any attempt to do so is a fraud upon the bank, and can not be set up in defense to an action by the bank to enforce the instrument according to its face.[84] In fact, an officer of the

82. Necessity for proving actual authority where third person has notice putting him on inquiry.—Stallcup *v.* National Bank, 47 Hun 639, 15 N. Y. St. Rep. 39.

83. Fraudulent and illegal contracts—Contracts opposed to public policy, etc.—Savannah Bank, etc., Co. *v.* Hartridge, 73 Ga. 223; McNulta *v.* Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203; Kennedy *v.* Otoe County Nat. Bank, 7 Neb. 59.

A resolution of the board of directors of a state bank voting a bonus to their president in consideration for the temporary supply of funds for the purpose of deceiving the auditor, and fraudulently accomplishing an organization of the bank with authority to proceed to business, and to dispose of stock apparently paid up in full, is an agreement to do an act forbidden by the statute, and is void. McNulta *v.* Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203.

Where a rule of a bank provides that no officer therein can become its debtor, it is not bound by the following agreement between its cashier and a third party: The cashier desiring to procure money from the bank to purchase stock made an agreement with the third party who acted with notice of the rule, by which the latter should purchase certain stock and the cashier as such should advance to him money of the bank to pay for it, such third person to give his note to the bank for the money and deposit the stock as collateral. This was done and the cashier assumed the payment of the note, the stock being his, and the bank having no other notice of the arrangement except the knowledge of the cashier. Savannah Bank, etc., Co. *v.* Hartridge, 73 Ga. 223.

84. Same—Secret understanding or agreement varying liability under contract.—Breyfogle *v.* Walsh, 71 Fed. 898; Metropolis *v.* Williams, 46 Mo. 17; Kennedy *v.* Otoe County Nat. Bank, 7 Neb. 59; Martin *v.* First Nat. Bank, 11 O. C. C., N. S., 93, 20-30 O. C. D. 398; Mead *v.* Pettigrew, 11 S. Dak. 529, 78 N. W. 945; Loomis *v.* Fay, 24 Vt. 240.

A bill which seeks to restrain the sale by a bank of property pledged as collateral security to a note discounted by it, on the ground that the president of the bank secretly agreed that he would see to the payment of the note without sale of the collateral, does not state a case for equitable relief, since such agreement, being against the interest of the bank, should not be enforced for the benefit of a party to it. Breyfogle *v.* Walsh, 71 Fed. 898.

An accommodation indorsement of a note to a bank, under an express agreement with the president that the indorser should not be held liable, would be void as a fraud upon the bank. Loomis *v.* Fay, 24 Vt. 240.

Where a bill of exchange is made payable to a bank through its cashier, and is received by the bank in the usual

bank who colludes with a third person for the purpose of defrauding the bank or evading charter and statutory restrictions can not, as to that transaction, be considered the representative of the bank, and his knowledge of the actual nature of the transaction can not, of course, be imputed to the bank.[85] Of course, if it can be shown upon the facts that the contract was really entered into in behalf of the bank, and that the bank received and used the proceeds, it may be made to account therefor.[86] Where the officers of the bank are authorized to borrow money for the bank, but forbidden to execute certain evidences of indebtedness or pledge the bank's securities as collateral therefor without the consent of the directors, money borrowed by them may be recovered of the bank upon an implied obligation to repay, notwithstanding the notes or bonds evidencing the indebtedness and the collateral deposited to secure it may be unenforceable for want of the previous consent of the directors as required by law.[87] Other contracts,

course of business, it is not bound by a secret agreement of the cashier with the drawer that the latter is not to be liable on the bill. National Bank *v.* Williams, 46 Mo. 17.

A bank cashier agreed that he would secure certain bonds as collateral for the payment of a note, made payable to and delivered to the bank, and that the liabilities of the sureties should be subordinate to such collateral. Held, that in the ordinary performance of his duties, he had no authority to make such an agreement, and therefore the bank was not bound. Martin *v.* First Nat. Bank, 11 O. C. C., N. S., 93, 20-30 O. C. D. 398.

An agreement by the president of a bank with one who gives a note in return for stock in the bank, that he will not be required to pay anything on the note, is not binding on the bank, and does not release the maker. Mead *v.* Pettigrew, 11 S. Dak. 529, 78 N. W. 945.

The president of plaintiff bank induced defendant to give his note in payment for certain shares of the bank's stock, in order that he might continue in control of the bank, representing that the dividends would be sufficient to pay the interest thereon, and that the stock would pay the note if it ever became necessary to pay it. The note was discounted by the bank, and the amount placed to the credit of the president, which he drew out by check. None of the officers of the bank except the president knew of the character of the contract, or that it was given for stock. Held, that the bank was not bound by the representations of its president with reference to matters in which it had no interest, and hence was entitled to recover the amount of the note. Kennedy *v.* Otoe County Nat. Bank, 7 Neb. 59.

85. Official entering into collusive agreement not considered the representative of the bank.—Savannah Bank, etc., Co. *v.* Hartridge, 73 Ga. 223; Kennedy *v.* Otoe County Nat. Bank, 7 Neb. 59.

86. Same—Evidence—Acceptance and use of benefits by bank.—Eastern Townships Bank *v.* Vermont Nat. Bank, 22 Fed. 186, 22 Blatchf. 498.

A., the president of defendant, a national bank in Vermont, applied to the plaintiff, a banking corporation in Canada, for a loan. Plaintiff's manager told him the money could not be loaned as an individual loan, as its individual loans were too near the limit allowed by law, but that it would deposit that amount with defendant, if desired. A. assented, and agreed that bonds should be deposited as security. Plaintiff drew two drafts for the amount, delivered them to defendant and received the collaterals, and entered the transaction on its books as a loan to defendant. Defendant indorsed the drafts, forwarded them to the drawee, from which it received credit for them, and retained the proceeds. Held, that the transaction was not a loan to A. individually, but to defendant. Eastern Townships Bank *v.* Vermont Nat. Bank, 22 Fed. 186, 22 Blatchf. 498.

87. Recovery upon implied obligation where officers exceed authority as to character of obligation, securities pledged, etc.—Union Nat. Bank *v.* Lyons, 220 Mo. 538, 119 S. W. 540. See also, as illustrating the same principle, Hitchcock *v.* Galveston, 96 U. S. 341,

such as the purchase of real estate for the bank in violation of charter or statutory provisions, rest upon the principle that, after the contract has been executed and title to the property vested in the bank, objection to the validity of the transaction can only be made by the state, and that the bank can sell and transfer the property and convey a valid title upon its vendee.[88] But as charter and statutory restrictions forbidding the purchase of real estate by banking associations are notice to all the world of the bank's restricted powers in that respect, it can not be bound by the contracts of its officers purchasing real estate in its behalf, unless it has so far recognized such contract as to estop itself from repudiating it.[89]

Bank Not Shift Responsibility to Officers and Agents, When.—Where the contract is one which it was clearly within the power of the bank's officers and agents to make, and appears to have been entered into by the other party upon the faith and credit of the bank's responsibility, and not that of its officers and agents, and the intention seems to have been to bind the bank as the principal, and not its officers and agents as individuals, the presumption is that it is the contract of the bank, and it will not be permitted, upon slight evidence, to escape its just responsibility by showing that it was never bound and that it was the contract of its officers and agents as individuals.[90] This principle also applies in favor of the bank as against third

24 L. Ed. 659; Louisiana *v.* Wood, 102 U. S. 294, 26 L. Ed. 153; Argenti *v.* San Francisco, 16 Cal. 255; Maher *v.* Chicago, 38 Ill. 266; Sparks *v.* Jasper County, 213 Mo. 218, 112 S. W. 265; Oneida Bank *v.* Ontario Bank, 21 N. Y. 490; Silver Lake Bank *v.* North (N. Y.), 4 Johns. Ch. 370; Vanatta *v.* State Bank, 9 O. St. 27; Allegheny City *v.* McClurkan & Co., 14 Pa. 81.

Rev. St. 1899, § 1281 (Ann. St. 1906, p. 1048), providing that no bills payable shall be made and no bills shall be rediscounted by the officers of a bank without the consent of its directors, did not prevent a bank's officers from borrowing money on the bank's credit without the consent of the directors, but only invalidated the note given therefor. Union Nat. Bank *v.* Lyons, 220 Mo. 538, 119 S. W. 540

88. Transactions to which state only may object—Purchase of real estate.—White *v.* Lester, 40 N. Y. (1 Keyes) 316, 4 Abb. Dec. 585, 34 How. Prac. 136; First Nat. Bank *v.* Reno, 73 Iowa 145, 34 N. W. 796; National Bank *v.* Matthews, 98 U. S. 621, 25 L. Ed. 188; Savings Bank *v.* Burns, 104 Cal. 473, 38 Pac. 102; Bank *v.* Flathers, 45 La. Ann. 75, 12 So. 243; Hennessy *v.* St. Paul, 54 Minn. 219, 55 N. W. 1123; Hall *v.* Farmers', etc., Bank, 145 Mo. 418, 46 S. W. 1000; Smith *v.* First Nat. Bank, 45 Neb. 444, 63 N. W. 796; Leazure *v.* Hillegas (Pa.), 7 Serg. & R. 313.

A purchase of lands at mortgage sale by a bank cashier in his own name for the benefit of his bank is not invalid because the bank, by its charter, is disabled from purchasing lands; and a purchaser from such cashier will therefore obtain a valid title as against the original owner. White *v.* Lester, 40 N. Y. (1 Keyes) 316, 4 Abb. Dec. 585, 34 How. Prac. 136.

89. Third persons bound to a knowledge of charter and statutory restrictions with respect to purchase of real estate.—Winsor *v.* Lafayette County Bank, 18 Mo. App. 665; Metropolitan Bank *v.* Godfrey, 23 Ill. 579.

90. Bank not permitted to shift responsibility upon officers and agents, when.—Robb *v.* Savings Bank, 6 Ky. L. Rep. 215; Merchants' Nat. Bank *v.* Phillip, etc., Machinery Co., 15 Tex. Civ. App. 159, 39 S. W. 217.

Where a bank has received a money deposit, it can not escape responsibility to the depositor by showing a verbal request by the depositor for the cashier to make investments for him. If the books of the bank show the deposit and the investment, the court will assume that the transaction was with the bank, and not with the cashier as the special agent of the depositor, and will require the bank to account either for the deposit or the

persons where, in order to defeat the rights of the bank, an attempt is made to show that a contract, apparently the contract of the bank, is in reality only the contract of its officers as individuals.[91]

Form and Manner of Executing Contract.—A charter or statutory provision requiring all contracts whatsoever to be signed by the president and countersigned by the cashier, in order to bind the bank, does not apply to such dealings and transactions as are usually and necessarily performed by the cashier or some other duly authorized agent of the institution.[92] Nor

investment. Robb *v.* Savings Bank, 6 Ky. L. Rep. 215.

A check was sent to defendant bank to indemnify it for furnishing a bond for plaintiff. The president and the cashier became sureties, and the check was deposited to their credit, and afterwards paid. Held, that the execution of a receipt by those officers individually did not constitute a contract between them, as individuals, and plaintiff, which extinguished the bank's liability to account for the check. Merchants' Nat. Bank *v.* Phillip, etc., Machinery Co., 15 Tex. Civ. App. 159, 39 S. W. 217.

91. Same—Principle also applies in favor of bank.—Gilmore *v.* Kilpatrick-Koch Dry-Goods Co., 101 Iowa 164, 70 N. W. 175.

The interest of B. as chattel mortgagee being as cashier of a bank, the word "us," in an agreement signed in his name and given the mortgagor, reciting, "It is hereby agreed that B., cashier, shall not take possession * * * until default therein, unless such action shall be necessary to protect us against other creditors," does not refer to the mortgagor and B., but to the bank. Gilmore *v.* Kilpatrick-Koch Dry-Goods Co., 101 Iowa 164, 70 N. W. 175.

92. Form and manner of executing contract.—Mechanics' Bank *v.* Bank (U. S.), 5 Wheat. 326, 5 L. Ed. 100; Carey *v.* McDougald, 7 Ga. 84; Merchants' Bank *v.* Central Bank, 1 Ga. 418, 44 Am. Dec. 665; Carey *v.* Giles, 10 Ga. 9; Wakefield Bank *v.* Truesdell (N. Y.), 55 Barb. 602; Leavitt *v.* Blatchford (N. Y.), 5 Barb. 9; Maxwell *v.* Planters' Bank, 29 Tenn. (10 Humph.) 507; Northern Bank *v.* Johnson, 45 Tenn. (5 Coldw.) 88.

A banking association, under the general banking law, is liable to repay money borrowed for its use on a letter of credit signed by the president under the proper authority, though there is no written promise to repay the same, signed by the president, vice president, and cashier. Leavitt *v.* Blatchford (N. Y.), 5 Barb. 9.

The 17th section of the act, incorporating the Mechanics' Bank of Alexandria, providing "that all bills, bonds, notes and every other contract or engagement on behalf of the corporation, shall be signed by the president, and countersigned by the cashier; and the funds of the corporation shall, in no case, be liable for any contract or engagement, unless the same shall be signed and countersigned as aforesaid," does not extend to contracts and undertakings implied in law. Mechanics' Bank *v.* Bank (U. S.), 5 Wheat. 326, 5 L. Ed. 100; Accord Northern Bank *v.* Johnson, 45 Tenn. (5 Coldw.) 88; Maxwell *v.* Planters' Bank, 29 Tenn. (10 Humph.) 507.

Where a general banking law contained a provision in the following words: "Contracts made by any bank or banking association established under the provisions of this act, and all notes and bills issued and put in circulation as money, shall be signed by the president and cashier thereof;" and a bank sold a draft which was signed by the president only, and was dishonored—it was held that the contracts referred to in the act were contracts intended to circulate as money only, and that the bank was liable on the draft. Paine *v.* Stewart, 33 Conn. 516.

Act 1855, p. 39, § 23, declaring that contracts made by banks, and all bills and notes by them issued and put in circulation as money, shall be signed by the president or vice president and cashier, does not include the indorsement of a note, for which the signature of the cashier alone is sufficient. Jones *v.* Hawkins, 17 Ind. 550.

Act 1855, p. 39, § 23, providing that contracts made by banks, and all bills and notes by them issued and put in circulation as money, shall be signed by the president or vice president and cashier, does not require the signatures of both president and cashier to a bill of exchange, for which the signature of

does a statutory provision that "contracts made by banks shall be signed by the president and cashier thereof" prevent a bank from contracting through other agents.[93]

§ 105 (1) Directors.—The directors of a bank are but its authorized agents, and can incur no obligation binding on the corporation, except while acting in the mode prescribed by, and within the limits of, the charter.[94] They represent the bank only when acting in their official capacity as a board. A single director can not bind the bank by contract without express authority from the board.[95] And when a debtor of the bank sets up a compromise or an accord and satisfaction as a defense to an action by the bank to recover against him, and alleges that such compromise or other agreement was made by a director of the bank, he is bound to show the authority of the agent to bind the bank, because the mere fact that the alleged agent is one of the directors is no proof of his authority to bind the bank by such an agreement.[96]

Power to Borrow Money.—The power of a bank to borrow money should be exercised by the directors,[97] and they may pledge the faith of the bank in execution of their trust.[98] The directors have no authority, however, to pledge the future earnings in the absence of express authority from the stockholders.[99]

Liquidation Contract.—A statute which vests authority in others than the directors of the bank to determine whether it shall be liquidated excludes such authority in the directors, and makes ultra vires a liquidation agreement executed by them.[1]

Donation or Appropriation of Bank's Funds.—The directors of a corporation have no power to make a donation from the funds of the bank or to misappropriate them in violation of the laws and rules regulating its mode of action.[2]

Compromise, Release or Extension of Claims.—The directors have power to compromise debts owing to the bank,[3] and the bank can not repudi-

the president alone is sufficient. Allison *v.* Hubbell, 17 Ind. 559.

93. **Same—Contracting through other than prescribed agent.**—Dana *v.* Bank, 4 Minn. 385 (Gil. 291).

94. **Contracts—Power of directors.**—Bank *v.* Schuylkill Bank (Pa.), 1 Pars. Eq. Cas. 180.

95. **Represent bank only when acting as a board.**—Harper *v.* Calhoun (Miss.), 7 How. 203; National Bank *v.* Shumway, 49 Kan. 224, 30 Pac. 411; Hughes *v.* Bank (Ky.), 5 Litt. 45.

96. **Proof of special authority of single director.**—Citizens' Nat. Bank *v.* Marks, 34 Pa. Super. Ct. 310; Olney *v.* Chadsey, 7 R. I. 224.

97. **Power to borrow money.**—Leavitt *v.* Yates (N. Y.), 4 Edw. Ch. 134.

98. **Same—Pledging faith of bank.**—State *v.* Bank, 5 Mart., N. S., 327.

99. **Same—Pledging future earnings.**—Brown *v.* Bradford, 103 Iowa 378, 72 N. W. 648.

1. **Liquidation contract.**—Assets Realization Co. *v.* Howard, 127 N. Y. S. 798, 70 Misc. Rep. 651, construing New York Banking Law (Consol. Laws c. 2), §§ 18, 19, 35, 66, 99, Code Civ. Proc., § 2419, and Gen. Corp. Law (Consol. Laws c. 23), § 170.

2. **Donation or appropriation of bank's funds.**—Union Bank *v.* Jones, 4 La. Ann. 236; Frankfort Bank *v.* Johnson, 24 Me. 490.

3. **Compromise, release, or extension of claims.**—Wolf *v.* Bureau, 1 Mart., N. S., 162.

ate the contract of its directors to accept land for a debt where no fraud on the part of the debtor is shown, or any conspiracy between the directors and the debtor to make a contract known to be disadvantageous to the bank.[4] Neither can the bank evade a contract to accept certain property of a debtor in discharge of his debts to the bank by the fact that one of the directors, who authorized such contract, was jointly liable with such debtor for the debt, where it is not shown that such director procured the contract by collusion with the other directors.[5] The directors of a bank can not release, without consideration, a debt due the bank; and a fortiori they can not empower the president to do so.[6] The directors of a branch bank, who are limited agents and unauthorized to make a donation of the property of the stockholders, have no power to authorize the cashier to vote for the discharge of an insolvent debtor, thereby releasing his future property and a surety, where the bank has acquired a right to a dividend whether a discharge be voted or not. Such a vote is a mere donation and not binding on the bank.[7] But they have power, in behalf of the corporation, to release a person whom they propose to call as a witness.[8] In order that any compromise or release entered into by the directors may be binding on the bank they must have acted in their official capacity as a board, and not as individuals.[9] Authority in a single director or other officer to release the claims of the bank must be derived from the directors by their vote, or from their assent, express or implied;[10] and when a debtor sets up a compromise agreement that he has entered into with a single director, it is incumbent upon him to show that such director has been made an agent of the bank with power to represent it in respect to the compromise or settlement of such claim.[11]

Compromise or Settlement with Officers of the Bank.—The di-

4. Accepting land in payment.—Baird *v.* Bank (Pa.), 11 Serg. & R. 411.

5. Accepting other than cash on contract on which director jointly liable.—Baird *v.* Bank (Pa.), 11 Serg. & R. 411.

6. Releasing debt without consideration.—Hodge *v.* First Nat. Bank, 63 Va. (22 Gratt.) 51. See, also, Bank *v.* Jones (U. S.), 8 Pet. 12, 8 L. Ed. 850, affirming Bank *v.* Dunn (U. S.), 6 Pet. 51, 8 L. Ed. 316.

7. Authorizing cashier to vote for discharge of insolvent debtor.—Union Bank *v.* Jones, 4 La. Ann. 236.

8. Power to release debtor who is to be called as a witness.—Lewis *v.* Eastern Bank, 32 Me. 90.

9. Must act in official capacity as a board.—Hughes *v.* Bank (Ky.), 5 Litt. 45.

Where a note given to a bank is made payable on a certain date, a parol agreement, made by the directors in their private capacity, not to demand payment until the occurrence of a certain contingency, does not bind the corporation. Hughes *v.* Bank (Ky.), 5 Litt. 45.

10. Single director must be specially authorized.—Olney *v.* Chadsey, 7 R. I. 224.

11. Same—Proof of special authority.—Citizens' Nat. Bank *v.* Marks, 34 Pa. Super. Ct. 310.

When a debtor of a bank sets up an agreement that would extinguish one-half of the debt in consideration of a second promise to pay the other half, and alleges that such an agreement was made by a director of the bank, the debtor is bound to show the authority of the agent in order to bind the bank. The mere fact that the agent was one of the directors does not in itself amount to proof of his authority to bind the bank by such an agreement. Citizens' Nat. Bank *v.* Marks, 34 Pa. Super. Ct. 310.

rectors of a bank have authority to make a settlement with a cashier whose accounts exhibit a deficit in the funds.[12]

Same—Effect of Fraud on the Part of the Directors.—Fraudulent conduct on the part of directors in making a settlement with the cashier would not annul or make the settlement void, unless the cashier was also guilty of fraud.[13]

Delegation of Power by Directors.—The directors are not required to devote themselves to the details of the business, but may leave these to the president and cashier and their assistants, or to committees chosen from their own number.[14] They can not, of course, delegate those powers which are of a personal nature, or which, under the charter, are required to be exercised by the directors in person.[15] They have power to authorize the president and cashier to borrow money or obtain discounts for the use of the bank;[16] and the settlement of a claim against a bank made by a director who has been specially delegated by the bank to take charge of the matter, and who acts under the direct advice of the president, is binding on the bank.[17] In the exercise of delegated powers, the officer, agent, or committee is restricted to the performance of those acts reasonably necessary to the accomplishment of that for which the power was given. Anything beyond this is not within his authority and will not be binding upon the bank.[18]

12. **Compromise or settlement with officers of bank.**—Frankfort Bank *v.* Johnson, 24 Me. 490.

13. **Same—Effect of fraud on the part of the directors.**—Frankfort Bank *v.* Johnson, 24 Me. 490.

14. **Delegation of power by directors.**—Briggs *v.* Spaulding, 141 U. S. 132, 35 L. Ed. 662, 11 S. Ct. 924; Mason *v.* Moore, 73 O. St. 275, 76 N. E. 932, 4 L. R. A., N. S., 597; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

15. **Same—Nonassignable powers.**—First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Ex parte Rickey, 31 Nev. 82, 100 Pac. 134; Murphy *v.* Gumaer, 12 Colo. App. 472, 55 Pac. 951.

16. **May authorize president and cashier to borrow money, obtain discounts, etc.**—Ridgway *v.* Farmers' Bank (Pa.), 12 Serg. & R. 256, 14 Am. Dec. 681.

17. **Director specially authorized to settle claim.**—Waxahachie Nat. Bank *v.* Vickery (Tex. Civ. App.), 26 S. W. 876.

18. **Incidental or implied powers of officer acting under special authority.**—Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; National Bank *v.* Levanseler, 115 Mich. 372, 73 N. W. 399; Bryant *v.* Bank, 95 Wis. 476, 70 N. W. 480.

The appointment, by the directors of such corporation, of a "finance committee," with "authority in collecting and providing ways and means and negotiating financial operations, and the power of discounting," does not give them power to direct the execution of a mortgage of real estate of the corporation. Leggett *v.* New Jersey Mfg., etc., Co., 1 N. J. Eq. 541, 23 Am. Dec. 728.

Where the directors of a bank authorized the president, cashier, and two of the directors as a committee to purchase certain land at a fixed price, the president and cashier had no authority to authorize a third person to buy the land at an increased price, so as to bind the bank to pay such person a commission therefor. Bryant *v.* Bank, 95 Wis. 476, 70 N. W. 480.

The directors of a bank, in the presence of one who had agreed to purchase property owned by the bank, authorized the president to execute to such purchaser a bond of indemnity against any legal claim or lien which a specified company might have upon the property. The bond given by the president was conditioned upon the bank obtaining from the company a good and sufficient written lease. The lease procured was not satisfactory to the purchaser, and he declined to accept it, and refused to pay the amount due on a purchase-money mortgage

Ratification of Unauthorized Contracts.—See post, "Ratification," § 114.

§ 105 (2) President.—Except to a very limited extent, the president of a bank has no inherent authority by virtue of his office to enter into contracts or agreements which will bind the corporation.[19] But on the other hand, it is clear that he may be authorized to do so, and it is equally clear that it is not necessary, in order to prove such authority, to produce a resolution of the board of directors conferring it, or to prove any action or consultation of the board on the subject, but such authority may be inferred by proving the existence of such facts as constitute clearly a public holding out that such an agreement or contract as he has entered into was within the scope of his legitimate delegated authority and that the public was warranted in so believing.[20]

Where President Personally Interested and Acts Adversely to Bank.—Where the president is acting adversely to the bank and is personally interested in a given transaction, he can not be regarded as representing the bank with respect thereto, and the bank is not bound, either by his knowledge or upon his agreement.[21]

until the condition of the bond should be satisfied. Held, on foreclosure of the mortgage, that the giving of the bond conditioned for the procuring of a lease was unauthorized, and did not bind the bank. National Bank *v.* Levanseler, 115 Mich. 372, 73 N. W. 399.

19. **Power of president to contract in behalf of bank.**—First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

20. **Same—Proof of special authority.**—First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Wells Fargo & Co. *v.* Enright, 127 Cal. 669, 60 Pac. 439, 49 L. R. A. 647.

21. **Where president personally interested and acts adversely to bank.**—Rhodes *v.* Webb, 24 Minn. 292; Lewis *v.* First Nat. Bank, 1 Neb. 177, 95 S. W. 355; People *v.* Mercantile Co-operative Bank, 104 App. Div. 219, 93 N. Y. S. 521.

Where the president of a bank, being of sufficient pecuniary responsibility, became personally liable with the debtor of the bank for a loan of money, and the object was to reduce the debtor's debt, the president of the bank did not act as the agent of the bank, nor was it in any manner responsible therefor. Lewis *v.* First Nat. Bank, 1 Neb. 177, 95 N. W. 355.

A bank president agreed with a director to purchase his stock, and, as purchaser thereof, took the same, handed it to the cashier, with instructions to return the director the latter's note of equal amount, held by the bank, and hold the stock in lieu thereof; the president promising to pay the amount of such note. The note was stamped, "Paid," and returned to the maker. Held, that the maker of the note was not thereby discharged from his liability, in the absence of ratification of the transaction by the bank. Rhodes *v.* Webb, 24 Minn. 292.

Plaintiff conveyed land to a bank, and subscribed for stock; the bank agreeing that in consideration of a certain sum, payable in installments, equaling the dues on plaintiff's stock, it would reconvey the land. At the same time the bank paid plaintiff $10,000, which he loaned to N., the bank's president, who gave to plaintiff his personal bond, conditioned on the payment by him of said installments. The bank received no benefit from the $10,000. Held, that plaintiff had no claim against the bank for said loan, or for damages for failure in payment of the installments, but his remedy was on N.'s bond. People *v.* Mercantile Co-Operative Bank, 104 App. Div. 219, 93 N. Y. S. 521.

A subsequent resolution by the bank's directors to indemnify N. from loss on his undertaking was without consideration, and gave plaintiff no right. People *v.* Mercantile Co-Operative Bank, 104 App. Div. 219, 93 N. Y. S. 521.

Power to Contract with Respect to Particular Matters.—See ante, "President," § 102 (5b).

§ 105 (3) Cashier—§ 105 (3a) In General.—In order to bind the bank by any contract that he may make, the cashier must keep within the usual and apparent scope of his authority. Without special authority from the board of directors, express or implied, he can not make for his bank a contract in regard to a subject matter outside the usual and customary business of the bank, and outside the business usually performed by cashiers.[22] The actual powers and duties of the cashier, like those of all other agents, may be more or less qualified, restricted or enlarged by the corporation, institution or party for whom he acts. Any restriction upon his usual and customary authority, to be binding upon third persons dealing with the bank through him, must be brought to their knowledge, for where a party deals with the cashier of a bank in good faith, without notice of any want of authority on his part, and the act done is within the apparent scope of his authority, the bank is bound by the contract.[23] On the other hand, contracts not within the scope of the powers ordinarily incident to the office of a cashier will be binding upon the bank where authority to enter into such contracts on behalf of the bank has been expressly conferred, or where he has been held out to the public as having such authority by a previous course of dealing. In short, any contract is binding on a bank, made by its cashier acting within the reasonable or apparent scope of his authority, or made by him when acting with the knowledge and approval of the directors, or like others which he had been accustomed to make with their approval, or that was afterwards ratified by the bank's availing itself of the benefits of such contract.[24] And where the directors of a bank allow the cashier to take

22. Power of cashier to contract in behalf of bank.—Hill *v.* Bank, 87 Mo. App. 590; City Bank *v.* Perkins, 17 N. Y. Super. Ct. 420; First Nat. Bank *v.* Mansfield Sav. Bank, 10 O. C. C. 233, 6 O. C. D. 452; Sturges & Co. *v.* Bank, 11 O. St. 153, 78 Am. Dec. 296; City Nat. Bank *v.* Martin, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632; First Nat. Bank *v.* Greenville Oil, etc., Co., 24 Tex. Civ. App. 645, 60 S. W. 828.

23. Restriction upon customary powers of cashier—Notice—Proof.—Sturges & Co. *v.* Bank, 11 O. St. 153, 78 Am. Dec. 296; City Nat. Bank *v.* Martin, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632; First Nat. Bank *v.* Greenville Oil, etc., Co., 24 Tex. Civ. App. 645, 60 S. W. 828.

The owner of a promissory note payable to the paying teller of a bank and endorsed by him in blank, delivered it to such teller for collection, to be held by him as an agent of the bank. The teller collected the money on a check given for it and payable to his bank and caused the same to be entered on the books of the bank to his individual credit, concealing from the owner the fact that the money had been collected. The teller died insolvent and a defaulter to his bank. No other officer of the bank knew of the act of the teller in collecting and appropriating the money to his own use. In a suit by the owner of the note against the bank, held: It being shown that the teller had in other transactions made collections for others as an officer of the bank, and the collection being within the scope of his apparent authority, it was immaterial whether the collection was really within the scope of his authority or not, and the bank would be bound by his acts. City Nat. Bank *v.* Martin, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632.

24. Authority beyond ordinary scope of powers—Proof of.—Hill *v.* Bank, 87 Mo. App. 590.

the general charge and management of the business and contracts of the bank, all his contracts made within the scope of the powers of the bank are binding upon it.[25]

No Power to Bind the Bank for His Private Benefit.—A cashier has no implied power to bind the bank for his individual benefit or to pledge the credit of the bank in aid of his private enterprises, and where the transaction is such as to carry upon its face notice to third persons that an attempt is being made to use the credit of the bank for such a purpose, they are put upon inquiry to ascertain whether it is being done with the knowledge and sanction of the board of directors.[26]

§ 105 (3b) Particular Powers Considered.—Control and Management of Bank's Property.—A cashier of a bank is without implied authority as a matter of law to lease the bank's premises, to accept the surrender of a leasehold term or to lease premises of others for it, though he is the executive officer of the bank with reference to its business, such as deposits, discounts, and exchange.[27] And his agreement that the bank's lessee may use the leased premises for a purpose prohibited by the lease does not bind the bank, where it is provided by statute that the business of the bank shall be managed by the directors, and where, under the bank's charter and by-laws, defining the cashier's duties, it is a matter within the directors' control.[28] But while the management of the bank's property as, for example, a hotel property, including repairs, etc., is not in the line of the ordinary duties of a bank cashier, the corporation, by its course of conduct with him, may clothe him with such power as to bind the property with a mechanic's lien.[29]

25. **Same—Where cashier given general management of bank's affairs.**—City Bank *v.* Perkins, 17 N. Y. Super. Ct. 420.

26. **Cashier no power to bind bank for his private benefit.**—West St. Louis Sav. Bank *v.* Shawnee County Bank, 95 U. S. 557, 24 L. Ed. 490; State Nat. Bank *v.* Newton Nat. Bank, 14 C. C. A. 61, 66 Fed. 691.

A cashier of a bank has no implied authority to bind the bank by a pledge of its credit to secure a discount of his own notes for the benefit of a corporation in which he was a stockholder. State Nat. Bank *v.* Newton Nat. Bank, 14 C. C. A. 61, 66 Fed. 691.

The cashier of a bank is not, by reason of his official position, presumed to have the power to bind it as an accommodation indorser on his individual note; and the payee who fails to prove that the cashier, as such, had authority to make the indorsement, can not recover against the bank. West St. Louis Sav. Bank *v.* Shawnee County Bank, 95 U. S. 557, 24 L. Ed. 490, affirming Fed. Cas. No. 17,462, 3 Dill. 403.

The transfer of a note, owned by a bank as collateral security, for a note executed by the father of the cashier of the bank, by one of the owners of the bank, and by the cashier individually, payable to the bank, and indorsed and substituted by the bank for a certificate of deposit issued by it, was not an attempt to transfer the note owned by the bank as security for the cashier's private debt, for the transaction was that of the bank, and for the bank. Powers *v.* Woolfolk, 132 Mo. App. 354, 111 S. W. 1187.

27. **Particular powers of cashier—Control and management of bank's property.**—People's Bank *v.* Bennett, 159 Mo. 1, 139 S. W. 219.

28. **Same—Use of leased property.**—Dycus *v.* Traders' Bank, etc., Co., 52 Tex. Civ. App. 175, 113 S. W. 329.

29. **Same—Special powers—Mechanic's liens.**—Marshall *v.* Bank, 76 Mo. App. 92.

Purchase or Sale of Property.—See ante, "Power of Cashier," § 104 (3); "Disposition, Encumbrance, or Lease of Real Estate," § 104 (5).

Creation of Agency.—The creation of an agency of any kind for the bank is a matter not within the usual and implied powers of the cashier. It must have been authorized by those to whom has been confided the power to manage its business, both ordinary and extraordinary.[30]

Power to Release or Compromise Claims, Extend Time of Payment, etc.—The cashier of a bank, unless specially empowered to do so, either expressly or implied by the course of business, has no authority to release, otherwise than in due course of business and upon payment, the makers of notes or other debtors of banks, or to release sureties or indorsers, and notwithstanding his agreement to do so, the parties still remain liable to the bank even though the note or other security may have been given up and canceled.[31]

Same—Extension of Time Operating a Release.—This doctrine not only forbids direct agreements for the cancellation of securities and the release of the parties thereto, but forbids any agreement for an extension of time or any course of dealing operating to release parties secondarily liable without the knowledge or consent of the party primarily liable

30. Same—Creation of agency.—United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130.

The cashier of a bank wrote to the secretary of the treasury that the bearer of the letter, who was a director of the bank, was authorized on behalf of the bank to contract for the transfer of money for the general government from the east to the south or west, and the secretary of the treasury made with the said bearer such a contract, and delivered to him funds, which he failed to deliver according to the contract. In a suit by the United States against the bank it was held that such a transaction not being within the scope of the authority of the cashier, nor authorized by the directors, nor ratified by them, the bank was not obliged to reimburse to the United States the moneys so advanced by the secretary of the treasury. United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130.

31. Power of cashier to release or compromise, extend time of payment, etc.—Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428; Thompson *v.* McKee, 5 Dak. 172, 37 N. W. 367; Mott *v.* Semmes, 24 Ga. 540; Marine Bank *v.* Ferry, 40 Ill. 255; Ecker *v.* First Nat. Bank, 59 Md. 291; Farmers', etc., Bank *v.* Clancy, 163 Mich. 586, 128 N. W. 752; Payne *v.* Commercial Bank (Miss.), 6 Smedes & M. 24; Daviess County Sav. Ass'n *v.* Sailor, 63 Mo. 24; People's Sav. Bank *v.* Hughes, 62 Mo. App. 576; Merchants' Bank *v.* Rudolph, 5 Neb. 527; Cocheco Nat. Bank *v.* Haskell, 51 N. H. 116, 12 Am. Rep. 67; Bank *v.* Reed (Pa.), 1 Watts & S. 101; Hodge *v.* First Nat. Bank, 63 Va. (22 Gratt.) 51; Bank *v.* Wetzel, 58 W. Va. 1, 50 S. E. 886; First Nat. Bank *v.* Lowther-Kaufman Oil, etc., Co., 66 W. Va. 505, 66 S. E. 713.

Where the bank's officers were diligent, and where its discount committee met almost daily, and was at all times accessible to the cashier, and no unusual powers were conferred on him, he was without authority to make a contract releasing an indorser. Farmers', etc., Bank *v.* Clancy, 163 Mich. 586, 128 N. W. 752.

"Ordinarily, he has no power to discharge a debtor without payment, nor to surrender the assets or securities of the bank. And, strictly speaking, he may not, in the absence of authority conferred by the directors, cancel its deeds of trust given as security for money loaned—certainly not unless the debt secured is paid. As the executive officer of the bank, he transacts its business under the orders and supervision of the board of directors. He is their arm in the management of its financial operations." Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428.

thereon.[32]

Same—Changing Character of Relation.—Neither is it within the general powers of the cashier to change the character of the relation between the bank and the parties to paper held by it, as by an agreement that each indorser shall be liable for only a certain portion of the debt, or by an agreement operating to release some of the parties in consideration of the execution of new or additional securities by the others.[33]

Same—Compromise—Substitution of Securities.—A cashier is without authority to compromise a claim, unless such authority is either directly or impliedly by the course of business conferred on him, and where the bank's officers were diligent and where its discount committee met almost daily, and was at all times accessible to the cashier and no unusual powers were conferred on him, he was without authority to make such a contract.[34]

32. **Same—Extension of time operating a release.**—Vanderford *v.* Farmers', etc., Nat. Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A., N. S., 129; Bank *v.* Hooke, 41 Tenn. (1 Coldw.) 156; Bank *v.* Wetzel, 58 W. Va. 1, 50 S. E. 886. But see Wakefield Bank *v.* Truesdell (N. Y.), 55 Barb. 602.

A cashier of a bank has no implied power, merely by virtue of his office, to receive money for interest in advance on a note owned by the bank and agree to extend time of payment and thus discharge an endorser from liability. Bank *v.* Wetzel, 58 W. Va. 1, 50 S. E. 886.

The cashier of a bank, after a bill had been protested, accepted another bill drawn and indorsed by the same parties, not for the purpose of a renewal, but merely for the purpose of saving the credit of said parties, by preventing the bill from appearing on the list of protested papers. Afterwards the new bill was returned to the drawer, and an action brought on the old bill against the accommodation indorser. Held, that the arrangement whereby the cashier accepted the new bill was unauthorized, and not binding on the bank and would not operate to release the indorser of the original bill. Bank *v.* Hooke, 41 Tenn. (1 Coldw.) 156.

33. **Same—Changing character of relation.**—Ecker *v.* First Nat. Bank, 59 Md. 291; Payne *v.* Commercial Bank (Miss.), 16 Smedes & M. 24; Bank *v.* Reed (Pa.), 1 Watts & S. 101; First Nat. Bank *v.* Lowther-Kaufman Oil, etc., Co., 66 W. Va. 505, 66 S. E. 713.

Nor has he any authority, by virtue of his office, to bind his bank by an agreement with indorsers of a note, unknown to the directors, that each indorser shall be liable only for a certain portion of the debt, whether the contract relates to original notes discounted or to notes taken in renewal. First Nat. Bank *v.* Lowther-Kaufman Oil, etc., Co., 66 W. Va. 505, 66 S. E. 713.

The cashier of a bank is not authorized by his general authority to change the character of the bank, in relation to certain paper, from that of creditor to that of an agent of its debtor. Bank *v.* Reed (Pa.), 1 Watts & S. 101.

It is not within the general power of a cashier to release a party to a note from his liability to the bank thereon by taking another note signed by all of the parties to the original save the one so attempted to be released; nor can he, by virtue of his office, release a surety, even though the bank holds other security to which it may resort. Ecker *v.* First Nat. Bank, 59 Md. 291.

In an action by a bank against the parties to a note held by it, it appeared in proof that the cashier of the bank had made an agreement which, if carried out, would have discharged all the parties to the note but one, and that he made that agreement after consulting with two or more of the directors. The court instructed the jury that the cashier of the bank had no authority to bind the bank by any contract that would release the parties, but that, if he acted on consultation with two or more of the directors, then his acts would be binding on the bank. Held, that the entire instruction, taken together, and applied to the facts, would not be erroneous in its conclusion. Payne *v.* Commercial Bank (Miss.), 6 Smedes & M. 24.

34. **Same—Compromise—Substitution of securities.**—Farmers', etc., Bank *v.* Clancy, 163 Mich. 586, 128 N. W. 752.

Neither has he any authority, by virtue of his office, to go into another state, and settle an account with another bank, taking private securities therefor, and giving a receipt in full. In such a transaction he acts as the agent of his bank simply, and, in order to bind it, his acts must be within the scope of his appointment.[35]

Same—Power to Enter into Composition and Discharge.—Without special authority from the directors, he has no power to bind the bank by an agreement for composition with creditors and the discharge of an insolvent, the bank being one of the creditors.[36]

Same—Power to Receive Payment Other than Money.—The cashier of a bank is not authorized, merely by virtue of his position, to receive, in payment of debts due the bank, other notes, or things other than money, without consulting the president and other officers of the bank; but if intrusted by the corporation with the business of renewing notes and debts of the bank, or the management of the business of the bank, his agreement to accept one note in payment of another is binding on the bank; which authority need not be expressly conferred, but may be shown by the manner in which the business of the bank was conducted, and by the cashier's repeated dealings with the party, who claims that he has such authority, it being a question for the jury, under all the evidence.[37]

35. **Same—Same.**—Sandy River Bank *v.* Merchants', etc., Bank, Fed. Cas. No. 12,309, 1 Biss. 146.

36. **Same—Power to enter into composition and discharge.**—Reed *v.* Powell (La.), 11 Rob. 98; Union Bank *v.* Bagley (La.), 10 Rob. 43; Clinton & Port Hudson R. Co. *v.* Kernan (La.), 10 Rob. 176; Union Bank *v.* Jones, 4 La. Ann. 236; Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189.

A cashier can not, by virtue of his office, represent the bank at a meeting of creditors, and vote for syndic; he must be authorized by the directors. Reed *v.* Powell (La.), 11 Rob. 98.

A cashier may, as an act of administration, accept an insolvent's surrender and vote for syndic; but, without express and special authority from the directors, he can not discharge the insolvent. The release of a debtor is an act of ownership, and not of administration. Civ. Code, arts. 2965, 2966. Union Bank *v.* Bagley (La.), 10 Rob. 43; Clinton & Port Hudson R. Co. *v.* Kernan (La.), 10 Rob. 176; Union Bank *v.* Jones, 4 La. Ann. 236.

The president and cashier of the C. Bank were its active managers. A debtor of the bank proposed a compromise to the cashier, the debtor's other creditors, two banks, agreeing to compromise if the C. Bank would. The president assenting, the cashier wrote to one of the other banks, stating that the C. Bank accepted the compromise. Soon afterwards the president and cashier changed their minds, and, when the debtor tendered the indorsed note and check agreed upon, the cashier refused to accept them, and repudiated the agreement. In the meantime the debtor had settled with the other banks. It did not appear that the cashier had acted without authority. The repudiation was not put upon that ground, and compromises were of common occurrence with the bank. Held, that the cashier's authority was to be presumed; that the agreement was a valid composition agreement; and that after it had been acted upon by the other creditors, the C. Bank was bound. Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189.

37. **Same—Power to receive payment other than money.**—Mitchell *v.* Porter, 15 Ky. L. Rep. 335.

An agreement by a bank cashier to accept a verbal assignment of an interest in a note, previously assigned to another bank as collateral security, in payment of another note, is void, because beyond the scope of his authority. Piedmont Bank *v.* Wilson, 124 N. C. 561, 32 S. E. 889.

He has no authority, by virtue of his office, to accept the certificates of the capital stock of an insurance company

Same—Special Authority to Release or Compromise.—A cashier, acting in conformity with the established practice and rules of the bank, may release a debt and mortgage to the bank.[38] And where the directors have, for a number of years, left the entire management of the bank to the cashier, and have acquiesced in all his acts in making loans, taking securities, and discharging mortgages, his act in discharging a mortgage will be binding on the bank.[39]

Same—Restrictions Applicable to Other Subordinates.—What has been said with reference to the want of power in the cashier to release parties indebted to the bank, applies, of course, to the tellers and other assistants subordinate to the cashier.[40]

Contract to Pay Money Otherwise than in Way of Loan.—A cashier of a bank has no power, by virtue of his office, to bind the corporation except in the discharge of his ordinary duties, and the ordinary business of a bank does not comprehend a contract made by a cashier—without delegation of power by the board of directors—involving the payment of money not loaned by the bank in the customary way.[41]

Agreements as to the Application of Money or Payments.—It is within the scope of the cashier's authority to accept payments under an agreement that they should be applied in discharge of a particular debt or debts owing to the bank.[42]

To Pay Notes and Drafts Out of Funds of Customers.—A promise by the cashier of a bank, made without consideration to the drawer of a draft, to pay the same out of funds of a customer on whom the draft is drawn and who has been credited with the proceeds of negotiable paper which he as owner transferred to the bank, is not enforceable against the

in payment of a debt due the bank. Bank *v.* Hart, 37 Neb. 197, 55 N. W. 631, 20 L. R. A. 780.

It has been held, however, that the cashier of a bank is its executive officer, and has authority to take a book account against a third person in payment of a note. Santa Fe Exch. Bank *v.* Dick, 73 Mo. App. 354.

38. **Same—Special authority to release or compromise.**—Ryan *v.* Dunlap, 17 Ill. 40, 63 Am. Dec. 334.

39. **Same—Releasing mortgage.**—Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428.

40. **Same—Restrictions applicable to other subordinates.**—Marine Bank *v.* Ferry, 40 Ill. 255.

The functions of a note teller of a bank do not extend to the erasure of the name of one of several makers of a note, simply upon his request, so as to bind the bank. Marine Bank *v.* Ferry, 40 Ill. 255.

41. **Contract to pay money otherwise than in way of loan.**—Bank *v.* Dunn (U. S.), 6 Pet. 51, 8 L. Ed. 316; United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130; Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428.

42. **Agreements as to the application of money or payments.**—Stebbins *v.* Lardner, 2 S. Dak. 127, 48 N. W. 847.

Defendants assigned certain rents to the cashier of a bank, to be applied to the satisfaction of a particular debt due by them to the bank, the cashier agreeing that the rents should be so applied. Held, that such agreement was within the scope of the cashier's authority, and that the bank was bound thereby; and that, if sufficient rents were paid into the bank under such agreement to pay said note, the note, in law, was paid, without regard to other indebtedness of defendants to the bank. Stebbins *v.* Lardner, 2 S. Dak. 127, 48 N. W. 847.

bank, unless the customer assents that the bank shall make such an application of the funds so placed to his credit.[43] The managing partner of a firm doing a banking business, who is also the cashier, has authority to make an agreement by which a note shall be charged to a third party in pursuance of a previous agreement between the bank and the maker of the note.[44]

To Borrow Money for the Bank.—The cashier of a bank is the proper officer to execute its power of borrowing money, and he needs no special delegation of authority to do so. If done in the ordinary course of his business, it is presumably done within the scope of his duty, and the bank is bound by his acts and representations in the apparent exercise of such authority.[45] As an incident to this power, it is within the apparent scope of the authority of the cashier to execute the necessary evidences of the indebtedness and to pledge the bank's property or funds to secure the money borrowed by him for the bank in regular course of business.[46]

43. To pay notes and drafts out of funds of customers.—Bullard Bros. *v.* Bank, 121 Ga. 527, 49 S. E. 615.

44. Same—Charging note to account of third person.—Wise *v.* Leob, 15 Pa. Super. Ct. 601.

45. To borrow money for the bank.—State Bank *v.* People's Nat. Bank (Sup.), 118 N. Y. S. 641; Barnes *v.* Ontario Bank, 19 N. Y. 152; Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165; Ringling *v.* Kohn, 6 Mo. App. 333.

46. Same—Power to execute evidences of indebtedness and give security.—Citizens' Bank *v.* Bank, 31 Ky. L. Rep. 365, 103 S. W. 249.

It is competent for the cashier of a bank organized under the general banking law (Rev. St., c. 7), as agent for its board of directors, to execute a promissory note for money borrowed to use in its business, and the bank will be bound thereby. Ballston Spa Bank *v.* Marine Bank, 16 Wis. 120.

A cashier, having the general charge and management of a bank, has authority to transfer the bank's paper as collateral security for the bank's debts. Powers *v.* Woolfolk, 132 Mo. App. 354, 111 S. W. 1187.

Where, for almost a year, negotiable securities had been constantly pledged by the cashier of one bank, under his written agreement as cashier, with another bank, for advances made, held, that the latter bank was a purchaser for value of said securities, free from all prior equities, as it might presume that the cashier acted with the consent of the directors. Mercantile Bank *v.* McCarthy, 7 Mo. App. 318.

The cashier of a bank has the same authority to pledge collaterals to secure notes given by the bank that he has to give the notes, and it was therefore error, in an action for an accounting against the assignee of an insolvent bank, to direct the creditor to return to the assignee certain collaterals held by such creditor as security for the notes of the bank. Sloan *v.* Kansas City State Bank, 158 Mo. 431, 57 S. W. 1056.

A bank cashier arranged with A. that A. should accept the bank's drafts on condition that the bank should keep a corresponding balance with A. to A.'s credit, on which balance A. should have a lien as security for his liability, and should be kept informed of the condition of the bank, and have at any time the right to take the balance to pay the acceptances. Held, that this agreement was within the power of the cashier to make, and bound the bank; and that, upon notice from the bank of its insolvency, A. was entitled to apply the balance in pursuance of the agreement, as against the assignee in insolvency. Coats *v.* Donnell, 94 N. Y. 168.

Actuary's authority.—The Freedman's Savings and Trust Company, chartered by an act of congress approved March 3, 1865 (13 Stat. 510), being, during a financial crisis, pressed for means, its agent, with the knowledge and consent of its trustees, borrowed of A. moneys which were applied to its use. A note therefor was signed by the actuary of the institution, who subsequently transferred to A., in satisfaction thereof, certain

Same—Statutory Restrictions.—There is no implied authority in the cashier to borrow money on behalf of the bank under a statutory provision which vests that power only in the directors or their duly authorized agents and officers.[47] And a statute which provides that a bank's cashier shall have no power to indorse, sell, or pledge any obligations received by it for money loaned, unless authorized in writing by the directors, is notice to the world of the limitation of the cashier's authority.[48] But such a statute does not prevent a cashier from borrowing money for the bank's benefit in the ordinary course of business without any authority from the directors. Such statute merely invalidates a pledge of the bank's securities as collateral when made without the required written authority.[49] And such statutes do not apply to private banks having no board of directors.[50]

securities belonging to the company. That officer was held out to the public as competent to make such an exchange, and there was no departure in this instance from the established usages. No fraud was committed, and the transaction was advantageous to the institution. On the failure of the company, the commissioners appointed to wind up its affairs filed their bill, praying that A. be decreed to deliver to them said securities. Held, that the commissioners are not entitled to relief. Creswell *v.* Lanahan, 101 U. S. 347, 25 L. Ed. 853, citing Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

47. **Same—Statutory restrictions.**—First Nat. Bank *v.* Michigan City Bank, 8 N. Dak. 608, 80 N. W. 766.

The cashier of a state bank organized under Laws 1890, c. 23, providing (§ 4, subd. 7) that such a bank shall have power to exercise, by its board of directors or duly-authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, bills of exchange, drafts, and other evidences of debt, by receiving deposits, etc., has no authority to borrow money unless it is specially given by the board of directors. First Nat. Bank *v.* Michigan City Bank, 8 N. Dak. 608, 80 N. W. 766.

48. **Same—Knowledge of statutory restrictions.**—Union Nat. Bank *v.* Lyons, 220 Mo. 538, 119 S. W. 540.

49. **Same — Statute construed.**—Union Nat. Bank *v.* Lyons, 220 Mo. 538, 119 S. W. 540.

Held absolutely void here.—Under Rev. St. 1899, § 1294, requiring that authority of the directors to a bank cashier to dispose of its securities shall be given in a regular meeting of the board, a written record of which proceeding shall first have been made, and providing that all acts of indorsing, pleading, etc., by such cashier without authority from the directors shall be null and void, such acts by the cashier, unless previously authorized by the written record of a director's meeting of the bank, are not voidable, but are without any force and validity whatever. Hume *v.* Eagon, 83 Mo. App. 576.

Not obnoxious to the statute here.—Defendant, indebted to a bank, in lieu of the notes executed other notes and a mortgage to plaintiff, the cashier, without authority of the directors. Plaintiff assigned the notes to the bank, which reassigned them to him, and he testified that he had no personal interest, but held them for the bank. Held, that the notes were not void as obnoxious to Rev. St. 1899, § 1294 (Ann. St. 1906, p. 1054) providing that the cashier shall have no power to indorse, sell, pledge, or hypothecate any notes or other obligations received by said corporation for money loaned, until such power shall have been given to the board of directors, and declaring such transactions void. Donnell *v.* Miller, 152 Mo. App. 217, 132 S. W. 1194.

50. **Same—Same—Applicability to banks having no board of directors.**—Powers *v.* Woolfolk, 132 Mo. App. 354, 111 S. W. 1187.

Rev. St. 1899, § 1294 (Ann. St. 1906, p. 1054), forbidding a cashier to transfer notes of the bank as collateral security, unless such power shall have been given him by the board of directors, and making transfers, without such authority, null and void, which section, so far as applicable, by § 1301, Rev. St. 1899 (Ann. St. 1906, p. 1058),

To Pay the Debts and Obligations of the Bank.—It is within the usual and implied powers of the cashier to apply its funds as well as its negotiable securities to the discharge of its obligations.[51] And a resolution of the directors requiring the president and cashier to liquidate the debts of the bank, is sufficient to authorize the cashier, with the sanction of the president, to indorse the paper of the bank, even if he lacked such authority before; and if it did not, a subsequent ratification thereof made the same binding;[52] but if the cashier promises to pay a debt which the corporation does not owe, or which it is not liable to pay, or if he represents forged bills to be genuine, such promise or admission will not bind the bank, except as against bona fide holders for value and without notice, unless it has authorized or adopted the act.[53]

Power to Renew Notes.—The cashier of a bank, who, in addition to his usual powers, is, in the absence of the president, running the bank under the advice of the executive committee, has authority to bind the bank by a contract to renew notes, in consideration of the release by the indorser of a lien on the maker's property.[54]

Pledging Assets for Antecedent Debts.—The cashier of a bank has not the power to pledge its assets for the payment of an antecedent debt.[55]

To Execute Indemnity Bond to Sheriff.—A cashier of a bank has not, under his general authority merely, authority to execute an indemnity bond to a sheriff who has levied on property under an execution in favor of the bank.[56]

To Bind Bank as Surety or Guarantor.—A bank has no authority to lend its credit; hence it is not within the power of the cashier to bind it upon a contract of guaranty or suretyship for the accommodation of third persons and with respect to matters in which it has no interest.[57]

governs private banks, does not apply to a private bank which has no board of directors. Powers *v.* Woolfolk, 132 Mo. App. 354, 111 S. W. 1187.

51. Power of cashier to pay debts and obligations of bank.—Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631; Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; Cochecio Nat. Bank *v.* Haskell, 51 N. H. 116, 12 Am. Rep. 67.

In the absence of all positive restrictions, it is his duty as well to apply the negotiable funds, as the moneyed capital, of the bank, to discharge its debts and obligations. Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631.

52. Under resolution of directors.—Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631.

53. Debts which bank does not owe —Forged bills.—Merchants' Bank *v.* Marine Bank (Md.), 3 Gill. 96, 43 Am. Dec. 300.

54. Power of cashier to renew notes.—Bank *v.* Bright, 23 C. C. A. 586, 77 Fed. 949.

55. Pledging assets for ante credit debts.—State *v.* Davis (N. Y.), 50 How. Prac. 447.

56. To execute indemnity bond to sheriff.—Watson *v.* Bennett (N. Y.), 12 Barb. 196.

57. Power to bind bank as surety or guarantor.—West St. Louis Sav. Bank *v.* Shawnee County Bank, 95 U. S. 557, 24 L. Ed. 490; Seligman *v.* Charlottesville Nat. Bank, Fed. Cas. No. 12,642, 3 Hughes 647; National Bank *v.* Atkinson, 55 Fed. 465; Farmers', etc., Bank *v.* Troy City Bank (Mich.), 1 Doug. 457; Swofford Bros. Dry Goods Co. *v.* Bank, 81 Mo. App. 46; Bowen *v.* Needles Nat. Bank, 87 Fed. 430.

The guarantor by the bank of the notes of third persons, discounted by a customer acting through the cashier is not within the scope of the cashier's authority, is without the ordinary

Buying and Selling Exchange.—There being nothing to show any restriction or qualification of his powers in that regard, the duties of the cashier may reasonably be understood to extend to the buying and selling, and negotiating bills of exchange, checks and promissory notes, as well as to that of borrowing money, as the agent of the bank. In the discharge of his duty, he is supposed to be instructed and directed, either generally or specially, by the bank, either through its board of directors or president, as the case may be.[58] The written assurance of the cashier which accompanies a bill sent to the parties purchasing the same that it "is perfectly safe," amounts to a warranty or representation in the nature of a guaranty that the bill is collectible and the bank is bound thereon.[59]

§ 106. Deposits—§ 106 (1) In General.—An officer of a bank can not bind the bank in regard to a deposit by an act for his own benefit which is hostile to the interests of the bank.[60]

Entry of Deposit.—A bank is bound by the entry of a deposit in a bank book by the proper clerk.[61]

course of the banking business, and is not binding on the bank. Third Nat. Bank *v.* St. Charles Sav. Bank, 244 Mo. 554, 149 S. W. 495.

A bank cashier has no authority to bind the corporation by way of guaranty or a mere accommodation indorsement. Swofford Bros. Dry Goods Co. *v.* Bank, 81 Mo. App. 46.

The cashier has no power to accept bills of exchange, on behalf of the bank, for the accommodation merely of the drawers. Farmers', etc., Bank *v.* Troy City Bank (Mich.), 1 Doug. 457.

The signing of a replevin bond by a bank by its cashier, in an action between third parties in which the bank has no interest, is not an act within the apparent authority of the cashier. Judgment, Sturdevant Bros. & Co. *v.* Farmers', etc., Bank, 62 Neb. 472, 87 N. W. 156, affirmed on rehearing. Sturdevant Bros. & Co. *v.* Farmers, etc., Bank, 69 Neb. 220, 95 N. W. 819.

A bank cashier has no authority by virtue of his office to make a purchase of boots and shoes in the name of the bank for the benefit of a third person, and the bank will not be liable therefor in the absence of consent to the purchase or ratification thereof. North Star Boot, etc., Co. *v.* Stebbins, 2 S. Dak. 74, 48 N. W. 833.

A bank having ordered goods for third persons who were unable to pay at the time, the acting cashier took their paper and sent the sellers a certificate of deposit payable in three months, regular in form, but signed with his name alone, and not as cashier. Held, that the transaction was within the usual course of business and the scope of the cashier's authority. Crystal Plate Glass Co. *v.* First Nat. Bank, 6 Mont. 303, 12 Pac. 678.

58. Buying and selling exchange.—Lafayette Bank *v.* Bank, Fed. Cas. No. 7,987, 4 McLean 208; Wild *v.* Bank, Fed. Cas. No. 17,646, 3 Mason 505; Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631; Robb *v.* Ross County Bank (N. Y.), 41 Barb. 586; Marine *v.* Hymers (N. Y.), 2 Kern. 223; Sturges & Co. *v.* Bank, 11 O. St. 153, 78 Am. Dec. 296.

Purchase of exchange.—Contracts for the purchase and sale of New York funds are authorized by the directors, and are sanctioned by usage (dissenting opinion). Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

59. Warranty or representation as to responsibility of parties to paper.—Sturges & Co. *v.* Bank, 11 O. St. 153, 78 Am. Dec. 296.

60. Deposits.—Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293, 24 How. Prac. 1, 2 Am. Law Reg., N. S., 92.

As to deposits generally, see post, "Deposits," §§ 119-155. As to deposits in national banks, see post, "Deposits in General," § 263. As to deposits in savings banks, see post, "Deposits," §§ 298-301.

61. Entry of deposit.—Mechanics', etc., Bank *v.* Banks, 11 La. 260; Hepburn *v.* Citizens' Bank, 2 La. Ann. 1097, 46 Am. Dec. 564.

Certificates of Deposit.—The bank is not liable to a bona fide holder, in all respects, of a certificate of deposit issued by a subordinate officer holding without authority and unsustained by any prior practice or usage.[62] An indorsee of a certificate of deposit which is postdated,[63] or which shows on its face that it was certified by an assistant cashier,[64] is not a bona fide holder.

Certification of Check.—Where an employee of a bank is authorized to certify a check, his certification binds the bank for its payment without regard to the state of the drawer's account.[65] But it has been held that a person dealing with a bank is presumed to know that no officer has power to bind the bank by the certification of a check, when the drawer has no funds on deposit.[66] Where a subordinate officer or clerk has been permitted to pursue a particular practice in certifying checks for customers or otherwise, his acts, although wrongful, will bind the bank in favor of a person who fulfills the conditions of a dealer in good faith.[67] Since an agent can not put himself in a position of hostility to his principal, an agent of a bank, authorized by a by-law to certify checks drawn upon the bank, does not render the bank liable by certifying his own checks, when he has no funds to his credit.[68]

Special Deposit.—Where no instructions were given to the subordinate officers of a bank to reject packages presented to it for safe-keeping, and no notice given that they would not be received, the receipt of such officers binds the bank, and renders it liable for loss of the packages.[69] Whether an officer of a bank has power to bind it by the acceptance of a deposit, with in-

62. **Certificate of deposit.**—Pope *v.* Bank, 57 N. Y. 126, reversing 59 Barb. 226.

63. **Postdated certificate.**—"The check was dated at Albion on the 1st of March, 1866, and if it was assumed to have been a transaction in the ordinary course of business, was accepted or certified within the usual banking hours at Albion on the day it bore date. It was purchased by the plaintiff on the morning of the following day (March 2), and it seems reasonably certain, from the evidence, that if 'accepted' at Albion on the 1st, it could not, in the ordinary course of the mail, have reached New York until the afternoon of the following day; and of this fact the plaintiff was bound to take notice. It was sufficient to put him at least upon inquiry." Pope *v.* Bank, 57 N. Y. 126, reversing 59 Barb. 226.

64. **Certified by assistant cashier.**—B. drew a postdated check, payable, to his own order, on a bank, in which he had at the time no funds on deposit, and procured the assistant cashier thereof to write an acceptance across the face of the check. B. indorsed the check to G., who procured it to be cashed by P. Held that, as the assistant cashier had no authority to accept the check, the bank was not liable thereon to P. Pope *v.* Bank, 57 N. Y. 126, reversing 59 Barb. 226.

65. **Certification of check.**—"And whether a check when presented, is paid by the officer of the bank in money, or he gives the holder a certificate of deposit or draft, or a certificate that he will retain sufficient of the money standing to the drawer's credit, the officer is acting within the line of his duty, and the bank bound." French *v.* Irwin, 63 Tenn. (4 Baxt.) 401.

66. Clarke Nat. Bank *v.* Albion Bank (N. Y.), 52 Barb. 592.

67. Pope *v.* Bank, 57 N. Y. 126, reversing 59 Barb. 226, citing Farmers', etc., Bank *v.* Butchers, etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678.

68. Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293, 24 How. Prac. 1, 2 Am. L. Reg., N. S., 92.

69. **Special deposits.**—Pattison *v.* Syracuse Nat. Bank (N. Y.), 1 Hun 606, 4 Thomp. & C. 96. See post, "Special Deposits," § 153.

structions as to its distribution, is to be determined by a consideration of his relation to the bank, and the principles governing the same, and not by the mere opinion of a witness, such as the cashier and secretary, as to the legal effect of that relation.[70]

§ 106 (2) President.—In the absence of special authority from the directors of a bank, the president can not authorize the cashier to pay the checks of a person who holds a claim against the president, but has no deposit in the bank.[71]

Certification of Check.—A general authority to the president of a bank, to certify checks drawn upon it, does not extend to checks drawn by himself.[72] The identity between the name of the drawer of a check and the president of the bank who certified it informs any one that the president had certified his own checks without funds in the bank, and deprives the owner of the protection afforded to holders in good faith.[73]

Interest on Deposits.—Where the president of a bank gave a time check bearing interest, signed by the president individually with nothing to show that the bank assumed any obligation for its payment, but there was an agreement made between the president and the depositor at the time of the deposit, the depositor can recover from the bank in an action for money had and received.[74]

Drawing Check.—A resolution of the directors, authorizing the president of a bank to draw checks and drafts, containing no limitation on its face justifies the payment by a depository of funds of the bank of a check drawn by such president against such deposit.[75]

§ 106 (3) Cashier.—It is the cashier's duty to receive all the funds which come into the bank, and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. Where the money is in the bank, he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on

70. Burnell *v.* San Francisco Sav. Union, 136 Cal. 499, 69 Pac. 144.

71. **President.**—Dowd *v.* Stephenson, 105 N. C. 467, 10 S. E. 1101.

72. **Certification of check.**—Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293, 24 How. Prac. 1, 2 Am. L. Reg., N. S., 92.

73. Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293, 24 How. Prac. 1, 2 Am. L. Reg., N. S., 92, reversing 36 Barb. 540.

74. **Interest on deposit.**—A party went to the banking house of defendant to make a time deposit and asked what interest they were paying, and the president testified that he asked plaintiff how long the money would be left, and the reply was that she would leave $1,600 for six months, and he promised to pay four per cent and received an eastern draft for an amount exceeding $1,600, and returned a time check for the amount, payable at the bank in six months, with interest at four per cent. The check was signed by the president individually, and there was nothing to show that the bank assumed any obligation for its repayment. Held, that the depositor could recover from the bank in an action for money had and received. First Nat. Bank *v.* Heim, 76 Neb. 831, 107 N. W. 1019.

75. First Nat. Bank *v.* National Park Bank, 175 Fed. 881.

the books of the bank. This he is authorized to do virtute officii. The power is inherent in the office.[76]

Acceptance of Deposit.—The cashier of a national bank, unless restricted by special rules, has authority to bind the bank to take a deposit.[77]

Payment of Check.—A promise by a bank cashier to pay a check the drawer of which has no funds on deposit in the bank, in consideration of the drawee's agreeing to deposit the check in another bank, and have it thus pass through the clearing house, is outside the cashier's authority, and not binding on the bank, unless expressly authorized.[78]

Certificate of Deposit.—Where the by-laws of a bank provided that the cashier should have power to sign all papers connected with the business, and perform the duties necessary for the transaction of business, he had power to sign certificates of deposit.[79] But it has been held that a bank cashier, in the absence of special authority, can not bind his bank by issuing its certificates of deposit to himself.[80] As to an innocent holder, the bank is liable on a certificate falsely issued by the cashier.[81] On the question as to the authority of a bank cashier to issue a specie certificate of deposit to a person who has no specie on deposit, similar acts, frequently done by the cashier, are admissible.[82]

Certification of Check.—The cashier of a bank has no authority, by virtue of his office, to bind the bank by a certification of his own individual check drawn thereon; and, as in this case he has neither real nor apparent authority, the certification is invalid.[83]

Deposit of Worthless Check.—The cashier of a bank has no right or authority to accept a worthless check of another bank and charge his bank with the amount thereof.[84] This is not a deposit of money, against which

76. Cashier.—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed 1008.

77. Acceptance of deposit.—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; City Nat. Bank *v.* Merchants', etc., Nat. Bank (Tex. Civ. App.), 105 S. W. 338.

78. Morse *v.* Massachusetts Nat. Bank, Fed. Cas. No. 9,857, Holmes 209.

79. Certificate of deposit.—Abbott *v.* Jack, 136 Cal. 510, 69 Pac. 257.

80. Lee *v.* Smith, 84 Mo. 304, 54 Am. Rep. 101.

81. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

82. Robinson *v.* Bealle, 20 Ga. 275.

83. Gale *v.* Chase Nat. Bank, 43 C. C. A. 496, 104 Fed. 214.

84. Deposit of worthless check.—Clarke Nat. Bank *v.* Bank (N. Y.), 52 Barb. 592; Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678.

S., who had owned a private bank, of which L. had been cashier, was defendant's treasurer, under an agreement by which he was entitled to use defendant's funds, deposited in consideration of his services as treasurer; and checks had been drawn by defendant on S., as treasurer, and paid through the bank. On January 15, 1894, S. caused the plaintiff savings bank to be formed, of which he was president and L. was cashier, and the business of the private bank was closed through the savings bank. At this time S., as defendant's treasurer, was short in his accounts, and the old bank had a credit in plaintiff bank to the extent of but $1,110. Defendant then drew a check in favor of S., as its treasurer, for $10,380, which was the amount of its credit in the old bank, which check L., as plaintiff's cashier, permitted S. to charge against plaintiff on his executing a check, as defendant's treasurer, on plaintiff, in favor of the old bank, for $9,000, which was charged to his account, as treas-

an unauthorized check is drawn, but a credit given the maker of the check.[85]

Deposit to Credit.—A cashier of a bank has power to make an arrangement whereby a customer should accept the bank's drafts on condition that the bank should keep a corresponding balance to the customer's credit, on which balance the customer should have a lien as security for his liability and have at any time the right to take the balance to pay the acceptance.[86]

Charging Account of Depositor.—A bank is liable to a depositor where the cashier, with the knowledge of the president, charged a deposit with the amount of a draft, which the depositor directed to be credited on a note given the depositor by the cashier, where the depositor had no notice that the draft had been so charged.[87]

Special Deposit.—The mere voluntary act of the cashier of a bank, in receiving securities for safe-keeping, will not render the bank liable for their loss;[88] but, if the deposit is known to the directors and acquiesced in, the bank will be liable.[89] Where it is proved to have been a part of the ordinary

urer, on plaintiff's books. Held, that L., as cashier, had no authority to accept defendant's check on the old bank, which was worthless, and charge plaintiff with the amount thereof. Van Buren County Sav. Bank *v.* Stirling Woolen Mills Co. (Iowa), 94 N. W. 945, affirmed in 125 Iowa 645, 101 N. W. 477.

Neither defendant, nor S., as its treasurer, was entitled to credit for the full amount of the check drawn on the old bank, since neither the old bank nor S. had funds against which such check could be charged. Van Buren County Sav. Bank *v.* Stirling Woolen Mills Co. (Iowa), 94 N. W. 945, affirmed in 125 Iowa 645, 101 N. W. 477.

85. Van Buren County Sav. Bank *v.* Stirling Woolen Mills Co. (Iowa), 94 N. W. 945, affirmed in 125 Iowa 645, 101 N. W. 477.

86. Deposit to credit.—A bank cashier arranged with A. that A. should accept the bank's drafts on condition that the bank should keep a corresponding balance with A, to A.'s credit, on which balance A. should have a lien as security for his liability, and should be kept informed of the condition of the bank, and have at any time the right to take the balance to pay the acceptances. Held, that this agreement was within the power of the cashier to make, and bound the bank. Coates *v.* Donnell, 48 N. Y. Super. Ct. 46, affirmed in 94 N. Y. 168.

87. Charging account of depositor.—A depositor left with his bank for collection a note payable by the cashier. He afterwards wrote to the cashier, asking him to remit to a certain person a draft on New York, and to apply the amount on the note. The cashier remitted the draft, but, instead of applying it on the note, he charged it to the depositor's account. The president of the bank knew the contents of the depositor's letter, and that the cashier sent the draft, and also that the cashier had on deposit sufficient to pay the note. The depositor had no notice that the draft had been so charged until some time later, when he demanded the balance of his account, which was refused. Held, in an action against the bank to recover the balance, that the cashier had no right to so charge the account, and that the bank was liable. Reynolds *v.* Kenyon (N. Y.), 45 Barb. 585.

88. Special deposit.—First Nat. Bank *v.* Graham, 79 Pa. 106, 21 Am. Rep. 49.

The Act of Pennsylvania of 1824 relating to banks did not authorize special deposits of papers in banks, and therefore, where a cashier received such deposit without authority and without the knowledge of the directors, the bank was not liable for loss. Lloyd *v.* West Branch Bank, 15 Pa. 172, 53 Am. Dec. 581.

89. Acquiescence of bank.—First Nat. Bank *v.* Graham, 79 Pa. 106, 21 Am. Rep. 49.

Bonds were deposited with the assistant cashier of a bank for safe-keeping, and afterwards were pledged by him as cashier as collateral for, and sold in payment of, the bank's debts, without the depositor's knowledge or consent. Held that, though

business of a bank to receive United States bonds for safe-keeping, it follows that the cashier in dealing with the defendants in error acted within the scope of his authority as cashier, and the bank is therefore bound by his acts.[90]

Deposit for Investment.—A loan of money to a bank on the representations of its cashier that he would loan it out on first mortgage on good real estate, must be considered as one with the full knowledge of the bank, in the absence of evidence to the contrary, where the entries of all dealing concerning the money had been made both on the bank's individual ledger and in the pass book of the creditor.[91] Where the cashier and general manager of a bank undertook to make investments for a depositor, and exhibited to the depositor, from time to time, statements taken from the books of the bank, purporting to show investments made by the bank for him, it will be presumed that the officer of the bank was acting for the bank, and not as special agent for the depositor, and the bank will be required to account for the deposits or the investments.[92] But where an arrangement is made with a cashier of a bank, whereby he is to keep books and receive and disburse funds for a third person, he is the agent of the person selecting him, and not of the bank, and hence the bank is not liable for moneys so received by him outside of the bank which were never in fact paid over to the bank.[93]

Security for Deposit of Public Funds.—A cashier of a bank has authority to execute a bond on its behalf to secure deposits of public funds in the absence of a rule or regulation by the directors or stockholders requiring special authority and notice thereof to the obligee.[94]

Interest on Deposit.—The cashier of a national bank, unless restricted by special rules, has authority to bind the bank to pay interest on daily balances.[95]

Overdraft.—The cashier can not, either with or without the express or implied permission of the directors, permit overdrafts, without being derelict in duty.[96]

§ 106 (4) Teller.—A receipt of a deposit by the receiving teller of a private bank is the receipt by the private banker, because he is the principal and the teller the agent, and the deposit is the banker's private property.[97]

Entry of Deposit.—In the case of money credited in the books of a

the officer was never authorized to receive such deposits, the bank became liable from the time the bonds were pledged for its debt, as the bank could not retain the fruits of the crime and repudiate the acts of the agents. Hughes *v.* First Nat. Bank, 110 Pa. 428, 1 Atl. 417.

90. Bank *v.* Zent, 39 O. St. 105.

91. Deposit for investment.—Deposit Bank *v.* Fleming, 19 Ky. L. Rep. 1947, 44 S. W. 961.

92. Bobb *v.* Savings Bank, 23 Ky. L. Rep. 817, 64 S. W. 494.

93. Demarest *v.* Holdeman, 34 Ind. App. 685, 73 N. E. 714.

94. Johnson County *v.* Chamberlain Banking House, 80 Neb. 96, 113 N. W. 1055.

95. City Nat. Bank *v.* Merchants', etc., Nat. Bank (Tex. Civ. App.), 105 S. W. 338.

96. Overdraft.—Minor *v.* Mechanics', Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47. See, also, Potts *v.* Wallace, 146 U. S. 689, 36 L. Ed. 1135, 13 S. Ct. 196.

97. Teller.—Ex parte Rickey, 31 Nev. 82, 100 Pac. 134.

teller, or proved to have been deposited with him, though he omits to credit it, the liability of the bank depends upon whether the act was done in the exercise of, and within the limits of the powers delegated. These facts are necessarily inquirable into by a court and jury.[98]

Certification of Check.—The teller of a banking institution has no implied authority to certify checks, though authority may be implied from his conduct in certifying checks, and the subsequent payment of them by the institution.[99] A bona fide holder of a negotiable check, certified by the paying teller of the bank on which it is drawn, whose authority is limited to cases where the bank has funds of the drawer in hand, sufficient to cover the check, can enforce the payment of the check, although the bank has not such funds, and the check was certified for the mere accommodation of the drawer, and upon his promise that it should not be presented for payment.[1] The bank is liable to an innocent holder, where the teller fraudulently certified a check.[2] A bank is liable on a postdated check certified by the teller with knowledge of the cashier, and where on the morning of the day the check was payable the drawer's deposit was sufficiently large to pay it but was exhausted by the payment of other checks during the day.[3]

Certificate of Deposit.—A teller who is authorized to sign and indorse checks and sign certificates of deposit in the absence of the cashier has power to bind the bank by issuing a certificate for the balance of the purchase price of property held by the bank under deed of trust for the amount of the debt.[4]

98. Mechanics' Bank *v.* Bank of Columbia (U. S.), 5 Wheat. 326, 337, 5 L. Ed. 100.

99. **Certification of check.**—Muth *v.* St. Louis Trust Co., 94 Mo. App. 94, 67 S. W. 978.

1. Farmers', etc., Bank *v.* Butchers', etc., Bank, 16 N. Y. 125, 69 Am. Dec. 678, affirming 11 N. Y. Super. Ct. 219.

2. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

3. **The payee of a postdated bank check** presented it to the drawee's paying teller in the office, after banking hours. The teller, who sometimes received deposits in the absence of the receiving teller, promised to pay the check when due, and enter it as a deposit to the credit of the payee. The cashier was in the bank at the time of the transaction, and later in the day saw the check on the paying teller's desk, and knew that he had received it from the payee. On the morning of the day the check was payable the drawer's deposit was sufficiently large to pay it, but was exhausted by the payment of other checks during the day, and the check deposited with the paying teller was protested for nonpayment. The payee sued the bank for money had and received. Held, that the teller acted as the agent of the bank, and hence the bank was liable. Washington Second Nat. Bank *v.* Averell, 2 App. D. C. 470, reversing 19 D. C. 246.

4. **Certificate of deposit.**—A debt to a bank was secured by a deed of trust which named an officer thereof as trustee. The latter generally attended to its loans, and in the course of such business received a check from an intending purchaser of the property for more than the amount of the debt, and signed a reconveyance of the property to the parties. The transaction was had and the check delivered to him across the counter and at the desk or window where such transactions were ordinarily had; and he was instructed to deduct the amount of the debt, and hold the balance on deposit for the debtor. He handed the check to a teller, and the money therefor was received by the bank. He was authorized to sign and indorse checks and sign certificates of deposit in the absence of the cashier, and in this case issued a certificate to the debtor's husband for the balance due her, and after-

Charging Account.—A teller has the power to charge the account of a depositor with money withdrawn. Where he acted as the agent of the depositor in making collections through a number of years but was authorized to draw money from his account, the bank is liable for an amount withdrawn by the teller, because in so doing he was acting as the agent of the bank and not of the depositor.[5]

Special Deposit.—Where the cashier has entire control of a bank, and he gives the teller authority to receive special deposits of papers for safekeeping, the act of the teller in so receiving papers will be binding on the bank.[6]

§ 106 (5) Directors.—A director of a bank may, if he chooses, without the knowledge or request of the bank, furnish the money to make good an overdraft by an insolvent depositor and have it deposited to the latter's credit and thus satisfy the debt so far as the bank is concerned, but by so doing he does not make the bank his debtor, nor acquire any claim against it, at least, beyond the right to be subrogated to the claim of the bank against the depositor which he has paid.[7]

§ 107. Collections—§ 107 (1) In General.—Where the failure of a bank holding a check as indorsee to present it for payment is based on some omission of one of its agents not having authority to make presentation, it is excused by the fact that such agent was ignorant of the existence of the check.[8] But the bank can not urge the ignorance of its agent as an excuse, where it withheld the necessary information from the agent.[9]

wards paid the same to the husband's order. Held, that he was authorized to receive the deposit, and the bank was accordingly liable for the money received for the debtor, and which it had never paid to her. Burnell *v.* San Francisco Sav. Union, 136 Cal. 499, 69 Pac. 144.

5. Charging account.—A depositor in a bank authorized the teller to act as her agent in making and collecting loans, but he was not authorized to draw money from her account, except on checks procured from her. The arrangement was continued for a number of years, during which she gave several hundred checks, aggregating over $90,000. During the same time, without the authority or knowledge of the depositor, the bank permitted the teller from time to time to withdraw money from her account on a "teller's memorandum," which was merely a direction to the bookkeeper to charge her account with a stated sum, and such sums he appropriated to his own use. Held, that in such transaction the teller acted in his capacity as an officer of the bank, and not, so far as the bank was concerned, within the apparent scope of his agency for the depositor, and that the bank was liable to her for the amounts so withdrawn. National Bank *v.* Munger, 36 C. C. A. 659, 95 Fed. 87.

6. Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582.

7. Director.—Where A voluntarily pays to B a debt which C owes, he can not afterwards, upon failure to collect of C what he has advanced or paid for him, recover back from B the amount paid him in satisfaction of his debt against C. Traders', etc., Bank *v.* Black, 108 Va. 59, 60 S. E. 743.

8. Collections.—Temple *v.* Carroll, 75 Neb. 61, 105 N. W. 989.

As to collections generally, see post, "Collections," §§ 156-175. As to collections by national banks, see post, "Collections," § 268.

9. Where a bank withheld from one of its agents information necessary to enable her properly to conduct the business intrusted to her, it can not

§ 107 (2) President.—The president of a bank has authority to make collections for the bank.[10] Payment to the president discharges the maker of a promissory note, although the note had been fraudulently altered by an insertion after the name of the payee, making it payable to the payee as president of the bank.[11]

§ 107 (3) Cashier.—The cashier of a bank which holds a bill for collection is the proper officer to negotiate all the business relating to its collection.[12] He has authority to take such reasonable measures for the collection or security of the debts due to the bank as are in accordance with the ordinary usages of the banking business,[13] such as the payment of collection fees,[14] the transmission of the debt to another bank[15] and the foreclosure of a mortgage.[16]

urge her ignorance as an excuse for lack of diligence on her part in presenting a check for payment. Temple *v.* Carroll, 75 Neb. 61, 105 N. W. 989.

10. President.—Merchants' Nat. Bank *v.* Camp, 110 Ga. 780, 36 S. E. 201.

The Iowa Code, § 1866, directs that a state bank shall be managed by its board of directors. The entire management of a state bank was intrusted by the directors to its president. For several years he was in complete control, receiving all its mail and indorsing all its drafts. Held that, though the president was not expressly empowered to perform these acts, the performance for so long a time indicated that the practice had been acquiesced in by the directors, making the acts within the authority of the president. Griffin *v.* Erskine, 131 Iowa 444, 109 N. W. 13.

A creditor directed a bank to collect a debt. The debtor issued a draft, making the drawee the president, and followed his name by the abbreviation "Pt." The president received the draft in the ordinary course of mail. For several years he had received all the bank's mail and had indorsed all its drafts. The business of the bank was conducted largely in the name of its officers as such, instead of in the name of the bank. Held to show that the president, on receiving the draft, received it in behalf of the bank, and his subsequent misappropriation of it did not affect the debtor. Griffin *v.* Erskine, 131 Iowa 444, 109 N. W. 13.

11. Where note altered.—Whether a promissory note had or had not been fraudulently altered by inserting after the name of the payee the letters "Pt.," as an abbreviation of the word "President," payment to such payee discharged the makers from further liability, where it appeared that, even treating the paper as the property of a bank of which the payee was president, he had, as such, full authority to collect the paper in its behalf. Merchants' Nat. Bank *v.* Camp, 110 Ga. 780, 36 S. E. 201.

12. Cashier.—Security Sav. Bank *v.* Smith (Iowa), 119 N. W. 726; Warren *v.* Gilman, 17 Me. 360; Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273; First Nat. Bank *v.* Ratliff, 33 Tex. Civ. App. 279, 76 S. W. 591.

13. Measures for collection.—Bridenbecker *v.* Lowell (N. Y.), 32 Barb. 9.

The cashier of a bank is ordinarily the active financial manager and agent thereof and has authority to take measures reasonably adequate to the collection of debts. Security Sav. Bank *v.* Smith (Iowa), 119 N. W. 726.

14. Payment of collection fees.—The cashier of a bank is the collecting officer of such bank, and as such he has the power to enter into contracts looking to the collection of debts due the bank, and can, if necessity arises, bind his principal to pay reasonable collection fees for the collection of its claims. First Nat. Bank *v.* Ratliff, 33 Tex. Civ. App. 279, 76 S. W. 591.

15. Transmission to another bank.—The cashier of a bank has the power to transmit a promissory note to another bank for discount and collection, and to transfer the title thereto to the latter bank. Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273.

16. Foreclosure of mortgage.—The foreclosure of a mortgage to the bank on land to secure the claim of the bank or the sale of the land under the mortgage, are steps in collection of the debt for which the cashier can

Negligence of Cashier.—A bank holding a bill of exchange is bound by the neglect of its cashier to present it for acceptance, in consequence of which the drawer is released from liability.[17]

Cashier of Bank to Which Transmitted for Collection.—Where a bank receives a draft for collection, and transmits it in the course of business to another bank, the cashier of the latter bank has no implied authority to agree to defend in behalf of his bank an action against the first bank by the drawer of the draft for negligence in collection.[18]

§ 107 (4) Teller.—Where it appeared that a bank teller who had collected and appropriated to his own use money on a check given in payment of a promissory note indorsed by the owner in blank, and delivered to the teller for collection, had in other transactions made collections for others as an officer of the bank, it was immaterial, the collection being within the scope of his apparent authority, whether it was really within the scope of his authority or not, and the bank was bound by his acts.[19]

§ 107 (5) Attorney.—Where a bank employed an attorney to bring suit against the defendant for a balance due the bank on a note, and the attorney sold shares held as security and received payment, as the attorney was the bank's agent and the money was paid to him as such agent, a judgment for the plaintiff on the note is improper.[20]

§ 108. Loans and Discounts—§ 108 (1) In General.—Where the president, cashier, and secretary of a bank, without authority of the board of directors, inserted in a certificate of the bank's stock purchased by a depositor a provision that such stock would not be transferred until all indebtedness of the stockholder to the bank was paid, the fact that it was inserted without the authority of the board of directors is immaterial as against such

legally contract commission fees to another for aid and assistance, and bind the bank therefor. First Nat. Bank *v.* Ratliff, 33 Tex. Civ. App. 279, 76 S. W. 591.

17. National Bank *v.* Williams, 46 Mo. 17.

18. First Nat. Bank *v.* Mansfield Sav. Bank, 10 O. C. C. 233, 6 O. C. D. 452.

19. City Nat. Bank *v.* Martin, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632.

20. Attorney.—A bank sued to recover a balance alleged to be due by defendant on a note. Defendant, at the time of executing the note to the bank, deposited certain shares of stock as collateral, and left other shares of stock with the bank for safe-keeping. An attorney for the bank informed the president of an opportunity to sell part of the shares of defendant, and he and such president settled between them the terms of sale. The attorney sent defendant the shares for transfer, informing him of the sale, and that the bank was to take the proceeds of the sale for the indebtedness. The purchase price was paid by check and two notes, which were sent to the attorney, who deposited the notes, and deposited the check, which was payable to him, to his own account, and afterwards, on request of the president, paid the amount of the check to him. Afterwards the bank failed, and defendant was notified that his note was unpaid. Held that, as the attorney was the bank's agent and the money was paid to him as the bank's agent under agreement that defendant's note was to be surrendered, a judgment for plaintiff was unsupported by the evidence. Robeson *v.* First Nat. Bank, 42 Fla. 504, 29 So. 325.

stockholder, who subsequently became indebted to the bank, since such officers will be presumed to have authority to arrange the terms of the loan.[21]

Soliciting Loan.—A bank is not bound by the acts of a person in soliciting notes for discount in times of scarcity of money, who had authority to solicit them only when money was plenty.[22]

§ 108 (2) Directors.—All discounts are made under the authority of the directors, and it is for them to fix any conditions which may be proper, in loaning money.[23] This authority may be delegated to the other officers of the bank.[24] Under a statute providing that a bank shall have power by its board of directors, or fully authorized officers or agents, to exercise all such incidental powers as shall be necessary to carry on the business of banking, an officer can make a loan only upon express authority from the directors or by their ratification.[25]

§ 108 (3) Committee.—Where the by-laws of a bank provided for the appointment of an exchange committee, without whose sanction the cashier was to make no loans above a certain amount, the committee was to consist of the president, cashier, and a designated director, of whom a majority were to have power to act, the failure to designate a director does not affect the power of the president and cashier to act as such committee.[26] The committee of the board of directors on finance of the North American Trust & Banking Company of New York had the power, under its articles of association and by-laws, to authorize the president and cashier to make an agreement and trust deed to secure the repayment of a loan to the company.[27]

§ 108 (4) President.—The president can bind the bank by an agreement to loan money for a certain purpose.[28]

21. Loans and discounts.—Jennings *v.* Bank, 79 Cal. 323, 21 Pac. 852, 5 L. R. A. 233, 12 Am. St. Rep. 145.

As to loans and discounts generally, see post, "Loans and Discounts," §§ 176-187. As to loans by national banks, see post, "Loans and Discounts," § 269.

22. Washington Bank *v.* Lewis (Mass.), 22 Pick. 24.

23. Directors.—Bank *v.* Dunn (U. S.), 6 Pet. 51, 8 L. Ed. 316; United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130; United States *v.* Britton, 108 U. S. 192, 27 L. Ed. 703, 2 S. Ct. 525. See Evans *v.* United States, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934; Jennings *v.* Bank, 79 Cal. 323, 21 Pac. 852, 5 L. R. A. 233, 12 Am. St. Rep. 145; Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506.

24. United States *v.* Britton, 108 U. S. 192, 27 L. Ed. 703, 2 S. Ct. 525.

25. Delegation of authority.—One who seeks to charge a banking corporation organized under Laws 1890, c. 23, providing (§ 4, subd. 7) that such a bank shall have power to exercise by its board of directors, or fully-authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, etc., on a loan made by one of its officers, must show that such officer had express authority from the directors to make the loan, or that it was ratified by them. First Nat. Bank *v.* Michigan City Bank, 8 N. Dak. 608, 80 N. W. 766.

26. Committee.—Wallace *v.* Exchange Bank, 126 Ind. 265, 26 N. E. 175.

27. Leavitt *v.* Blatchford (N. Y.), 5 Barb. 9.

28. President.—The president of a bank is authorized to make an agreement whereby a party is to get money from the bank to buy a certain description of hogs. Roe *v.* Bank, 167 Mo. 406, 67 S. W. 303.

Loan to Himself.—The president of a bank, even if clothed with general authority to lend its money can not bind it by lending its funds to himself, or by lending them to the cashier, when the latter knows that the loan was made for the president's own benefit.[29]

Security for Loan.—Where a note is discounted by a bank, its president has authority to take collateral securities and agree to collect the same, and to apply the proceeds to the payment of the note; and in such case no recovery can be had against an indorser thereon where the bank collected a portion of the securities without applying the proceeds as agreed, and made arrangements with the debtors for the payment of the remainder.[30]

Repayment of Loan.—Although the president of a bank has no authority to receive payment of a debt due the bank, yet such payment will not be set aside after it has been acquiesced by the bank for many years.[31]

§ 108 (5) Cashier.—The power to make loans[32] or to discount negotiable paper[33] is not an implied power of the cashier. His authority must be derived from the charter, or by-laws,[34] or from the custom or course of business of the bank and borrower.[35] Usually the question of discounting paper comes before the board of directors or of a committee, and the cashier is but the executive officer to carry out their decision; his duties are ordinarily strictly executive. It is, however, true that, beyond his inherent powers, the cashier may be authorized to act for the bank by the organic law, by action of the stockholders, by a vote of the board, by usage and tacit approval.[36]

Loan to Himself.—The cashier, whatever may be his general authority as to making loans, can not bind the bank by lending its money to himself.[37] Where a rule of a bank prohibits its officers becoming its debtor, a transaction between the cashier and one who acts with notice of the rule, which is palpable and colorable evasion thereof, will not affect the bank.[38]

29. McGregor *v.* Witham, 126 Ga. 702, 56 S. E. 55.

30. Wales *v.* Bank (Mich.), Har. 308.

31. Parker *v.* Donnally, 4 W. Va. 648.

32. Cashier.—The cashier of a bank, unless authorized by the charter or by laws, has no authority to lend the money of the bank. The bank can not be held liable in damages for a breach of a contract entered into by the cashier to lend its money, without authority from the bank, and in direct violation of the banking laws of the state. Swindell & Co. *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13.

33. "It was held by this court in Bank *v.* Dunn (U. S.), 6 Pet. 51, 8 L. Ed. 316, that the power to discount paper was not one of the implied powers of the cashier, and this is believed to be the law at the present." Evans *v.* United States, 153 U. S. 584, 38 L. Ed. 830, 14 S. Ct. 934.

34. The cashier of a bank, unless specially authorized by the charter or by-laws, has no authority to loan money of the bank, and it is not liable for breach of a contract entered into by him without authority and in direct violation of law. E. Swindell & Co. *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13.

35. Blair *v.* First Nat. Bank, Fed. Cas. No. 1,485, 2 Flip. 111.

36. Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506.

37. Loan to himself.—McGregor *v.* Witham, 126 Ga. 702, 56 S. E. 55.

38. Savannah Bank, etc., Co. *v.* Hartridge, 73 Ga. 223.

Release of Parties.—The cashier of a bank can not of his own authority bind the bank by a contract to release one or more of several parties to a note held by the bank; but, if he acts on consultation with two or more of the directors, then his acts are binding on the bank.[39]

In Usual Course of Business.—Bona fide indorsees before maturity of paper discounted by a cashier are not affected by the fact that it was unauthorized by the discounting committee of the bank, if the paper passed through the bank in the usual course of business.[40]

Rediscount.—The power to rediscount bills and notes does not come within the ordinary duties of a cashier and is not one of his inherent powers; but, if it is the practice of the cashier in pressing emergencies to rediscount bills and notes, a transfer of the bills and notes in the usual course of business of the bank to a person, who has no reason to doubt the propriety thereof, or to question its good faith, is prima facie valid and vests a good title in the transferee.[41]

Repayment of Loans.—A statute, authorizing a bank to receive Confederate States treasury notes, having been declared unconstitutional and void, can not be relied upon as authorizing a cashier of the bank to receive such notes in discharge of debts due the bank.[42]

39. Release of parties.—In an action by a bank against the parties to a note held by it, it appeared in proof that the cashier of the bank had made an agreement which, if carried out, would have discharged all the parties to the note but one; and that he had made that agreement after consulting with two or more of the directors. The court instructed the jury that the cashier of the bank had no authority to bind the bank by any contract that would release the parties, but that, if he acted on consultation with two or more of the directors, then his acts would be binding on the bank. Held, that the entire instruction, taken together, and applied to the facts, would not be erroneous in its conclusion. Payne *v.* Commercial Bank (Miss.), 6 Smedes & M. 24. See ante, "Particular Powers Considered," § 105 (3b).

40. Blair *v.* First Nat. Bank, Fed. Cas. No. 1,485, 2 Flip. 111.

41. Rediscount.—It is the practice for the cashier of a bank in pressing emergencies to rediscount the bills and notes of the bank to raise money to pay depositors and meet other demands of the bank. But this is only done on extraordinary occasions and when the requirements are such as do not admit of delay. It is customary, wherever it can be done, to consult the directors and obtain their consent to make such rediscounts. It is a matter which does not come within the ordinary duties of the cashier and is not one of his inherent powers; but inasmuch as it is a power which is exercised by him under some circumstances, a transfer of such bills and notes made by him in the usual course of the business of the bank to a person, who has no reason to doubt the propriety of the transfer or to question its good faith, will be prima facie valid and vest a good title in the transferee. The validity of the transfer in such case will be sustained upon the ground that the transferee had a right to presume that the cashier had from the board of directors either an express or implied authority to make the transfer, and not because he had by virtue of his office inherent power to do so. Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688; Lamb *v.* Cecil, 28 W. Va. 653, applied and approved in Lamb *v.* Pannell, 28 W. Va. 663.

42. Repayment of loans.—The act of the legislature, passed July, 1861, authorizing the Bank of Tennessee to receive and pay out confederate treasury notes, having, by the fifth section of the schedule of the amended constitution, been declared unconstitutional, null and void, from the beginning, can not be relied upon as authorizing a cashier of the bank to receive it in discharge of debts due the bank. Bank *v.* Woodson, 45 Tenn. (5 Coldw.) 176.

§ 108 (6) Treasurer and General Manager.—Where the negotiation of a loan by a bank and the execution of the papers were intrusted to its treasurer, his subsequent acts, on ascertaining the condition of the title to the security, for the benefit of the bank, were within his implied powers.[43] An accountant and general manager of a bank is not presumed to have authority or be charged with the duty of discounting papers for the bank.[44]

§ 109. Bills, Notes and Securities—§ 109 (1) In General.—Although a loan, for which a note signed by the vice-president and another director and indorsed by the president of a bank, is not in fact procured before the bank and the bank does not receive the proceeds and the indorsement is not authorized by the board of directors, the bank is liable on the note, the officers having implied authority to act.[45]

Making Note to Cover Overdraft.—If a part of the directors of a bank, including the president and cashier, make their note and have it discounted, and use the proceeds to make good an overdraft of an insolvent depositor, from fear that the amount of the overdraft would become known to the public and injure the credit of the bank, and agree among themselves that the bank shall make good the amount to them when they deem it safe to notify the other directors, and afterwards, at the instance of one of the makers, the bank becomes the owner of the note, and, after the claim against the depositor has become barred by the act of limitations, they disclose the whole transaction to the board of the bank, and ask that the bank charge off the note to profit and loss, the bank is under no obligation to do so, and in an action on the note by the bank against the makers they can not defeat recovery on the ground that the note was made for the accommodation of the bank.[46]

43. Treasurer.—Gerrity *v.* Wareham Sav. Bank, 202 Mass. 214, 88 N. E. 1084.

44. General manager.—Union Sav. Bank, etc., Co. *v.* Ellis, 110 Ga. 494, 35 S. E. 780.

45. Bills, notes and securities.—The vice president of a bank represented to another bank that he desired a loan for his bank, and gave a note signed by himself and another director, indorsed by his bank and by its president. Thereafter such note was renewed by another note indorsed by the bank by its cashier. The lending bank knew that the two directors signing the first note were directors of the borrowing bank, and that the cashier signing the indorsement on the second note transacted all the business of the borrowing bank. Held that, though the loan was not in fact procured for the bank, and though it did not receive the proceeds, and the indorsement was not authorized by the board of directors, the bank was liable, the officers having implied authority to act. First Nat. Bank *v.* Arnold, 156 Ind. 487, 60 N. E. 134. See post, "Exchange, Money, Securities, and Investments," §§ 188-195.

46. Making note to cover overdraft.—Three directors of a bank whose board consisted of 18 members, one of the 3 being the president and another the cashier, together with 3 large stockholders, met together and executed a note, and had it discounted at another bank. With the proceeds they aid an overdraft by a bankrupt depositor in their own bank, and agreed among themselves to say nothing about the matter to the other directors, and that the bank, when able, should pay them back, and charge the amount to profit and loss. The claim on the overdraft was turned over to one of their number and the amount

Sale to Bank.—A statutory provision that no officer of a bank shall in any manner directly or indirectly use its funds or deposits or any part thereof except for the regular transactions of the bank, does not prohibit an officer of the bank from selling negotiable paper to it, unless the act is resorted to for the purpose of indirectly obtaining a loan to him, and even then by appropriate procedure such a loan may be effected.[47]

Transfer and Indorsement.—A bank is bound by the transfer of a note by an officer having general authority to transfer its notes, as against a bona fide transferee having no notice of any limitation upon such authority as to the particular note.[48] A bank authorized to deal in commercial paper is bound by the indorsement or guaranty by its executive officers.[49]

§ 109 (2) President and Vice-President—§ 109 (2a) President.—Unless expressly authorized to do so by the board of directors, the president of a bank can not use the funds of the bank to pay his personal obligations.[50]

Drawing Check.—Where no special authority is delegated to the president of a bank to draw checks by its charter, but such duty, by the general custom of other banks, devolves upon the cashier, except in his absence, when the duty is performed by the president, such also is the usage of the particular bank, and in the absence of the regular cashier, but while a temporary cashier is discharging his duties, the draft in question is drawn and signed by the president, the bank is liable for the payment of the draft.[51]

Making Note.—Where a party discounts a note given by the president of a bank, with the indorsement of the bank thereon, supposing that he is dealing with and advancing the money to the bank, and not the president personally, the bank is liable for the payment of such note.[52] Under a bank charter which declares contracts to be binding on the bank shall be

collected and applied on the note. Subsequently the bank, at the request of one of the makers, purchased the note, and on refusal of the makers to pay it brought suit. Held, that it was no defense that the note was made for the accommodation of the bank, and that, as the bank had received full benefit of the proceeds in the satisfaction of the overdraft, the note was fully paid when the bank acquired it. Traders', etc., Bank *v.* Black, 108 Va. 59, 60 S. E. 743.

47. Code 1897, § 1869; State *v.* Corning Sav. Bank, 139 Iowa 338, 115 N. W. 937.

48. Transfer and indorsement.—Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

49. State *v.* Corning Sav. Bank, 139 Iowa 338, 115 N. W. 937.

50. President.—Chrystie *v.* Foster, 9 C. C. A. 606, 61 Fed. 551. See post, "Directors," § 109 (4).

51. Drawing check.—"Although the president of a bank be not authorized, by virtue of his office, to draw checks for the moneys of the bank, it is clear that the company may empower him, as its agent, in a particular instance, or generally, to do so; and that, in such case, the bank will be bound by the act. Corporations, in this respect, stand upon the same footing with natural persons, and are alike bound by the acts of its agent beyond the limits of his authority, if done by their previous or subsequent assent, or express or implied direction." Neiffer *v.* Bank, 38 Tenn. (1 Head) 162.

52. Making note.—Central Trust Co. *v.* Cook County Nat. Bank, 15 Fed. 885.

signed by the president and countersigned by the cashier, the president can not object to the regularity of the contract in a suit against him by the holder of a negotiable instrument, drawn by him as president of the bank and in his own favor.[53] The president of a bank can not authorize another bank to which he has given his personal note to charge such note to the account of his bank.[54] Where the president of a bank borrows money for it, executing his personal note therefor, he will be personally bound thereon, though the payee of the note was informed at the time it loaned the money and took the note that the maker was acting only as agent for the bank.[55]

Acceptance of Note.—A bank which accepts a note obtained in negotiations conducted by its president may not deny that he had authority to represent the bank in the transaction.[56]

Rediscount of Note.—When a bank has long been in the habit of rediscounting its bills receivable in large amounts, all other banks in the same locality pursuing the same practice, and the president and cashier of such bank propose to its regular correspondent a rediscount of its bills, and there are no circumstances attending such proposal to arouse suspicion, the bank to which it is made may safely act upon it, without further inquiry, on the assumption that the act has either been specially authorized, or that the officers are acting within the purview of their general powers.[57]

Acceptance of Renewal Note.—The president of a bank who secures a settlement from an indorser on a overdue note held by the bank, by taking a new note signed and indorsed by the same parties, acts as the agent of the bank, and whatever he does within the apparent scope of his authority is binding on the bank which accepts and holds his security.[58]

53. The charter of the Insurance Bank of Columbia prescribes the mode in which contracts shall be executed to be binding on the company, namely, that they shall be signed by the president and countersigned by the cashier. In a suit at the instance of the holder of a bill against the indorser, on a bill drawn by himself as president of the said corporation, and in his own favor, he can not object to the regularity of the contract, nor is he protected on his indorsement by its want of conformity to the statute. McDougald *v.* Central Bank, 3 Ga. 185.

54. Charge of note to bank.—C., in order to obtain a credit in his personal account with a bank of which he was the president, procured defendants, a banking firm, to discount his individual note, credit the amount to the bank, and notify the bank that he had deposited the amount with them to the credit of the bank. The bank had previously given C. credit for the amount, and, after being notified by defendants that the deposit had been actually made with them, allowed C. to overdraw his account. Thereafter, and while his account with the bank was overdrawn, C., in his official character as president, authorized defendants to charge the note to the account of the bank, and defendants did so. Held, in a suit by the receiver of the bank to recover the deposit, that, unless expressly authorized to do so, the president of the bank could not use the funds of the bank to pay his personal obligation; and, there being no proof of such express authority, the authorization given by him to defendants was not a defense to the claim. Chrystie *v.* Foster, 9 C. C. A. 606, 61 Fed. 551.

55. Willoughby *v.* Ball, 18 Okl. 535, 90 Pac. 1017.

56. First State Bank *v.* Hare (Tex. Civ. App.), 152 S. W. 501.

57. United States Nat. Bank *v.* First Nat. Bank, 24 C. C. A. 597, 79 Fed. 296.

58. Cake *v.* Pottsville Bank, 116 Pa. 264, 9 Atl. 302, 2 Am. St. Rep. 600.

Receiving Payment.—Authority may be conferred on the president to receive payment of bills and notes, or the bank may allow him to hold himself out and act in such manner as to raise the presumption that he possesses such authority; in which event the bank is estopped from denying his authority to receive payment from one who, relying on his authority, pays money to him.[59]

Transfer and Indorsement.—The president of a bank has the general power to transfer and indorse its bills and notes.[60] A bank authorized to deal in commercial paper is bound by the president's indorsement of the paper.[61] The president and directors of a bank, having by the charter full power to conduct its affairs, may authorize the president to indorse its notes.[62] A bank may, through its president, by indorsement, transfer the legal title of a promissory note to such president.[63] The president, upon giving paper held by the bank to creditors of the bank, as collateral security for their claims, has authority to indorse or guaranty such paper in the name of the bank, so as to bind the bank and its shareholders.[64] But it has been held that the president of a bank has no inherent authority to indorse or transfer notes belonging to the bank.[65]

Guaranty of Payment or Loss.—Where one purchased negotiable paper from the president of a bank with a guaranty of payment executed by him apparently in behalf of the bank, on his representation that the paper belonged to the bank, and the transaction occurred in the banking house where the president was apparently engaged in performing his duties as such, the bank was liable on the guaranty.[66] A guaranty against loss or liability for signing as sureties, given by a bank president in his own name and without authority from the directors, to those whom he had solicited thus to sign a note given to the bank to retire a prior note held by it against their principal, is the individual contract of the president, and not binding upon the bank.[67]

59. Reno *v.* James, 16 Ky. L. Rep. 60.

60. Transfer and indorsement.—Rezner *v.* Hatch, 2 Handy 42, 12 O. Dec. 320.

It is within the implied powers of the president of a bank to indorse negotiable paper in the ordinary transaction of its business. United States Nat. Bank *v.* First Nat. Bank, 24 C. C. A. 597, 79 Fed. 296.

61. Indorsement by president.—A bank, purchasing from the president of another bank acting in his official capacity notes drawn to the president in his individual capacity as payee, and indorsed by both the bank and the president, had a right to assume that the title to the notes was in the bank, since the president acted within the scope of his duties, and the fact that the notes were drawn in his name was consistent with the bank's ownership. State *v.* Corning Sav. Bank, 139 Iowa 338, 115 N. W. 937.

The president of a bank may transfer, by his indorsement, a note made, to the corporation, if he has a general authority for that purpose from the directors; and the seal of the corporation need not be affixed to the transfer, nor a particular vote therefor be passed on the subject. Spear *v.* Ladd, 11 Mass. 94.

62. Merrick *v.* Bank (Md.), 8 Gill 59.

63. Palmer *v.* Nassau Bank, 78 Ill. 380.

64. Irons *v.* Manufacturers' Nat. Bank, 27 Fed. 591.

65. Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

66. City Nat. Bank *v.* Thomas, 46 Neb. 861, 65 N. W. 895.

67. First Nat. Bank *v.* Bennett, 33 Mich. 520.

Security.—A president of a bank who secures a settlement from an indorser on overdue notes held by the bank, by taking new notes signed and indorsed by the same parties, acts as the agent of the bank, and whatever he does within the apparent scope of his authority to obtain the new security is binding on the bank which accepts and holds the security.[68] The act of the president of a bank and another stockholder, in depreciating the value of certain stock pledged as collateral security for notes held by the bank, is not the act of the bank, so as to charge it with any loss resulting to the owner of such pledged stock because of the depreciation.[69]

§ 109 (2b) Vice-President.—Where a bank purchased certain securities at the suggestion of its vice-president, who announced that he would make the purchase on behalf of the bank, and subsequently informed the directors that he had done so, and still later turned over certain of the securities to the bank with a letter authorizing it to receive the balance, and at the trial of an action for conversion acknowledged that his intention had been to turn over the securities to the bank on payment of a note for which they were pledged his possession of the securities was the possession of the bank, and title to the securities was in it.[70]

Transfer and Indorsement.—The vice-president of a bank, having authority to transact its business, who has given bond in his official capacity, with himself individually as surety, to secure a deposit of county funds, has the power to afterwards assign to the county treasurer notes belonging to the bank as additional security, though the bond alone may be ample.[71]

Guaranty of Payment.—With the knowledge and consent of the president and cashier, who were also directors, but without any notice to or authority from the board, one of the directors and vice-president of the bank guaranteed, at the time of the negotiability, a note made payable to the bank, the payment of the note at maturity by an indorsement thereon to that effect, in the name of and on behalf of the bank. It is to be presumed that the officer had rightfully the power he assumed to exercise, and the bank is estopped to deny it.[72]

§ 109 (3) Cashier.—Drawing Check.—The cashier of a bank has power to bind the bank by drawing a check in its name, when acting as an officer of the bank.[73] But he can not bind a bank by drawing a check to

68. Security.—Cake *v.* Pottsville Bank, 116 Pa. 264, 9 Atl. 302, 2 Am. St. Rep. 600.

The president of a bank held authorized to unite it in a mortgage executed to secure a loan with which to pay the debt of a landowner to the bank for the purpose of releasing the bank's mortgage as to the part of the debt satisfied by the loan and subordinating the bank's lien as to the remainder to that of the complainant. Citizens' Life Ins. Co. *v.* Owensboro Sav. Bank, etc., Co., 150 Ky. 161, 150 S. W. 26.

69. Napier *v.* Central Georgia Bank, 68 Ga. 637.

70. Vice-president.—Metropolitan Trust Co. *v.* McKinnon, 172 Fed. 846.

71. Richards *v.* Osceola Bank, 79 Iowa 707, 45 N. W. 294.

72. People's Bank *v.* National Bank, 101 U. S. 181, 25 L. Ed. 907.

73. Cashier—Drawing check.—Where a check was drawn by a person who was the cashier of an incorporated bank, and it appeared doubtful, upon the face of the instrument,

pay his individual debt.[74]

Binding Bank on Note.—Where the cashier of a bank makes a note for the bank and the bank receives the benefit thereof, it is bound by such act.[75]

whether it was an official or a private act, parol evidence was admitted, to show that it was an official act. Mechanics' Bank *v.* Bank (U. S.), 5 Wheat. 326, 5 L. Ed. 100, approved in Metcalf *v.* Williams, 104 U. S. 93, 26 L. Ed. 665, where it was said:

"The appearance of the corporate name of the institution on the face of the paper, at once leads to the belief, that it is a corporate, and not an individual transaction; to which must be added the circumstances, that the cashier is the drawer, and the teller, the payee; and the form of ordinary checks deviated from, by the substitution of 'to order,' for 'to bearer.' The evidence, therefore, on the face of the bill, predominates in favor of its being a bank transaction." Mechanics' Bank *v.* Bank (U. S.), 5 Wheat. 326, 5 L. Ed. 100.

74. Payment of individual debt with cashier's check.—The cashier of bank E. borrowed for his individual account from bank C. a sum of money, and his debt, evidenced by his demand note, secured by stock of bank E. as collateral, amounted, on the 4th of May, 1893, in principal and interest, to a sum slightly exceeding fifteen thousand dollars. Being requested to pay or furnish additional security, after offering $8,000 in cash and a draft for $7,000, signed by him as cashier of the bank E., drawn on a Philadelphia bank, which was declined, it was thereupon agreed that the cashier would give his individual check on his bank for the principal and interest of his debt; that this check should be by him certified and made payable at bank C. that the cash offered should be received, and that the check and cash should be at once put, respectively, to the debit and credit of the account of bank E. It was also understood that the draft on Philadelphia should be taken, and when collected its proceeds should be credited to the bank E. account. Held, that the draft for $7,000, which was collected by bank C., not drawn by the cashier to his individual order, but drawn by him as cashier to his order as cashier, and endorsed for deposit to his credit as cashier, was therefore but an order transferring the funds of bank E. which were on deposit in the Philadelphia bank, to the deposit account of bank E. with bank C. The money collected by bank C. for account of bank E. was obviously the property of the latter. The draft on Philadelphia was refused because of the delay which it was feared would attend its collection. The certified check was taken. It was for the entire debt, principal and interest. It was at once charged. The sum to the credit of the account of bank E. when the check was charged was more than sufficient to pay it. Upon the theory of the good faith of the transaction, on the part of bank C. its debt was paid by the check, and it could have no possible interest in the proceeds of the collection of the draft drawn by the cashier. Rankin *v.* Chase Nat. Bank, 188 U. S. 557, 47 L. Ed. 594, 23 S. Ct. 372.

Held, also that the question of the legality of the check could not be raised, no exception having been saved thereto; but that the cash actually received by bank C., having been received in good faith, as settled by the verdict of the jury, could not be recovered by bank E. as having been embezzled by its cashier, unless fraud should be affirmatively shown by bank E. Rankin *v.* Chase Nat. Bank, 188 U. S. 557, 47 L. Ed. 594, 23 S. Ct. 372.

75. Binding bank on note.—A bank dealing with the cashier of another bank, permitted by directors to have complete control of its business relations with other banks, may trust in the integrity of such cashier in transacting business with him, where there is nothing in the known state of affairs of the cashier's bank or of his relation to it to excite suspicion that he is using his position to the prejudice of his bank, and hence where such cashier contracted with another bank to keep a balance with such bank, which should receive collections from the cashier's bank and credit them to it, and the cashier sent his own note accompanied by collateral, requesting that his note be discounted and the proceeds placed to the credit of his bank, which was done, and afterwards at his request the note was charged to his bank and the collateral returned to it, and regular monthly statements

Acceptance of Note.—Where the bank received the benefit thereof, it is bound by an agreement between the cashier and a customer for a loan to the customer, a part of which was to be used by the cashier in taking up an old loan by the bank, and for which notes secured by mortgage were made to the cashier and negotiated by him for the benefit of the bank.[76] Where a note payable to the order of the cashier at a designated bank was never indorsed by him, but it was shown that he was the bank's cashier, and that he acted for it in the transaction in which the note was given, the bank can sue on the note in its own name.[77]

Acceptance of Bill of Exchange.—The cashier of the Bank of Kentucky has no authority, ex officio, to accept bills of exchange.[78]

Protest of Note.—The act of the cashier of a bank, in causing a note to be protested, is the act of the bank.[79]

showing such transaction were sent to the cashier's bank, and no objection to such charging of the note was made until about four months after the transaction, the cashier's bank could not recover the amount of the note. Pensacola Bank, etc., Co. v. National Bank (Fla.), 52 So. 294.

In an action by D. Bank against the receiver of F. Bank, the petition alleged that G. was cashier and general manager of F. Bank, and, as such, had power to borrow money, rediscount bills and notes, and do all other acts necessary for the conducting of said banking business; that G., as said cashier, sold and transferred to plaintiff certain notes made payable to and belonging to said bank, and indorsed and guarantied in writing the payment thereof to plaintiff, and thereby promised to pay said plaintiff $1,500; that, when the notes rediscounted became due, said bank, by G., its cashier as aforesaid, procured from plaintiff a loan of $2,000, and that G. executed his note in writing, and secured the same by depositing certain certificates of stock in F. Bank with said plaintiff; that, of the amount so borrowed, $1,500 was applied to take up the aforesaid rediscounted notes, and that said notes were returned to F. Bank by plaintiff, and placed among, and included in, the assets of said bank, and the remaining $500 was placed to the credit of said bank by said plaintiff, and that the said additional sum was accepted and received from said plaintiff by said F. Bank, and was used by it in the regular course of its business, and that a record thereof was made on its books and records, at the time, by its proper officer, as a liability thereof; that certain extensions of time for the payment of said indebtedness were granted, a new note being given each time an extension was granted; that the note in suit was given to secure an extension of such indebtedness; that the note in suit was executed by G., as cashier and general manager of the bank, for the sole use and benefit of the bank, and that the said indebtedness was duly recorded in its books at the time by the proper officer thereof as a liability of it, and said note was received and accepted from said cashier and general manager of said bank by said plaintiff as an indebtedness against said bank. Held, evidence was admissible, under the petition, to show the capacity in which G. signed the note. Douglas County Bank v. Ayres, 9 Kan. App. 606, 58 Pac. 491.

76. Acceptance of note.—The cashier of a bank agreed to loan a customer a certain sum, part of which was to be used by the cashier in taking up an old loan by the bank, the securities for which had been sold to third parties, and the balance to be credited to the borrower's account. Notes secured by mortgage were accordingly made to the cashier, but he negotiated part of them for the benefit of the bank, failing to take up the old loan. Held, that the bank, having received the benefit of the transaction, could not escape its liability on the claim that the agreement was ultra vires. Owens v. Stapp, 32 Ill. App. 653.

77. First Nat. Bank v. Johnson, 133 Mich. 700, 95 N. W. 975, 103 Am. St. Rep. 468.

78. Pendleton v. Bank (Ky.), 1 T. B. Mon. 171.

79. Burnham v. Webster, 19 Me. 232.

Rediscount of Note.—A cashier of a bank, to whom its entire management is intrusted by the directors, has authority to have its paper rediscounted in the usual course of business; and his authority is not limited to extraordinary occasions, not admitting of delay.[80]

Payment of Note.—Ordinarily it is the duty of the cashier to receive payment of bills and notes due the bank.[81]

Demand and Notice.—The cashier of a bank which is the holder of a bill of exchange may give notice of its nonpayment.[82]

Transfer and Indorsement.—A cashier of a bank has prima facie authority to transfer and indorse negotiable paper belonging to the bank.[83] He may indorse it to himself.[84] He has power, prima facie, to indorse for collection notes discounted, and notes deposited to be collected, or deposited as collateral security;[85] but it has been held that he can not assign it to

80. Rediscount of note.—Davenport *v.* Stone, 104 Mich. 521, 62 N. W. 722, 53 Am. St. Rep. 467. See ante, "President," § 109 (2).

81. Reno *v.* James, 16 Ky. L. Rep. 60.

82. Bank *v.* Vaughan, 36 Mo. 90.

83. Transfer and indorsement.—Lafayette Bank *v.* Bank, Fed. Cas. No. 7,987, 4 McLean 208; Blair *v.* First Nat. Bank, Fed. Cas. No. 1,485, 2 Flip. 111; Lanning *v.* Lockett, 10 Fed. 451; Pease *v.* Dwight (U. S.), 6 How. 190, 12 L. Ed. 399; West St. Louis Sav. Bank *v.* Shawnee County Bank, 95 U. S. 557, 24 L. Ed. 490; Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631; Wild *v.* Bank, Fed. Cas. No. 17,646, 3 Mason 505; Everett *v.* United States (Ala.), 6 Port. 166, 30 Am. Dec. 584; Carey *v.* Giles, 10 Ga. 9; State Bank *v.* Wheeler, 21 Ind. 90; Merchants' Ins. Co. *v.* Chauvin (La.), 8 Rob. 49; Haynes *v.* Beckman, 6 La. Ann. 224; Farrar *v.* Gilman, 19 Me. 440, 36 Am. Dec. 766; Hartford Bank *v.* Barry, 17 Mass. 94; Kimball *v.* Cleveland, 4 Mich. 606; Harper *v.* Calhoun (Miss.), 7 How. 203; Bridenbecker *v.* Lowell (N. Y.), 32 Barb. 9; Robb *v.* Ross County Bank (N. Y.), 41 Barb. 586; City Bank *v.* Perkins, 29 N. Y. 554, 86 Am. Dec. 332; Rezner *v.* Hatch, 2 Handy 42, 12 O. Dec. 320; Maxwell *v.* Planters' Bank, 29 Tenn. (10 Humph.) 507. See Contra Schneitman *v.* Noble, 75 Iowa, 120, 39 N. W. 224, 9 Am. St. Rep. 467; United States Bank *v.* Fleckner (La.), 8 Mart. (O. S.) 309, 13 Am. Dec. 287.

A cashier of a bank has prima facie the authority to indorse or transfer by delivery notes belonging to the bank. Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

Prima facie, the cashier of a bank possesses the power to indorse its negotiable securities in payment of its debts. Fleckner *v.* Bank (U. S.), 8 Wheat. 338, 5 L. Ed. 631.

A bank cashier is an agent with authority to bind the corporation by his acts and statements in relation to the sale of notes or drafts held by the bank. Sturges & Co. *v.* Bank, 11 O. St. 153, 78 Am. Dec. 296; Union Nat. Bank *v.* First Nat. Bank, 45 O. St. 236, 13 N. E. 884.

The bank may be bound by an indorsement made in the street, after banking hours, "R. L. Irvin, Cashier." Bissell *v.* First Nat. Bank, 69 Pa. 415.

In an action on a note, an instruction that the cashier of defendant bank had no authority as cashier to bind it by his indorsement of the note was properly refused. First Nat. Bank *v.* Anderson, 5 Ind. T. 118, reversed, 82 S. W. 693, 73 C. C. A. 160, 141 Fed. 926.

Since a cashier of a bank has prima facie authority to indorse negotiable paper held by the bank, a purchaser of such paper, in good faith, from the cashier, without notice of any special limitation of his power to transfer the same, will acquire title thereto, and the indorsement thereof by the cashier as cashier binds the bank. Bank *v.* Wheeler, 21 Ind. 90.

84. A bank cashier may indorse to himself, and sue on, a note payable to the bank. Young *v.* Hudson, 99 Mo. 102, 12 S. W. 632.

An indorsement of a promissory note belonging to a bank, made by the cashier to himself, is voidable only, and operates to pass the legal title until avoided by the bank. Preston *v.* Cutter, 64 N. H. 461, 13 Atl. 874.

85. To indorse for collection.—Elliot *v.* Abbot, 12 N. H. 549, 37 Am. Dec. 227; Corser *v.* Paul, 41 N. H. 24,

pay a deposit;[86] and that he can not indorse it for the purpose of making the bank liable on a contract of indorsement.[87] A transfer of negotiable securities by a cashier of a bank, in order to pay the debts of the bank, is valid in law, when it is made after the board of directors had resigned, and when the presidency of the bank has been assumed by a person who is neither an officer nor a director.[88] The prima facie authority of a cashier of a bank to transfer its notes will not render valid the transfer of a particular note to one proven to have known that it was made by the cashier outside of the usual course of business and for an improper purpose.[89] But it has been held that the cashier of a bank can not assign notes belonging to it unless authorized by the bank, or by the directors, pursuant to powers vested in them.[90] And where a note not negotiable is payable to the bank,[91] or where a note, made payable to the bank, is discounted and taken by a third person,[92] the cashier can not make a valid indorsement of the note, without authority from the directors or from the corporation.

Agreement to Save Maker Harmless.—A person induced by the cashier to sign a note and deliver it to the bank in order that the cashier might substitute the note for his own notes and some charges against him by the bank, under assurance by the cashier that he would not be liable, is liable to the bank for the amount of the note, where there had been no previous course of dealing between him and the bank authorizing his exemption from liability.[93]

77 Am. Dec. 753; State Bank *v.* Farmers' Branch Bank (N. Y.), 36 Barb. 332.

86. To pay debt.—A cashier of a bank the management of which is intrusted by its charter to a board of directors has no authority to assign discounted bills and notes to a depositor in payment of his deposit. Lamb *v.* Cecil, 25 W. Va. 288.

87. To make bank liable.—A bank cashier was authorized to indorse notes for the purpose of transmitting them to other banks for collection, but not for the purpose of making the bank liable on a contract of indorsement; he indorsed a bill, to facilitate the collection, with his own name, "P. S. C., Cas." Held, that this did not render the bank liable as indorser. State Bank *v.* Farmers' Branch Bank (N. Y.), 36 Barb. 332.

88. Carey *v.* Giles, 10 Ga. 9.

89. Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

90. Hartford Bank *v.* Barry, 17 Mass. 94; Lamb *v.* Cecil, 25 W. Va. 288.

91. Note payable to bank.—The cashier of a bank to which a note not negotiable is payable has no authority to transfer the same, without authority from the bank, evinced by usage in similar cases, or in some other way. Barrick *v.* Austin (N. Y.), 21 Barb. 241.

92. Note taken by third person.—The separate assent of a majority of the creditors (without any meeting), that he should make an indorsement, confers no authority upon the cashier for that purpose. Elliott *v.* Abbot, 12 N. H. 549, 37 Am. Dec. 227.

93. Agreement and save maker harmless.—Defendant was induced by the cashier of a bank to sign a note and deliver it to the bank, in order that the cashier might substitute the note for the notes of the cashier held by the bank and some charges against him by the bank, and signed the note under the assurance of the cashier that he would not be liable upon it, and would never be asked to pay it. The cashier turned the note in to the bank and withdrew his own notes, and received the excess of the note over his indebtedness to the bank in money. There was no evidence that the officers or directors of the bank authorized the cashier to make any such arrangement with plaintiff, and it was the first note of the kind which he had given the bank. Held, that the

Agreement to Save Surety Harmless.—An agreement by a bank cashier that the liability of sureties on a note taken by the bank shall be subordinate to collateral to be obtained by him is not within his authority.[94] In the absence of special restrictions known to the sureties on a note payable to a bank, the apparent scope of the authority of the cashier is broad enough to include an agreement by him with the sureties to proceed to make the debt, if practicable, out of land owned by the maker, pointed out to the cashier by the sureties, and against which the bank held other unsecured claims which were kept secret from the sureties.[95]

Crediting Proceeds of Draft.—It is within the apparent scope of the business of the cashier to credit a customer with the proceeds of a draft presented to the bank; and, by authorizing and ratifying the act of the cashier in giving such a credit, the bank gave him implied authority to do so in future, even though he would not otherwise have had such authority.[96]

Entries in Bank Books.—A cashier has authority to bind his bank, and entries made by him, even though relating to forged paper, charge such bank with notice of transactions being conducted by him on behalf of the bank.[97]

Security.—Since the cashier of a bank is the executive arm of the board of directors, he had authority to bind the bank by recognition of a mortgage of collaterals pledged to the bank for a loan.[98] The mortgagor is liable to the bank, although the mortgage was made to the cashier, where the bank made loans thereon.[99] A cashier, intrusted with entire manage-

cashier had no authority by virtue of his office, to make such an arrangement, that defendant was chargeable with notice that the arrangement was not authorized, and that defendant acted upon the cashier's statement at his peril. State Bank v. Forsyth, 41 Mont. 249, 108 Pac. 914.

94. Agreement to save surety harmless.—Martin v. First Nat. Bank, 11 O. C. C., N. S., 93, 20-30 O. C. D. 398.

95. Where sureties on a note payable to a bank failed to proceed against land owned by the maker, relying on the agreement of the cashier of the bank to enforce collection out of the land, and stating that the sureties need not trouble themselves about the matter, and concealing from them the existence of unsecured claims of the bank against the maker, the bank proceeding against the land for the collection of the note and its other claims, could not deny the power of the cashier to make the agreement, and the sureties, when sued on the note, were entitled to hold the bank to the extent of the injuries sustained by their reliance on such agreement, occasioned by the fact that the proceeds of the land, being insufficient to pay the note and the unsecured claims, were applied to the payment of the unsecured claims. Security Sav. Bank v. Smith, 144 Iowa 203, 122 N. W. 825.

96. German Nat. Bank v. Grinstead, 21 Ky. L. Rep. 674, 52 S. W. 951.

97. Hansel v. First Nat. Bank, 158 Ill. App. 127.

98. Security.—Bank v. Kirkman, 156 Mo. App. 309, 137 S. W. 38.

99. A dealer in agricultural implements mortgaged to the plaintiff, who was the cashier of a bank of which the mortgagor was a customer, his entire stock and all additions thereto to secure payment of his present and future obligations to the bank. The bank continued for more than two years after the execution of the mortgage to discount paper for the mortgagor, and furnished him other financial assistance when he made an assignment for the benefit of creditors and the receiver appointed on the failure of the assignee to qualify took possession of the assigned property which was replevied by the mortgagee. Held, that defendant can not object to said recovery on the ground that the mortgage was taken in the individual

ment of a bank's affairs, and possessing general authority to receive additional security for notes held by it, is not disqualified from receiving collateral in the bank's behalf to secure a note held by it, because of interest in the transaction, due to his being an indorser.[1] Where the by-laws of a bank provide that the cashier shall be responsible for all moneys, funds and valuables of the bank and deliver the same to the order of the directors or to the person authorized to receive them, and the cashier, to pay a deposit without the authority from the directors transferred securities of the bank, the transaction is without authority and void.[2] Where title conveyed by a deed to secure a debt is in a bank, the power of sale on default can not be exercised by the cashier.[3] An assignment of a mortgage to the cashier of a bank to have and to hold the same unto the assignee, his successors and assigns forever, as collateral security to a note which the assignors had given to the bank, is held to have been made to the assignee as a bank officer, and to be a contract with the bank, and that the bank can foreclose the mortgage in its own name.[4]

§ 109 (4) Directors.—The directors have authority to control all the property of the bank, and they may authorize one of their number to assign any securities belonging to the corporation.[5] Where an act establishing a bank does not give to the president and directors thereof the power of assigning notes executed to themselves, and power not being necessary in the ordinary course of their business, it is not to be inferred; and therefore an action on a note transferred by them is properly brought in the

name of plaintiff; it appearing that its purpose was fully understood, not only by the mortgagor but by the creditors, that all of the business was done through plaintiff, and that no one has been prejudiced by reason of the mortgage not running direct to the bank. Chafey *v.* Mathews, 104 Mich. 103, 27 L. R. A. 558, 62 N. W. 141.

1. Judgment 104 N. Y. S. 1040, 120 App. Div. 542, affirmed. First Nat. Bank *v.* Sing Sing Gas Mfg. Co., 194 N. Y. 580, 88 N. E. 1119.

2. **Where the by-laws of a bank provide** that the cashier "shall be responsible for all moneys, funds, and valuables of this bank, * * * and deliver the same to the order of the board of directors of this bank, or to the person or persons authorized to receive the same," and the cashier, to pay a deposit, without authority from the directors, transfers certain securities of the bank to the treasurer of a corporation, who is also assistant cashier of the bank, after which the bank assigned to said assistant cashier, the transfer of the securities is without authority, and void. In re Assignment, 32 Or. 84, 51 Pac. 87.

3. Where a deed given to a vice president of a bank individually recites that it is given as security for a debt, and contains a power of sale, that power can not be exercised by the cashier of the bank. Greenfield *v.* Stout, 122 Ga. 303, 50 S. E. 111.

4. Michigan State Bank *v.* Trowbridge, 92 Mich. 217, 52 N. W. 632.

5. **Directors.**—A note belonging to a bank may be assigned or transferred by its directors having the control of its financial affairs. Stevens *v.* Hill, 29 Me. 133.

A blank indorsement, in pursuance of such authority, by the person so authorized, is sufficient to transfer a note, and the indorsement may be properly filled at the bar. Northampton Bank *v.* Pepoon, 11 Mass. 288.

A negotiable promissory note, made payable to a bank or order, but not discounted by them, may be indorsed to the holder of the note by a vote of the directors of the bank. Cross *v.* Rowe, 22 N. H. 77.

name of the bank, for the use of the transferee.[6]

§ 109 (5) Clerk and Actuary.—A clerk, acting as cashier in the absence of that officer, has no authority to transfer any of the notes or securities of the bank, unless such authority has been given him by the directors; and the cashier can not clothe such clerk with any more of his power than is necessary to enable the latter to carry on the usual and ordinary business of the bank.[7] An act incorporating a bank provided that the business thereof should be managed by a board of trustees. A by-law adopted by the trustees provided that no securities belonging to the bank should be sold or transferred, except as authorized by a vote of the finance committee. Money was loaned to the bank on its note and collateral securities. The money was used for its exclusive benefit. The actuary transferred other secured notes to the holder of the note who surrendered his collaterals to the bank. The transfer was made without authority. The bank could not maintain a bill in equity for the return of the secured notes so transferred without rescinding the agreement and refunding the amount actually loaned or at least returning the collaterals which had been surrendered.[8]

§ 110. Actions—§ 110 (1) Directors.—The directors of a bank, appointed by the governor and council, under the Act of Maine, 1841, accepting the surrender of the charter, had power to enter into a reference of all demands between the bank and a person claiming to be the creditor thereof.[9]

§ 110 (2) President.—The president of a bank has power to employ counsel and manage the litigation of the bank,[10] in the absence of any order of the board of directors[11] or of any by-law[12] depriving him of such

6. Hamtramck *v.* Bank, 2 Mo. 169.

7. **Clerk acting as cashier.**—A clerk acting as cashier, in the absence of that officer, has power to transmit notes owned by the bank, or held by it for collection and payable in other places, or at other banks, to its agents, for that purpose; to indorse such paper for the bank, when necessary; and to vest in the collecting agents such title as is necessary and proper to accomplish that object. But he has no power to transfer any other or higher title thereto, and the agents will not, as against the bank, acquire any lien on the notes for any balance due from the bank. Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273.

8. **Actuary.**—Creswell *v.* Lanahan, 2 MacArthur (9 D. C.) 484.

9. **Actions—Directors.**—Emerson *v.* Washington County Bank, 24 Me. 445.

As to actions generally, see post, "Actions," §§ 213-231; "Actions by or against National Banking Associations," §§ 273-280½.

As to actions by or against savings banks, see post, "Actions," § 306.

10. **President.**—Deitz *v.* National Exch. Bank, 4 Ky. L. Rep. 837.

The president of a bank, being its chief executive officer, has a right as such to appear and answer for it, and employ counsel for its defense. Savings Bank *v.* Benton (Ky.), 2 Metc. 240.

11. Citizens' Nat. Bank *v.* Berry, 53 Kan. 696, 37 Pac. 131, 24 L. R. A. 719.

12. **Where the by-laws of a bank** vested the authority to bring suit and employ counsel in the directors, a warrant of attorney, signed by the president, and containing the seal of the corporation, was not the act of the corporation, if the directors did not authorize it. Citizens' Bank *v.* Keim (Pa.), 10 Phila. 311, 1 Wkly. Notes Cas. 263.

power. Other cases hold that the president has no such inherent power and can act only upon authority from the directors. The president of a bank can contract for legal services in conducting litigation for the bank.[13]

Pleading Statute of Limitations.—Power to agree not to plead the statute of limitations it would seem should be vested either virtute officii or by custom and usage in some of the officers of the bank for the convenient transaction of its business. In the absence of any different distribution of power by the charter, or by official action of the board of directors, it might be rightfully exercised by general custom and usage, by the president.[14]

Provisional Remedies.—The president of a bank is the proper person to verify pleadings and affidavits for provisional remedies on behalf of the bank, if he is in the county where the bank is situated.[15]

Letters as Evidence.—Letters relating to a transaction of the business of a bank written by the president of the bank, who negotiated the transaction, are competent against the bank in a controversy growing out of such transaction.[16]

Confession of Judgment.—The president and cashier of an incorporated state bank are not authorized to enter a confession of judgment against the corporation, under the Nebraska Code more than two years after the bank has ceased doing business, and on notes executed by the cashier in the name of the bank after the bank had ceased doing business.[17]

§ 110 (3) Cashier.—By virtue of his general authority, the cashier of a bank may maintain an action on a note by the bank, without express proof of authority.[18] He may employ an attorney to collect a claim, although the directors have appointed an attorney to take charge of the land, business, and affairs of the bank.[19] But other cases hold that it is not within the scope of the powers ordinarily conferred upon a cashier to appear and defend suits against the bank,[20] and to employ an attorney.[21] An answer, therefore, by the cashier, when the bank is garnished, will not support a judgment against the bank.[22]

13. No inherent power.—Merchants' Nat. Bank *v.* Eustis, 8 Tex. Civ. App. 350, 28 S. W. 227.

A power of attorney to institute suit, executed by the president of a bank without authority from the board of directors, is not sufficient. Citizens' Bank *v.* Keim (Pa.), 10 Phila. 311, 1 Wkly. Notes Cas. 263.

14. Pleading statute of limitations.—But it does not appear from this record that the president of the bank had the inherent power as president, to agree that the bank would not plead the statute of limitations to the claim set up against it. Morgan & Co. *v.* Merchants' Nat. Bank, 81 Tenn. (13 Lea) 234.

15. Deitz *v.* National Exch. Bank, 4 Ky. L. Rep. 837.

16. Panhandle Nat. Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23.

17. Code Civ. Proc., § 433; Fogg *v.* Ellis, 61 Neb. 829, 86 N. W. 494.

18. Cashier.—Battersbee *v.* Calkins, 128 Mich. 569, 87 N. W. 760.

19. Root *v.* Olcott, 42 Hun 536, 4 N. Y. St. Rep. 709, affirmed in 115 N. Y. 635, 21 N. E. 1116.

20. Branch Bank *v.* Poe, 1 Ala. 396.

21. It is not within the authority of the cashier of a bank to make a contract authorizing the employment of attorneys to defend a suit on a claim brought against another bank, whereon his bank might have been liable. First Nat. Bank *v.* Mansfield Sav. Bank, 10 O. C. C. 233, 6 O. C. D. 452.

22. Branch Bank *v.* Poe, 1 Ala. 396.

Provisional Remedies.—The president of a bank is the proper person to verify pleadings and affidavits for provisional remedies on behalf of the bank, if he is in the county where the bank is situated, but the making of the affidavit by the cashier is an assumption that the president was not then in the county, and the proper way to question this assumption is by filing an affidavit in the lower court, showing that the president was in the county at the time the cashier swore to the affidavit. The question can not be raised on appeal for the first time.[23]

On Note or Mortgage Given Cashier.—An action by the cashier of a certain bank, upon a note to him as such cashier, is not an action by the bank, and although the declaration states that notice was given and protest made in behalf of the bank, such allegation is a mere surplusage, especially where the note is nonnegotiable; and hence the question as to whether the bank could deal in paper of the kind sued on does not arise in such case.[24] The defendant, indebted to the bank on notes, in lieu of the notes executed other notes and a mortgage to the plaintiff, the cashier, without authority of the directors. The plaintiff assigned the notes to the bank, which reassigned them to him; and he testified that he had no personal interest, but held them for the bank. The plaintiff, as trustee for the bank, having the mortgage, after condition broken, is the party to maintain replevin for the chattels under authority contained in the mortgage.[25]

Presumption of Authority.—It will be presumed that a cashier of a bank had authority to institute an action which was in the name of the bank, and commenced by capias issued on his affidavit, which alleged his connection with the bank and authority to make the affidavit.[26]

Assistant and Acting Cashier.—An assistant cashier of a plaintiff bank may make an affidavit in attachment in its behalf, where he is acquainted with the facts.[27] In an action by a bank on a note, its acting cashier may make an affidavit of demand where the office of cashier is vacant.[28]

Confession of Judgment.—See elsewhere.[29]

§ 110 (4) Treasurer.—A treasurer of a bank may direct a suit to be brought on an overdue note; and if, judgment being obtained, and land taken on execution set off to the bank, the attorney of the bank, acting under the direction of the treasurer and of a trustee, to whom such matters have been intrusted, accepts seisin, and brings a writ of entry to recover possession of the land, it is no objection to the proceedings that a previous vote of the trustees, authorizing them, has not been passed.[30]

Presumption of Authority.—Where an action is brought in the name

23. Deitz *v.* National Exch. Bank, 4 Ky. L. Rep. 837.

24. Porter *v.* Nekervis, 25 Va. (4 Rand.) 359.

25. Donnell *v.* Miller, 152 Mo. App. 217, 132 S. W. 1194.

26. Wachsmuth *v.* Merchants' Nat. Bank, 96 Mich. 426, 56 N. W. 9.

27. National Park Bank *v.* Whitmore, 40 Hun 499, 2 N. Y. St. Rep. 87.

28. Philadelphia Nat. Bank *v.* Morgan (Del.), 1 Marv. 265, 40 Atl. 1113, 2 Hardesty 9.

29. See ante, "President," § 109 (2).

30. Treasurer.—Bristol County Sav. Bank *v.* Keavy, 128 Mass. 298.

of a bank, by direction of its treasurer, for trespass on land on which the bank holds a mortgage, it is presumed that the suit was brought with the bank's authority.[31]

§ 111. Representations or Admissions—§ 111 (1) In General.—The authority of officers of banks is restricted to such modes of binding the company as results from the nature of their duty and the powers vested in them by their offices. The property of stockholders is not bound by the regular transactions, or by the declarations or confessions of their officers, beyond the legal sphere of their action.[32] The declarations, or incidental and casual remarks of the officers of a bank do not, as a rule, bind it; especially where they relate to transactions past and ended.[33]

Personal Interest of Officer.—A bank is not liable for the representations of its officers on a sale of bonds in which the officers were individually interested, and in which the bank had no interest, though the officers used the funds and credit of the bank to consummate the sale.[34]

Personal Liability to Bank.—A surety on a defaulting officer's bond can not set up a defense of misrepresentations made by the officer as to his liability to the bank, as the officer was not then acting as the agent of the bank and the bank is not bound thereby.[35]

Release of Party to Note.—The officers of a bank have no authority as its agents to bind it by statements and assurances that would relieve parties to a note held by it from their obligations thereon.[36]

Financial Condition of Third Person.—Representations by the officers of a bank that an insurance company had a certain amount of paid-up capital stock and surplus are ultra vires.[37]

Investment for Customer.—Where the managing officer and principal stockholder of a bank, while acting in a fiduciary capacity for its customer, by means of concealment and false representations induces the latter to invest in bonds bought and held by the bank for speculative purposes, the customer may rescind the transaction, and recover from the bank the money it received therefrom.[38]

31. Bangor Sav. Bank *v.* Wallace, 87 Me. 28, 32 Atl. 716.

32. **Representations and admissions.**—Wyman *v.* Hallowell, etc., Bank, 14 Mass. 58, 7 Am. Dec. 194; Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111.

33. Puryear *v.* McGavock, 56 Tenn. (9 Heisk.) 461; Jones *v.* Planters' Bank, 56 Tenn. (9 Heisk.) 455.

34. Ruohs *v.* Third Nat. Bank, 94 Tenn. 57, 28 S. W. 303.

35. **Personal liability to bank.**—A bank in charge of the comptroller, being represented by a majority of its board of directors, who are not in default, may, with the consent of the comptroller, accept collateral securities from a defaulting officer; and in obtaining securities from a third person, to be used by him for that purpose, such defaulting officer will not be regarded as the agent of the bank, so as to make his representations as to his liability to the bank binding on the bank. Tecumseh Nat. Bank *v.* Chamberlain Banking House, 63 Neb. 163, 88 N. W. 186, 57 L. R. A. 811.

36. Bank *v.* Jones (U. S.), 8 Pet. 12, 8 L. Ed. 850.

37. **Financial condition of third person.**—Hindman *v.* First Nat. Bank, 86 Fed. 1013, reversed in 39 C. C. A. 1, 98 Fed. 562, 48 L. R. A. 210.

38. **Investment for customer.**—Where the managing officer and prin-

Made to Accommodation Acceptor of Draft.—Where a bank has several branches in different places, the managers of which are treated as its agents, and a draft in favor of the bank is payable at and presented by one of such branches, an accommodation acceptor may assume that such manager is authorized to give information as to the draft, so that statements by the manager to the acceptor are admissible against the bank.[39]

§ 111 (2) Directors.—Statements by one of the directors and members of the discount board of a bank concerning the terms on which the bank would discount a customer's paper are not binding on the bank in the absence of special authority to such director to act as agent for the bank.[40] In an action by a bank on a note given to it in part payment of a draft on a banking firm which failed before the draft was paid, evidence that a director of the bank advised the defendant to buy the draft before it was needed, and promised in the name of the bank to lend him the money, is admissible, if it is shown that the promise was communicated to, and acted upon or acquiesced in by, the bank.[41]

§ 111 (3) President.—The statements of the president of a bank which holds an unrecorded mortgage executed by a corporation as to the solvency of the corporation, made to third persons subsequently becoming creditors of the corporation, are binding on the bank.[42] Where the president was acting for the bank, the fact that he was not authorized by the board of directors to make a false representation does not relieve the bank from liability therefor.[43] But the bank is not liable for representations made by the president while not acting for the bank but for himself.[44]

cipal stockholder of a bank, while acting in a fiduciary capacity for its customer, by means of concealment and false representations induces the latter to invest in bonds bought and held by the bank for speculative purposes, in reliance wholly on his representations that they were first-class securities, and that he had got them for her expressly, when in fact they were second mortgage bonds, and were sold at a profit, the customer may rescind the transaction, and recover from the bank the money received therefrom. Judgment 52 N. Y. S. 61, 23 Misc. Rep. 308, affirmed in 59 N. Y. S. 618, 43 App. Div. 10; Carr *v.* National Bank, etc., Co., 167 N. Y. 375, 60 N. E. 649, 82 Am. St. Rep. 725.

39. Canadian Bank *v.* Coumbe, 47 Mich. 358, 11 N. W. 196.

40. Directors.—East River Bank *v.* Hoyt (N. Y.), 41 Barb. 441.

41. West Branch State Bank *v.* Haines, 135 Iowa 313, 112 N. W. 552.

42. President.—State Bank *v.* Campbell, 152 App. Div. 335, 136 N. Y. S. 396.

43. Binghampton Trust Co. *v.* Auten, 68 Ark. 299, 57 S. W. 1105, 82 Am. St. Rep. 295.

44. While acting for himself.—C. and M. were sureties on a bond given for the faithful performance of a contract to build railroad machine shops. The contractors being about to abandon work, M., then president of the plaintiff bank, told C. that they ought to make a note, in order to carry out the contract, and thus save themselves from being sued as sureties. C. said that he had risked all he intended to in the matter, whereupon M. stated that they would not have to pay a cent; that he had a contract with the railroad company that would protect them; that the bank had loaned the contractors all the money it could afford to, and simply wanted the note to show to the bank examiner; and that the first money paid in under his contract with the railroad company would be applied to the note. Upon these representations, C. executed the note. Held, that the bank, having no actual knowledge of M.'s representa-

And the president of a bank can not charge it with a debt by his admissions.[45]

Certificate of Deposit.—The president of a bank has general authority to receive a deposit and issue a certificate, and his statements and representations made when transacting the business are binding upon the bank, but he has no authority, after the certificate has been paid, either by admissions or otherwise, to bind the bank to pay the amount of the certificate a second time to other parties; such power, if it exists, being vested in the board of directors, and not in the president.[46]

Statement of Depositor's Account.—The making of a statement as to past conduct and the condition of the account of the cashier, made and signed by the president and accompanying an application to a surety company for a bond, is no part of the duties of the office of president, and the bank is not bound thereby.[47]

Bond of Other Officer.—Where a bank seeks to avail itself of the benefit of the actions of its president in securing the execution of a bond guaranteeing the fidelity of its cashier, it must accept such actions subject to the president's representations inducing the execution of the contract by the surety.[48] But where the statute and by-laws under which a bank was organized gave all power with reference to acceptance of the cashier's bond to the board of directors, and there was no evidence that the president was authorized to speak for the board, his statements to the surety on the cashier's bond as to the cashier's reliability could not be binding on the bank, so as to prevent recovery from the surety on the cashier's defalcation.[49]

Financial Condition of Third Person.—Where the president of a bank owning notes of an insolvent corporation sent the notes to another bank to be discounted and credited to his bank's account, accompanied by false representations as to the solvency of the maker of the notes, the bank is liable for his misrepresentations, although he was not authorized to make them by the board of directors.[50] In an action by the receiver of a national

tions, who was acting for himself, was not bound thereby, and, having advanced money on the note, could hold C. liable therefor. National Bank *v.* Carper, 28 Tex. Civ. App. 334, 67 S. W. 188.

45. Henry & Co. *v.* Northern Bank, 63 Ala. 527.

46. Hazelton *v.* Union Bank, 32 Wis. 34.

47. Statement of depositor's account.—A bank cashier applying to a surety company for a bond accompanied the application with a statement as to his past conduct and the condition of his account, signed by the president of the bank, which was incorrect, though made in good faith. Such statement was not referred to in the bond issued. The president had no special authority to make it, and none of the directors knew of it until interposed as a defense in a suit on the bond; defendant claiming that the statement was either a false warranty by the bank, or a misrepresentation by it of material facts, which induced defendant to execute the bond. Held, that making the statement was no part of the duties of the office of president, and not within his implied powers or ordinary duties, but was his individual act, by which the bank was not bound. United States Fidelity, etc., Co. *v.* Muir, 53 C. C. A. 56, 115 Fed. 264.

48. Warren Deposit Bank *v.* Fidelity, etc., Co., 116 Ky. 38, 74 S. W. 1111, 25 Ky. L. Rep. 289.

49. Ida County Sav. Bank *v.* Seidensticker (Iowa), 92 N. W. 862.

50. Financial condition of third person.—The president of defendant bank, to which an insolvent corporation was indebted, took its notes for a part of

bank on a bond and for an overdraft, an affidavit of defense alleging that the president of such bank prior to its failure was also president of another institution in which the defendant was a depositor, and that the president falsely assured the defendant of the soundness of such other institution, and that the defendant thereby lost a sum in excess of the claim in suit, is insufficient.[51]

Financial Condition of Bank.—A statement of the president of a bank, for the purpose of procuring from another bank a discount of paper, that such former bank is in good condition, when, in fact, it is hopelessly insolvent in consequence of the president's own malversation, is a fraud, and entitled the discounting bank to recover back the proceeds of the discount.[52]

Exempting Maker from Payment of Note.—In an action by a bank on a note made by the defendant for the payee's accommodation, and discounted by the bank, evidence offered by the defendant that, when the note was made, the president of the bank agreed that he should not be called on to pay it, is inadmissible.[53]

§ 111 (4) Cashier.—The cashier of a bank has no incidental authority to make any declarations binding the bank, not within the scope of his ordinary duties[54] and not in the interest of the bank.[55] A cashier of a bank, who was also a director of a manufacturing company, and as such

the amount, and, after indorsing them, inclosed them in a letter to plaintiff, and requested plaintiff to discount them and place the proceeds to defendant's credit at a New York bank. The letter was written on the bank's letter head, and was signed, "A., President." In it he stated that the maker of the note was solvent and owned certain property, and that the note was good, for the reason that they held warehouse receipts therefor. These statements were false, and the maker was insolvent. Plaintiff discounted the notes, and had the proceeds deposited to defendant's credit in the New York bank, and the defendant credited the maker with the amount thereof on its indebtedness. Held, that the president was acting for defendant, and the fact that he was not authorized by the board of directors to make the false representations did not relieve it of liability therefor. Binghamton Trust Co. *v.* Auten, 68 Ark. 299, 57 S. W. 1105, 82 Am. St. Rep. 295.

51. Earle *v.* Munce, 133 Fed. 1008.

52. Fisher *v.* United States Nat. Bank, 12 C. C. A. 413, 64 Fed. 710.

53. Whitehall Bank *v.* Tisdale (N. Y.), 18 Hun 151.

54. Cashier.—Hindman *v.* First Nat. Bank, 50 C. C. A. 623, 112 Fed. 931, 57 L. R. A. 108; Merchants' Bank *v.* Marine Bank (Md.), 3 Gill 96, 43 Am. Dec. 300; Morgan & Co. *v.* Merchants' Nat. Bank, 81 Tenn. (13 Lea) 234.

If the cashier of a bank promises to pay a debt which the corporation did not owe, or was not liable to pay, or should admit forged bills to be genuine, such promise or admission would not bind the bank (except as to bona fide holders for value and without notice) unless it had authorized or adopted the act. Merchants' Bank *v.* Marine Bank (Md.), 3 Gill 96, 43 Am. Dec. 300.

55. Not in interest of bank.—Defendant signed notes payable to a bank for the accommodation of the cashier, and after maturity was told that they were not paid, whereupon he executed other notes for similar amounts, intended by him as renewals of the prior notes. Held, in an action by the bank on the last notes given, that the bank was not chargeable with representations made by the cashier, as he was acting in his own interests, and adversely to those of the bank. State Sav. Bank *v.* Montgomery, 126 Mich. 327, 85 N. W. 879.

Declarations of a cashier of a bank can not bind it, where, at the time of making them, he was not transacting any business for it. Consolidated Mill. Co. *v.* Fogo, 104 Wis. 92, 80 N. W. 103.

director assisted in promulgating false statements as to the financial condition of the company, for the purpose of defrauding all of its creditors, including the bank, was not the agent of the bank in such matter so as to affect the validity of its claims against the company.[56] Representations by a bank cashier need not be made at the counter or office of the bank in order to bind it.[57]

Injury from Misrepresentation.—A person relying upon a false representation made by the cashier of a bank can not complain thereof in the absence of evidence of injury.[58]

Past Transactions.—The cashier of a bank has no authority, and it is no part of the duty pertaining to his office, to give customers of the bank information as to transactions of the bank which have been fully transacted and passed.[59]

Statement of Depositor's Account.—Representations by the cashier of a bank to an insurance commissioner, that an insurance company had on deposit in such bank a certain amount which had been paid in as capital stock and net surplus, are not ultra vires.[60]

Certificate of Deposit.—The cashier of a bank is the proper officer to receive deposits and to give certificates or vouchers in respect thereto, which may properly include, with the consent of the depositor, a statement of the

56. Decree 34 C. C. A. 338, 92 Fed. 274, affirmed on rehearing in Hadden *v.* Dooley, 35 C. C. A. 554, 93 Fed. 728, reversed Dooley *v.* Hadden, 179 U. S. 646, 45 L. Ed. 357, 21 S. Ct. 259.

57. **Representations not made at bank.**—Houghton *v.* First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107.

But in Merchants' Bank *v.* Rudolf, 5 Neb. 527, it was held that casual statements made by the cashier away from the bank do not bind the bank.

58. **Injury from misrepresentation.**—Defendant signed two accommodation notes for the benefit of a bank cashier, the notes to be discounted by the bank. After maturity he was told by the cashier that one of the notes was paid, whereupon he executed a note intended as a renewal of the unpaid notes. Defendant testified that he had intended demanding security of the cashier, but did not do so because of his representation that the one note was paid; but it appeared that the cashier was then insolvent, and could not have given security if required. The last note given was subsequently returned to defendant. Held, in an action on the first note, that, even if the bank could be charged with such representation, defendant had failed to show that he was injured thereby. State Sav. Bank *v.* Montgomery, 126 Mich. 327, 85 N. W. 879.

59. Franklin Bank *v.* Steward, 37 Me. 519.

60. **Statement of depositor's account.**—Hindman *v.* First Nat. Bank, 86 Fed. 1013, reversed 39 C. C. A. 1, 98 Fed. 562, 48 L. R. A. 210.

A statement made by the cashier of a bank, certifying to the insurance commissioner of a state that a recently organized insurance company had on deposit in the bank a sum which had been paid in as the full amount of the capital stock of the company, and as a surplus fund, is false where a considerable portion of the deposit consisted of the proceeds of notes given by subscribers in payment for stock, and by officers of the company, which the bank had discounted on the indorsement of the company, and for which it held the stock as collateral security, whether such discounts were real or pretended, since the bank had knowledge that the deposit did not represent either capital or surplus; and, where such certificate was made in the interests of the bank, for the purpose of enabling it to secure a large deposit from the company, or to sell the stock it held as collateral, it was an act done in the due course of business, for which the bank is responsible. Hindman *v.* First Nat. Bank, 50 C. C. A. 623, 112 Fed. 931, 57 L. R. A. 108.

source from which the deposit arose; and for a false statement in that respect, made to subserve the interests of the bank, the latter is liable in tort to one injured thereby, although the cashier was not expressly authorized to make such statement by the board of directors.[61]

Special Deposit.—In the absence of knowledge of the directors or of a custom of the bank, statements of the cashier are not admissible to vary a receipt given for a special deposit.[62]

Payment of Note.—Declarations made to an indorser by a cashier, who was also an indorser, as to the payment of the note held by the bank, may estop the bank from asserting a contrary state of facts, and to impose on the bank the consequent loss.[63] But where a surety on a note payable to a bank claimed that he was induced by representations of the cashier that the note was paid to surrender securities to the principal, so that he was thereby released, statements made by the cashier at casual meetings away from the bank do not bind the bank.[64]

Use of Rented Premises.—In an action for rent against a banking company, the fact that a certain person was its cashier, and negotiated for the renting of the premises, does not constitute evidence of his authority to bind the company by remarks made to plaintiff as to the purpose for which the premises were rented, or the terms of a previous renting thereof.[65]

Financial Responsibility of Maker of Note.—In an action by a bank against indorsers of a note discounted for the accommodation of the maker, declarations of the cashier and one of the directors that they considered the maker perfectly good, although willfully false, does not affect the rights of the bank, not being made in the course of their duty as officers.[66]

Financial Standing of Third Persons.—In the absence of evidence of authorization, the cashier of a bank has no authority by virtue of his position to make any representations on behalf of the bank as to the solvency of a customer who is one of its debtors, and the bank is not estopped by such representations made by him to one whom the debtor of the bank referred to the bank for information.[67] Declarations made by the cashier

61. Hindman *v.* First Nat. Bank, 50 C. C. A. 623, 112 Fed. 931, 57 L. R. A. 108.

62. Special deposit.—A., at the solicitation of the cashier of a bank, deposited with it, for safe-keeping, certain bonds, taking a receipt therefor, stating that they were received "for deposit in the vault of this bank at the risk of the depositor." Held, that in the absence of any evidence that the bank was accustomed to receive bonds for safe-keeping, except at owner's risk, or that the directors had knowledge that bonds were left at the instance, request, or solicitation of the cashier, evidence of the latter's representations, at the time of the deposit, as to the safe-keeping of the bonds, was not sufficient to change the effect of the receipt so as to affect the bank. Comp *v.* Carlisle Deposit Bank, 94 Pa. 409.

63. Grant *v.* Cropsey, 8 Neb. 205.

64. Merchants' Bank *v.* Rudolf, 5 Neb. 527.

65. Union Banking Co. *v.* Gittings, 45 Md. 181.

66. Mapes *v.* Second Nat. Bank, 80 Pa. 163.

67. Financial standing of third person.—Plaintiff sold goods on credit to a customer of a bank on the statement of the cashier that the note to be given in payment would be good. The cashier knew that the customer was largely indebted to the bank and was practically insolvent. There was no

of a bank to a merchant residing in another state touching the financial standing of a merchant residing near the bank are not competent against the bank unless evidence is introduced tending to show that by virtue of the official position of the cashier or otherwise it was his duty to make such statements.[68]

Exempting Surety from Liability.—A surety on a note given to a bank by a third person in renewal of a prior note on which such surety was also an indorser may show, as against the bank, that, at the time he signed such renewal, its cashier informed him that the bank had sufficient funds of the maker to pay such renewal note; that its execution was a matter of form, necessary only to keep the bank accounts straight; and that the bank would not hold him liable thereon.[69]

Exempting Maker from Payment of Note.—In an action by a bank against a joint maker of a note, the defendant can not show that he signed it on the representations of the plaintiff's cashier that it was intended as a mere matter of form, and that he would not be called upon to pay it.[70]

Character and Conduct of Another Employee.—Statements made by a cashier of a bank as to the character of a coemployee and the condition of his accounts are not binding on the bank.[71] But as the making of certificates by a bank cashier, for the renewal of a bookkeeper's bond, that the bookkeeper's books had been found correct, was an act which he might have been authorized to do by the directors, and where, on a defalcation being discovered, the cashier, in behalf of the bank, presented the claim against the surety, a finding was warranted that the cashier had authority to make the certificates, and that his action was binding on the bank.[72]

§ 111 (5) Teller.—The statement of a bank teller that an indorsement upon a check is genuine does not bind the bank, which holds him out to the public as an agent with limited powers.[73]

Certified Check.—The bank is bound by the representations of its teller to another bank that a certificate of deposit was good, where the

evidence of any authority given the cashier in such regard, or of any authority given him to bind the bank by representations as to its customers. Held, that the bank was not liable, where such customer thereafter became insolvent. Judgment 73 N. Y. S. 924, 68 App. Div. 458, reversed. Taylor *v.* Commercial Bank, 174 N. Y. 181, 66 N. E. 726, 62 L. R. A. 783, 95 Am. St. Rep. 564.

Answering questions as to the solvency of parties is no part of the business of a cashier of a bank, nor fairly included within the scope of such business. It may be, and probably is, an accident of such position, but not an incident to it. Held, no liability attaches to the bank for any answer the cashier may make to the solvency of some third party. Horrigan *v.* First Nat. Bank, 68 Tenn. (9 Baxt.), 137.

68. In absence of such proof the statements of the cashier would not affect the bank. This rule would not be affected by the truth or falsehood of such declarations. Goodbar *v.* City Nat. Bank, 78 Tex. 461, 14 S. W. 851.

69. First Nat. Bank *v.* Pegram, 118 N. C. 671, 24 S. E. 487.

70. First Nat. Bank *v.* Foote, 12 Utah 157, 42 Pac. 205.

71. Lieberman *v.* First Nat. Bank, 8 Del. Ch. 229, 40 Atl. 382.

72. National Bank *v.* Equitable Trust Co., 223 Pa. 328, 72 Atl. 794.

73. Teller.—Walker *v.* St. Louis Nat. Bank, 5 Mo. App. 214.

teller failed to state that the payment thereof had been stopped.[74]

§ 112. Wrongful Acts—§ 112 (1) In General.—For the torts[75] or acts done by the officers or the agents of a bank in delicto,[76] in the course of its business and of their employment, the bank is responsible as an individual is responsible under similar circumstances.

As Defense of Bank.—Where a transaction with an incorporated banking association properly pertains to the business of such an association, the abuse or disregard of his authority by its managing officer or agent, will not be permitted to be shown in defense of such bank in an action against it by an innocent party, growing out of such transaction.[77]

§ 112 (2) Torts of Managing Officer and Cashier Generally—§ 112 (2a) Acts Not within Corporate Capacity.—A managing officer of a bank is not a servant of the corporation, but the head thereof; and the bank is liable for his torts committed while acting in the scope of his powers, even though the tortious acts are not within the corporate powers of the bank.[78]

§ 112 (2b) Acts without Scope of Authority.—For an act neither within the scope of the powers of the cashier, nor authorized by the directors, the bank is not liable, or bound thereby,[79] unless it receives and

74. **Certified check.**—After a check had been certified, the bank on which it was drawn was notified by the drawer that the check had been lost, and not to pay the same. Subsequently, a person in possession of the check, representing himself to be the owner thereof, presented the same at another bank, to have it discounted, and this bank, before accepting it, presented it to the drawee's teller, asking whether the certificate was good. The teller replied that it was, but said nothing about payment having been stopped. Upon faith of this the check was discounted. Held, that the drawee by failure to state that circumstance, was estopped from denying its liability thereon. Clews *v.* Bank, 89 N. Y. 418.

75. **Liability for torts of officers or agents.**—National Bank *v.* Graham, 100 U. S. 699, 25 L. Ed. 750; Reed *v.* Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468; Wachsmuth *v.* Merchants', Nat. Bank, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278; Johnson Fife Hat Co. *v.* National Bank, 4 Okl. 17, 44 Pac. 192; Merchants' Bank *v.* State Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; Zinc Carbonate Co. *v.* First Nat. Bank, 103 Wis. 125, 79 N. W. 229, 74 Am. St. Rep. 845.

76. Wheless *v.* Second Nat. Bank, 60 Tenn. (1 Baxt.) 469, citing Philadelphia, etc., R. Co. *v.* Quigley (U. S.), 21 How. 202, 16 L. Ed. 73; Humes *v.* Knoxville, 20 Tenn. (1 Humph.) 403; Ohio Life Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 30 Tenn. (11 Humph.) 1; Nashville *v.* Brown, 56 Tenn. (9 Heisk.) 1. See also, the case of Goodspeed *v.* East Haddam Bank, 22 Conn. 530.

77. **As defenses of bank.**—Citizens' Sav. Bank *v.* Blakesley, 42 O. St. 645.

78. **Acts not within corporate powers.**—Johnson Fife Hat Co. *v.* National Bank, 4 Okl. 17, 44 Pac. 192; Silverstein *v.* National Bank, 4 Okl. 35, 44 Pac. 198; Sanger *v.* National Bank, 4 Okl. 36, 44 Pac. 198; Mayer *v.* National Bank, 4 Okl. 37, 44 Pac. 198.

79. **Cashier.**—Where the cashier of a bank wrote to the secretary of the treasury, saying that the bearer of the letter was authorized to contract for the transfer of money from New York to New Orleans, and such a transaction was not within the scope of the powers of the cashier, nor authorized by the directors, the bank was not bound to reimburse the money which the secretary of the treasury advanced. United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130.

Effect of exceeding authority.—United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130.

If the letter was the cashier's own act, and had been given without the

accepts the benefit thereof.[80] Where a bank receives the benefit of a transaction, it is bound to account notwithstanding its cashier exceeded his authority in assuming, on behalf of the bank, to act in the transaction.[81]

§ 112 (3) Particular Torts or Wrongful Acts—§ 112 (3a) Fraud —§ 112 (3aa) In General.—Fraudulent representations, or a fraudulent concealment of material facts by the agent of a bank, when engaged in the transaction of the business of the bank, will charge the latter, constructively, through the agent.[82]

A banking corporation may be guilty of a fraud. In its relations to others, it is represented by its officers and agents, and their fraud in the course of corporate dealings, is, in law, the fraud of the corporation.[83]

As Defense of Bank.—Where a transaction with an incorporated bank-

knowledge or authority of the board of directors, or any of them individually, except the bearer, who was also a director, and if the agency was not constituted by or known to the board of directors, or the directors individually, or any of them except him, but was the act of the cashier alone; and if the cashier had no power as cashier, except such as belonged to the office of cashier generally, or such as are given by the charter or by the by-law or other law or usage of the said bank, then the bank was not concluded by that letter, and is not bound by the contract made by the bearer, without some subsequent ratification of the same, though the secretary had, in contracting with him, relied upon it as the act of the bank. United States *v.* City Bank (U. S.), 21 How. 356, 16 L. Ed. 130.

In a transaction between the cashiers of two banks, upon which one bank was seeking to hold the other bank liable, where the circumstances show that the cashier of the plaintiff bank must have known that the other acted without the knowledge of the directors, and if the cashier of the defendant bank had no authority, and the cashier of the plaintiff bank knew it, it is clear to a demonstration that the defendant bank is not liable (dissenting opinion). Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

Where a cashier knew that he himself had no authority to do such an act as cashier; that the law of the state forbade it; that no cashier of a national bank in that city had ever exercised any such authority and that the means of ascertaining whether the cashier of the defendant bank had such authority were at hand, the rule, under such circumstances, is well settled that the party must inquire before assuming to act or take the risk that the necessary authority exists (dissenting opinion). Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

80. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

81. **Acceptance of benefit.**—First Nat. Bank *v.* Bakken, 17 N. Dak. 224, 116 N. W. 92.

If a cashier, without authority to buy coin in behalf of his bank, do so buy it, and it goes into the funds of the bank, the bank is liable upon the principle of quantum valebat. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

82. **Fraud.**—Bank *v.* Davis (N. Y.), 2 Hill 451; Union Bank *v.* Campbell, 23 Tenn. (4 Humph.) 394.

President or managing officer.—If the president or managing officer of a bank is guilty of fraud, in exercising the powers conferred on him by the bank, it is liable for the consequences which flow therefrom. Johnson Fife Hat Co. *v.* National Bank, 4 Okl. 17, 44 Pac. 192.

83. **Banking corporation.**—Johnson Fife Hat Co. *v.* National Bank, 4 Okl. 17, 44 Pac. 192.

If an officer of a banking corporation, while exercising the authority conferred on him by the corporation, is guilty of falsehood and fraud, the corporation is liable for the consequence which may flow therefrom. Johnston Fife Hat Co. *v.* National Bank, 4 Okl. 17, 44 Pac. 192; Silverstein *v.* National Bank, 4 Okl. 35, 44 Pac. 198; Sanger *v.* National Bank, 4 Okl. 36, 44 Pac. 198; Mayer *v.* National Bank, 4 Okl. 37, 44 Pac. 198.

ing association properly pertains to the business of such association, the fraud or bad faith of its managing officer or agent will not be permitted to be shown in defense of such bank in an action against it by an innocent party growing out of such transaction.[84]

§ 112 (3ab) Fraud in Obtaining Loan for Bank.—Where it is within the apparent authority of the cashier[85] or president[86] of a bank to borrow money for the bank in the regular course of business it is liable for fraud practiced by him in such transaction.

Vice-President.—A bank, whose vice-president borrows money in its name of another bank, and appropriates it to his own use, is not liable therefor, unless he was specially authorized to borrow the money, or his act was ratified,[87] but where he has authority to negotiate the loan the rights of the loanor are not affected by the fact that the transaction was fraudulent as between the vice-president and his bank.[88]

§ 112 (3ac) Fraud in Receiving Deposits.—Fraud of officers of a bank in receiving deposits is a fraud of the bank.[89]

Fraud Respecting Paper Deposited for Collection.—A bank is liable for the fraud of its cashier in colluding with the maker of paper sent to it for collection to allow such paper to accumulate in the bank unpaid.[90]

84. **As defense of bank.**—Citizens' Sav. Bank *v.* Blakesley, 42 O. St. 645.

85. **Fraud in obtaining loan for bank.**—Where a cashier of an insolvent bank, acting for it, induced his fiancee to furnish securities for a loan to aid the institution, any fraud practiced on her through advantage taken of the relation between them was that of the bank. Hallett *v.* Fish, 120 Fed. 986.

The lender of money to a bank through its cashier acted in good faith and in the course of business. There was nothing in the transaction to put him on notice that the cashier exceeded his authority or misapplied the funds of the bank, or that the bank authorities were not regularly constituted and doing their duty. The cashier delivered to the lender a spurious resolution, purporting to have been passed by the bank's board of directors, authorizing the loan and the pledging of the bank's notes as collateral. Held, that the transaction was binding on the bank. Citizens' Bank *v.* Bank, 31 Ky. L. Rep. 365, 103 S. W. 249.

86. **Money borrowed by president by means of fraudulent representations.**—If a bank permits its president to usurp its functions, so that thereby he is enabled to borrow money from another bank by means of fraudulent representations, and retains the money thus fraudulently obtained, it is responsible, and, in a suit against the bank from which money was thus fraudulently obtained, that bank may set off the amount. City Nat. Bank *v.* National Park Bank (N. Y.), 32 Hun 105.

87. **Vice-president.**—Chemical Nat. Bank *v.* Armstrong, 13 C. C. A. 47, 65 Fed. 573, 28 L. R. A. 231, modifying 8 C. C. A. 155, 59 Fed. 372, to accord with 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572.

88. **Fraud between vice-president and his bank.**—Where a bank in good faith advanced money on collateral forwarded to it by the vice-president of another bank, and charged the loans to the latter, its rights are not affected by the fact that the transaction was fraudulent as between the vice-president and the bank which he represented, for the vice-president had authority to negotiate the loan, and the validity was not affected by his fraud. Webb *v.* Stasel, 4 N. P., N. S., 587, 17 O. D. N. P. 317.

89. **Fraud in receiving deposits.**—Warner *v.* Armstrong, 21 Wkly. L. Bull. 124, 10 O. Dec. 426.

90. **Fraud respecting paper deposited for collection.**—Notes and bills were sent by plaintiff to the cashier of defendant for collection, with a request to protest and return such as

§ 112 (3ad) Depreciating Collaterals.—The depreciation of stock held by a bank as collateral security, by the president of the bank and stockholders with a view of purchasing the controlling interest therein, does not alone make such conduct the act of the bank so as to furnish a basis for an action against it.[91]

§ 112 (3ae) Fraud in Procuring Note.—If a cashier, as agent of the bank, procure a note by improper means from the maker, and contrary to the original design of the indorser when he delivered it to the maker, lay it before the directors to be discounted, which is done, the bank can not recover of the indorser.[92]

§ 112 (3af) Fictitious Entry of Credit.—A bank is not liable for the amount of a fictitious entry of credit made by its cashier on the pass book of a depositor.[93]

§ 112 (3ag) Deposit of Worthless Check in Another Bank.—An agent of a bank to deposit a quantity of coin in another bank has no right to substitute his own worthless check for the money, and nothing but an actual and bona fide deposit of money to his principal's credit can charge the depositee bank, and the depositor bank was responsible for the act of its agent as if it had itself deposited the worthless check.[94]

§ 112 (3ah) Conspiracy to Defraud Third Person.—Where the president of a bank has the active control and management of its affairs, and, in conducting its business, enters into a conspiracy to defraud third

were not paid. They were never collected, nor were they protested or returned. The cashier was guilty of gross fraud in colluding with the maker of the paper, and in failing to enter the paper on the books of the bank. Held, that the fraud of the cashier did not relieve defendant from liability. National Pahquioque Bank *v.* First Nat. Bank, 36 Conn. 325, 4 Am. Rep. 80.

91. Depreciating collaterals.—Napier *v.* Central Georgia Bank, 68 Ga. 637.

92. Fraud in procuring note.—Bank *v.* Irvine (Pa.), 3 Pen. & W. 250.

93. Fictitious entry of credit.—L., as cashier of a bank and treasurer of a building association, credited himself with $10,000 on the books of the bank and entered a credit for a like amount on the pass book of the building association. On the faith of this fictitious credit the building association declared and paid a dividend to its stockholders. Subsequently receivers were appointed for both the bank and the building association, and the receiver of the building association sued the receiver of the bank on an account which included this fraudulent credit. Held, that no cause of action existed for the amount represented by the fictitious entry, and as to that item the petition should be dismissed. Webb *v.* Stasel, 4 N. P., N. S., 587, 17 O. D. N. P. 317.

94. Deposit of worthless check in another bank.—A bank delivered to a savings institution coin to be transmitted to the agent of the bank. The agent received the coin and sold it, and notified the institution that he had deposited the amount to its credit in another bank. The institution credited the bank on account and sent the agent's letter to the bank. After some days it was discovered that the agent had only deposited his check, which was worthless, as he had failed. Held, that neither the institution nor the bank in which the deposit was made was bound by the credit given on the faith of the check and notification. The agent was the agent of the bank, and the transaction was the same as though the bank had made the deposit of the worthless check. Dimes Sav. Inst. *v.* Allentown Bank, 65 Pa. 116.

persons, and puts the same into execution, whereby another is damaged, the bank will be liable in tort for the damages.[95]

Cashier.—Where the cashier of a bank assisted a gang of conspirators in defrauding a stranger by inducing him to bet on a foot race, the result of which was determined in advance, by allowing the use of the bank for the transference of money and to give an appearance of respectability, the bank, as well as the cashier, is liable with the conspirators for the amount of which the stranger was defrauded.[96]

§ 112 (3ai) Bank's Retaining Benefits of Transaction.—When a bank holds out its officer to the public, by his employment, as worthy of confidence, it can not profit by the frauds he perpetrates in the apparent scope of his employment.[97] The fraud of the officer is imputable to the

95. Conspiracy to defraud third person—President.—Johnson Fife Hat Co. *v.* National Bank, 4 Okl. 17, 44 Pac. 192.

Where the president of a banking corporation, who has the control and management of its business, enters into conspiracy to defraud third persons, and carries out such fraudulent design through his relations with the bank, the corporation has notice of the fraud, and, on accepting the benefits resulting therefrom, becomes a participant in the fraud and liable for the damage. Johnson Fife Nat. Co. *v.* National Bank, 4 Okl. 17, 44 Pac. 192; Silverstein *v.* National Bank, 4 Okl. 35, 44 Pac. 198; Sanger *v.* National Bank, 4 Okl. 36, 44 Pac. 198; Mayer *v.* National Bank, 4 Okl. 37, 44 Pac. 198.

It is a part of the duty of a banking corporation to loan money, and to collect such loans by sale of goods or other security, and where the president of the bank has the active control and management of the affairs of the bank, and in conducting its business enters into a conspiracy to defraud, and puts the same into execution whereby another is damaged, the bank will be liable in tort for the damages. Johnston Fife Hat Co. *v.* National Bank, 4 Okl. 17, 44 Pac. 192; Silverstein *v.* National Bank, 4 Okl. 35, 44 Pac. 198; Sanger *v.* National Bank, 4 Okl. 36, 44 Pac 198; Mayer *v.* National Bank, 4 Okl. 37, 44 Pac. 198.

Where the president of a banking corporation, having control and management of its business, entered into a conspiracy with a merchant whereby the latter was to purchase of wholesale dealers a large amount of goods on credit, on which the bank was to take a mortgage in an amount largely in excess of a loan which was to be made the merchant, under which it was to sell the goods, the proceeds of such sale to be given, one-third to the bank and two-thirds to the merchant, leaving the creditors unpaid; and, in pursuance thereof, goods were bought of the value of $10,000, on which the bank loaned $1,000, taking a mor'gage for $9,960; and, before the bills for the goods became due, the bank foreclosed the mortgage, and took possession thereunder, and sold the goods for $5,300, which was divided according to the agreement—the bank was liable to each of the defrauded creditors for the amount of goods so sold by each. Johnson Fife Hat Co. *v.* National Bank, 4 Okl. 17, 44 Pac. 192.

96. Cashier.—Hobbs *v.* Boatright, 195 Mo. 693, 5 L. R. A., N. S., 906, 93 S. W. 934, 113 Am. St. Rep. 709.

97. Banks retaining benefits of transaction.—City Nat. Bank *v.* Martin, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632.

Assets obtained by fraud.—Where a bank, through the fraud of its agent, obtained certain assets as security for its liabilities through another bank, though it is not liable criminally, yet is liable civiliter, as it appointed the end though not the means, and it can not retain any advantages which had been gained through the agent. Johnston *v.* Southwestern R. Bank (S. C.), 3 Strob. Eq. 263.

The president of a bank borrowed money for his own use on the security of bank stock fraudulently issued to the president. The amount borrowed was transferred to the bank without consideration, and the bank collected it, and placed the money among its assets. No stock was transferred on the books. The cashier, as well as the president, had knowledge of the

bank when it receives the benefit.[98]

§ 112 (3aj) Fraudulent Acts in Personal Transactions—§ 112 (3aja) In General.—A bank is not liable for fraudulent acts of its officers performed in a transaction conducted for their private benefit, although they may have illegally used the funds and credit of the bank in effecting their purpose.[99] A bank is not chargeable with notice of the fraudulent acts of an officer outside the scope of his authority and in furtherance of his personal designs.[1]

§ 112 (3ajb) Use of Name of Bank.—An officer or agent of a bank can not prostitute the name of his bank to the service of his own personal ends.[2] The use of the bank's name by an officer in negotiating notes which do not belong to it does not render the bank liable to the indorsee although the proceeds were deposited in the bank.[3]

fraudulent issue of the stock. Held, that a fraud had been committed by the president on the lender, and that the latter was entitled to rescind the contract; that the bank received the money to the use of the lender; and that, upon his surrendering the certificates, he was entitled to share, as a creditor of the bank, in the distribution of its assets. Manhattan Life Ins. Co. *v.* Farmers', etc., Nat. Bank, Fed. Cas. No. 9,024, 10 Blatchf. 344.

98. The president, a heavy stockholder in defendant bank, who was an intimate friend of plaintiff, agreed, as a matter of friendship, to invest her money in good, first-class securities. She relied entirely on his representations that he had purchased first-class securities. He retained them in his possession, and she did not examine them. As a matter of fact, the securities were not first-class, and had belonged to the bank before their transfer to plaintiff at their par value—five per cent above what the bank had paid for them. Held, that plaintiff was entitled to rescind the contract, and, on returning the securities, to recover the price from the bank, since the fraud of the president is imputable to the bank, which received the benefit. Carr *v.* National Bank, etc., Co., 23 Misc. 368, 52 N. Y. S. 61; S. C., 43 App. Div. 10, 59 N. Y. S. 618, affirmed in 167 N. Y. 375, 60 N. E. 649, 82 Am. St. Rep. 725.

99. Fraudulent acts in personal transactions.—Ruchs *v.* Third Nat. Bank, 94 Tenn. 57, 28 S. W. 303.

1. Jones *v.* First Nat. Bank, 3 Neb. 73, 90 N. W. 912.

2. Use of name of bank.—City Elect. St. R. Co. *v.* First Nat. Bank, 65 Ark. 543, 47 So. 855.

3. Negotiation of notes.—A bank is not liable to a company for proceeds of the company's note, made payable to one who was president of the bank and an officer of the company, though in negotiating it he used the bank's name, and though he deposited the proceeds in it; it having been to his own credit, and he having used the same. City Elect. St. R. Co. *v.* First Nat. Bank, 65 Ark. 543, 47 S. W. 855.

The president of defendant bank took to plaintiff bank a note executed by third persons, and asked plaintiff to discount it. Plaintiff's directors asked the president if the signers of the note were good, and he said they were. They then agreed to discount the note if the president would indorse it, which he did; the proceeds being credited to defendant bank on account of the signers of the note. The signers were financially involved at the time the note was issued, and later failed. Held, that defendant's president was acting individually in the matter, and that defendant was not liable on the ground that it had practiced a fraud upon plaintiff in procuring it to discount the note. American Nat. Bank *v.* Warren Deposit Bank, 22 Ky. L. Rep. 195, 92 S. W. 585.

Plaintiff bank held a note, which it had discounted upon the request of the president of defendant bank; the note being indorsed by both president and cashier of defendant bank. Defendant had a first mortgage on certain cattle belonging to the maker of the note, and, when the proceeds of the cattle were turned over to defendant's cashier, he paid a portion thereof to plaintiff, and a portion to the holder of another note executed by the same

Procuring Execution of Note.—Where the president of a bank, in seeking to defraud certain persons, told them that the bank would accept their notes, would renew them indefinitely, and under certain circumstances would not enforce payment, the bank is not charged with the knowledge of the president, and therefore, being innocent, may enforce the notes.[4]

§ 112 (3ajc) Buying and Selling Stock.—Buying and selling stock is not a part of the legitimate business of a bank, and the bank is not bound by the fraud or wrongful acts of its officer in such transactions.[5]

§ 112 (3ajd) Fraud on Depositor.—An employee of a bank in the perpetration of a fraud on a depositor is not the agent of the bank.[6]

§ 112 (3ak) Application of Principle of Estoppel.—The principle that, when one of two innocent parties must suffer by reason of a fraudulent transaction it must be the one whose act made it possible for the fraud to be perpetrated, can not be so perverted as to enable a bank to profit by a fraud perpetuated by the cashier who had the general charge of its affairs.[7]

§ 112 (3al) Proof of Fraud.—The fraud must be clearly shown.[8]

§ 112 (3b) False Representations as to Credit of Another.—Where an officer of defendant bank was not acting in his official capacity

parties, and on which he was also a surety. Defendant bank, though it had a first lien on the cattle, received nothing. Held, that plaintiff had no cause of action against defendant because of the manner in which the money was applied. American Nat. Bank *v.* Warren Deposit Bank, 22 Ky. L. Rep. 195, 92 S. W. 585.

4. Procuring execution of note.—Baker *v.* Berry Hill Mineral Springs Co., 112 Va. 280, 71 S. E. 626.

5. Buying and selling stock.—Plaintiff applied to the cashier of a bank to purchase shares of stock. The purchase was made from S., who retained the stock for some time, when he sent it to the cashier, with a letter addressed to the cashier individually. The account kept by plaintiff was with the cashier individually. Plaintiff gave his check for the price to the cashier individually, and the transaction did not appear on the books of the bank. The bank was not engaged in buying and selling stock for itself or for others. On receipt of the stock, the cashier kept it in his own private drawer of a desk in the bank. The cashier thereafter converted the stock, and plaintiff sued the bank in trover. Held, that the bank is not liable. Preston *v.* Marquette County Sav. Bank, 122 Mich. 696, 81 N. W. 920.

6. Fraud on depositor.—Brown *v.* Lynchburg Nat. Bank, 109 Va. 530, 64 S. E. 950.

7. Application of principle of estoppel.—Daniels *v.* Empire State Sav. Bank, 92 Hun 450, 38 N. Y. S. 580, 74 N. Y. St. Rep. 257.

Plaintiff, then an unmarried woman, having a deposit in a bank, on leaving for Europe, to be absent a year, signed checks in blank, and left them with the cashier, who was also manager of the bank, to be used as she might thereafter direct. The following year she returned, and later married. Afterwards the cashier filled out one of the checks, though it was not charged to plaintiff's account on her book. Held, that the bank could not charge plaintiff with the amount of the check. Daniels *v.* Empire State Sav. Bank, 92 Hun 450, 38 N. Y. S. 580, 74 N. Y. St. Rep. 257.

8. Fraud in procurement of notes for insurance premium.—Where A. & B. were induced by the cashier of a bank to take out policies of insurance and borrow money from the bank on notes to pay the premiums, by his promise that the bank would protect them in the first payment of the premium when they came due, and the bank sued them on their notes, it was held that fraud was not sufficiently shown by these facts. Vanzant *v.* Bank, 2 Ga. App. 763, 59 S. E. 85.

at the time he made certain false representations to plaintiff concerning the financial responsibility of a corporation with which plaintiff entered into a lumbering contract, the bank was not liable in an action for deceit.[9]

§ 112 (3c) Slander of Credit.—A bank corporation is not liable for slanderous statements made by its officer or agent, injurious to a depositor, in his occupation of merchant or trader, though made in connection with a refusal to honor his check drawn on the bank.[10] And a bank is not liable for slander for unauthorized declarations of its cashier that plaintiff had previously overdrawn his accounts.[11]

Wrongful Publication of Protest by Notary.—A bank is not liable for the malicious and wrongful publication of a protest by a notary public employed by it, unless it shared in the malicious act; since a notary public is a public officer, and the liability for his official acts is in no way affected by the fact that he was also an employee of the bank.[12] In order to render the bank liable, it would at least have to be alleged that it shared maliciously in the production or publication of the libel.[13]

§ 112 (3d) Negligence.—A bank can not ignore the negligence of all its officers and profit by their omission of duty.[14]

Negligent Keeping of Record of Director's Meeting.—The neglect by the cashier of a directory by-law, as to keeping a record of the proceeding of the directors, will not affect their validity.[15]

§ 112 (3e) Receiving Foreign Bank Note in Payment.—The teller of a bank does not render the corporation liable to the penalty prescribed by statute by receiving in payment a foreign bank note, unless his act was

9. **False representations as to credit of another.**—Simons *v.* Cissna, 52 Wash. 115, 100 Pac. 200.

10. **Slander of credit.**—Judgment, 20 Misc. Rep. 90, 45 N. Y. S. 68, reversed. Eichner *v.* Bowery Bank, 24 App. Div. 63, 48 N. Y. S. 978, 5 N. Y. Ann. Cas. 106.

11. **Unauthorized declarations.**—Etting *v.* Commercial Bank (La.), 7 Rob. 459.

12. **Wrongful publication of protest by notary.**—May *v.* Jones, 88 Ga. 308, 14 S. E. 552, 15 L. R. A. 637, 30 Am. St. Rep. 154.

13. An allegation "that the action of the notary in the matter, he acting under the authority of the bank, is the action of said bank," is not sufficient to charge the bank as a joint tort feasor with the notary. May *v.* Jones, 88 Ga. 308, 14 S. E. 552, 15 L. R. A. 637, 30 Am. St. Rep. 154.

14. **Liability for negligence.**—Kissam *v.* Anderson, 145 U. S. 435, 36 L. Ed. 765, 12 S. Ct. 960.

15. **Neglect of cashier to keep record —Effect.**—Where the cashier is required to keep a fair and regular record of the proceedings of the directors, it is a by-law of the corporation, directory to its officers, enacted for its own security and benefit, and not for the purpose of restricting the acts of the directors. If the cashier should neglect to keep such records, or should omit any single vote, the by-law has not declared that the vote shall be void, and the proceedings nugatory. Bank *v.* Dandridge (U. S.), 12 Wheat. 64, 6 L. Ed. 552.

Mr. Justice Story, in discussing the subject in Bank *v.* Dandridge, 12 Wheat. 64, 6 L. Ed. 552, said: "A board may accept a contract, or approve a security, by a vote, or by a tacit or implied assent. The vote or assent may be more difficult of proof by parol evidence than if reduced in writing. But this is, surely, not a sufficient reason for declaring that the vote or assent is inoperative." Jacksonville, etc., Nav. Co. *v.* Hooper, 160 U. S. 514, 40 L. Ed. 515, 16 S. Ct. 379.

authorized or adopted by the board of directors.[16]

§ 112 (3f) Organization of Another Bank in Evasion of Charter.—The act of a cashier, making an arrangement with the stockholders of another, not an organized bank, to organize that bank in evasion of their charter, although illegal, still, if it is an act done by him, not for himself or his benefit, but for the bank and the bank's benefit, and beneficial thereto, and known to the directors, or which, if unknown, is unknown on account of their negligence, and not repudiated, exposed, or neutralized, is the act of the bank, and debars it from resorting to the stockholders of the other bank for payment of bills held by it on that bank.[17]

§ 112 (3g) Attempt to Prefer Bank Officer to Other Creditors.—As against third parties, the terms of a resolution of the directors of a national banking association, when the exigencies of a financial crisis are upon them, in the attempt to prefer one of the bank's officers, can not properly be regarded as decisive upon the question of the facts actually existing in respect to such third parties in a given case.[18]

§ 112 (4) Embezzlement and Misappropriation—§ 112 (4a) In General.—A bank is liable to the owner for funds embezzled or misappropriated by its officers or agents by virtue of their positions in the bank,[19] but it is not liable where it had no connection with the fraud; as, for instance, where funds are obtained by the president as trustee for creditors.[20]

16. **Receiving foreign bank note in payment.**—Clark *v.* Metropolitan Bank, 10 N. Y. Super. Ct. 241.

17. **Organization of another bank in evasion of charter.**—Robinson *v.* Bealle, 20 Ga. 275.

18. **Resolution preferring bank officer—Effect.**—Reynes *v.* Dumont, 130 U. S. 354, 32 L. Ed. 934, 9 S. Ct. 486.

19. **Embezzlement and misappropriation.**—If a bank cashier, on its behalf, has received money on account of A., its subsequent misapplication by the cashier forms no defense to A.'s suit against the bank. Concord *v.* Concord Bank, 16 N. H. 26.

M. was president of defendant bank, and embezzled money belonging to a town of which he was a railroad commissioner, but, before absconding, gave his note to the bank to cover this shortage, and the bank's receiver, in assessing stock, included such shortage among the debts to be paid by the bank. Held, that the facts showed that M. had deposited the money in the bank, and hence embezzled it by virtue of his position as president of such bank, and not as railroad commissioner, and hence the bank was liable therefor. Kilby *v.* First Nat. Bank, 32 Misc. Rep. 370, 66 N. Y. S. 579.

Bonds deposited with bank.—Where the treasurer of a bank, who was also cashier and managing agent, took certain bonds belonging to plaintiff, and pledged them in the name of the bank to secure advances made to it liable for the conversion, though its directors were ignorant of the taking. Fishkill Sav. Inst. *v.* National Bank, 80 N. Y. 162, affirming 19 Hun 354.

20. **Funds received by president as trustee for creditors.**—A bank can not be held liable as trustee for money collected by its president and financial manager, as trustee for benefit of creditors of the maker of notes to the bank, and paid into the bank on a certificate of deposit in his name, and applicable to payment of the notes, where the bank had no connection with the trust property. Alpena Nat. Bank *v.* Greenbaum, 80 Mich. 1, 44 N. W. 1123.

In this case M. was president of the bank and also trustee for creditors of the makers of the notes, said maker being indebted not only to M.'s bank, but to third persons who had taken the notes of the makers, which they held, and discounted them at M.'s bank. The bank was now suing these third persons as indorsers of these discounted notes and they, as defend-

or as railroad commissioner;[21] or where funds were borrowed by the vice-president in its name and appropriated to his own use when he had no authority to borrow money and his act was not ratified by the bank.[22]

Liability on Checks Drawn by Cashier.—A bank is bound by the act of its cashier in drawing checks in its name, though with the intent of embezzling the proceeds, and payment of the checks by the drawee is binding on the bank.[23]

Liability for Drafts Drawn on Another Bank.—A bank is responsible for the act of its cashier in making a draft on another bank for the payment of money on a future day, contrary to Rev. St., c. 36, § 57, though fraudulently drawn by him to conceal his embezzlement of the funds of the bank.[24]

§ 112 (4b) Misappropriation of Deposits—§ 112 (4ba) In General.—Where a person occupying the position of managing officer of a bank, receives moneys which are deposited in the bank, his knowledge will be treated as that of the bank, and it is liable to the depositor, even though such officer misappropriates the moneys.[25] If such officer converts the money without the bank having received it, and without credit being given on its books, it will not be liable. But, when he receives funds which go into the bank, it is chargeable with all the knowledge possessed by him; otherwise those dealing with the bank would be without remedy in the case of fraud or misappropriation on the part of its managing officer.[26]

Clerk or Teller Agent of Customer in Making Deposit.—Where

ants, claimed that M. had realized on the property conveyed to him as trustee and placed the proceeds in his bank, now suing as plaintiff. Defendants claimed that M. should have used this money or part thereof to pay these notes on which they were indorsers, and that the money having been placed in the bank, the bank should be charged as a trustee for their benefit. Held, as in the Alpena Nat. Bank *v.* Greenbaum, 80 Mich. 1, 44 N. W. 1123.

21. **Funds obtained as railroad commissioner.**—Kilby *v.* First Nat. Bank, 32 Misc. Rep. 370, 66 N. Y. S. 579.

22. **Funds borrowed and misappropriated by vice-president.**—Chemical Nat. Bank *v.* Armstrong, 13 C. C. A. 47, 65 Fed. 573, 28 L. R. A. 231, modifying 8 C. C. A. 155, 59 Fed. 372, to accord 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572.

23. **Liability on checks drawn by cashier.**—Phillips *v.* Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982, 37 Am. St. Rep. 596, 23 L. R. A. 584, affirming 22 N. Y. S. 254, 67 Hun 378, 54 N. Y. St. Rep. 918.

24. **Liability for drafts drawn on another bank.**—Faneuil Hall Bank *v.* Bank (Mass.), 16 Gray 534.

25. **Misappropriation of deposits.**—Smith *v.* Anderson, 57 Hun 72, 10 N. Y. S. 278, 32 N. Y. St. Rep. 5; Holden *v.* New York, etc., Bank, 72 N. Y. 286; Port Jervis *v.* First Nat. Bank, 96 N. Y. 550; Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; Bartow *v.* People, 78 N. Y. 377; Fishkill Sav. Inst. *v.* Bostwick, 92 N. Y. 564; Fishkill Sav. Inst. *v.* Nat. Bank, 8 N. Y. 162.

Where plaintiff delivered moneys to the president of a bank to be deposited therein, and the latter, without plaintiff's knowledge or consent, deposited them in his own name as her attorney, and afterwards unlawfully appropriated a large part thereof to his own use, the bank is liable, since it is chargeable with the knowledge possessed by its president. Smith *v.* Anderson, 57 Hun 72, 10 N. Y. S. 278, 32 N. Y. St. Rep. 5.

26. Smith *v.* Anderson, 57 Hun 72, 10 N. Y. S. 278, 32 N. Y. St. Rep. 5.

a clerk[27] or paying teller,[28] of a bank to whom a customer delivered money for deposit in the bank, but who embezzled it, was agent of the customer in making the deposit, the bank is not liable, but the depositor is answerable for the deficit; but where the bank held him out as authorized to receive the money it will be liable.[29]

Trust Deposit.—Where a bank cashier is enabled to misappropriate a trust deposit by the failure of the director to supervise the officers, the bank is liable for the amount misappropriated.[30]

§ 114 (4bb) Special Deposits for Safe-Keeping.—For a special deposit, received by a bank through its cashier for gratuitous safe-keeping and return to the depositor on demand, the bank is not liable if the cashier, without its knowledge or consent, steals it or fraudulently appropriates it to his own use, provided the bank has exercised due diligence in selecting the cashier and in not keeping him in office after it knew, or ought to have known, that he was or had become untrustworthy. In stealing or clandestinely appropriating the deposit to his own use, the cashier would not be acting in the bank's business, or within the scope of his employment;

27. **Clerk, agent of customer in making deposit.**—A clerk in the bank, who acted as a bookkeeper, and whose particular duty it was to keep the ledger, into which the entries are copied from the teller's cash book, received money from A., who was a dealer with the bank, for the purpose of having the same deposited in the bank, and which he entered in the ledger, and afterwards into the dealer's bank book, but which was not received by the teller, nor entered in his cash book, and was supposed to be embezzled, with other moneys, by the clerk, who absconded. It was held that the clerk, in making the deposit, was the agent of A., and not of the bank, and that A. must be answerable for the deficit in the deposit. Manhattan Co. *v.* Lydig (N. Y.), 4 Johns. 377, 4 Am. Dec. 280.

28. **A paying teller,** receiving the funds of a stranger, and promising to apply them to the payment of a bill or a note, acts as the agent of the stranger, and not of the bank, which is not liable for any breach or neglect of his promise. Thatcher *v.* Bank, 7 N. Y. Super. Ct. 121.

29. A package of money was sent by express from plaintiff to defendant bank, directed to its cashier. The clerk of the express company took it to the bank, and, the receiving teller being temporarily absent, delivered the package to S., who was, and had for some time been, assistant receiving teller, and who at the time was at the receiving teller's desk. The package was never delivered by S. to the cashier, and the money never came into the possession of the bank. Held, that since the bank placed S. at the receiving teller's desk, and permitted him to act as receiving teller, it thereby held him out to the express agent as authorized to receive the package, and that the bank was liable for its loss. Hotchkiss *v.* Artisans' Bank, 41 N. Y. (2 Keyes) 564, 2 Abb. Dec. 403, affirming 42 Barb. 517.

30. **Trust deposit.**—Directors, by failing in their duty of supervision and control, permitted the cashier to have complete control over the business, so that he was able for a long time to commit irregularities, issuing worthless checks in the name of a company of which he was manager, which were paid by the bank and eventually taken up by him in exchange for his checks, on the account of an estate of which he was administrator. Two notes of his company being presented for payment when the company had no money on deposit, they were not paid by the bank, but the cashier took them up by drawing on the account of the estate. Held, that the bank was liable for the sum so drawn, though it received no benefit from the transactions; the directors' neglect being responsible for the cashier's opportunity to commit irregularities. Lowndes *v.* City Nat. Bank, 82 Conn. 8, 72 Atl. 150.

he would be representing himself and not the bank.[31] There is no undertaking on the part of the bank to the bailor that an officer of the bank should not steal; the case does not rest on any such warranty or undertaking, but on gross negligence in care taking.[32]

Effect of Recovery as Revesting Title in Depositor.—Where the cashier of a bank pledges bonds deposited therein for safe-keeping, the pledgee, acting in good faith, takes a good title; and a recovery of the bonds through the cashier's bad faith does not revest the title in the depositor.[33]

§ 112 (4c) Money Received for Transmission.—The transmission of money being an essential function of a commercial bank, and its cashier being clothed with apparent authority to act for it therein, a cashier, on receiving a depositor's check, with instructions to transmit the amount named to a trust company for deposit, is the agent of the bank, and not of the depositor, and the bank is liable for the cashier's misappropriation of the fund.[34] Even on the theory that the cashier was the depositor's agent the bank was liable for its misappropriation, being cognizant of the fraud.[35]

§ 112 (4d) Collateral Security.—Where the president[36] or cashier[37] of a bank converts securities pledged to it as collateral to secure a loan, the

31. Special deposits for safe-keeping.—Merchants' Nat. Bank *v.* Guilmartin, 88 Ga. 797, 15 S. E. 831; Merchants' Nat. Bank *v.* Demere, 92 Ga. 735, 19 S. E. 38; Merchants' Nat. Bank *v.* Carhart, 95 Ga. 394, 22 S. E. 628.

When the bank does its full duty in selecting a proper person and in not disregarding indications of dishonesty which ought to arouse suspicion and investigation, it is not responsible to one who has obtained from it the favor of barely keeping specific property without recompense, though the cashier steal the property so put in his charge. Merchants' Nat. Bank *v.* Guilmartin, 93 Ga. 503, 21 S. E. 55.

32. Merchants Nat. Bank *v.* Guilmartin, 93 Ga. 503, 21 S. E. 55.

33. Effect of recovery as revesting title in depositor.—Ringling *v.* Kohn, 4 Mo. App. 59.

34. Money received for transmission.—Goshorn *v.* People's Nat. Bank, 32 Ind. App. 428, 69 N. E. 185, 102 Am. St. Rep. 248.

35. A depositor, desiring to withdraw his bank deposit and commit it to a trust company, received from the bank cashier a suggestion as to a particular trust company, and, drawing a check, delivered it to the cashier, with instructions to deposit the amount named with the company suggested. Instead of doing so, the cashier substituted the depositor's money for paid checks of his own on the bank, which he was carrying as cash. Held that, even on the theory that the cashier was the depositor's agent for the transmission of the fund, the bank was liable for its misappropriation, the transaction amounting to a payment of the depositor's check merely with the evidences of the cashier's indebtedness, and the bank, moreover, being cognizant of the fraud through its cashier. Goshorn *v.* People's Nat. Bank, 32 Ind. App. 428, 69 N. E. 185, 102 Am. St. Rep. 248.

36. Collateral security.—The president of a banking association converted securities pledged to the bank as collateral for a loan. The evidence showing negligence on the part of the directors, held, that the association was liable. Cutting *v.* Marlon (N. Y.), 57 How. Prac. 56, 6 Abb. N. C. 388, affirmed in 78 N. Y. 454.

37. A cashier was intrusted with the management of affairs of a bank, which held a note on which he was indorser. He received bonds as collateral, and sold them and used the proceeds to reduce his indebtedness to it for money unlawfully appropriated. Held, that the bank was responsible for the loss resulting from the conversion of the bonds. Judgment, 101 N. Y. S. 1040, 120 App. Div. 542, affirmed. First Nat. Bank *v.* Sing Sing Gas Mfg. Co., 194 N. Y. 580, 88 N. E. 1119.

bank is responsible for the loss resulting therefrom; but one who borrows money from a bank for the cashier thereof, on collaterals belonging to cashier, is not entitled to credit for amount of such collaterals after they have been wrongfully withdrawn and converted by the cashier.[38]

§ 112 (4e) Paper Left for Collection.—Where a note is left with the teller for collection, and the bank receives the money, but the teller deposits the amount in his own name, the bank has notice as to the ownership of the note, and is liable to the true owner, although it was payable to the teller's order.[39]

§ 112 (4f) Right of Bank to Money or Paper Used to Conceal Embezzlement.—Where the president and cashier of a bank co-operate in abstracting and misapplying its funds, and, in order to accomplish their purpose and secrete their transactions from the board of directors, the note of a friend, with fictitious collaterals attached, is obtained and placed in the portfolio of the bank, the bank is not bound thereby; but the maker of such a note is bound to the bank, notwithstanding it was without consideration as to him.[40]

Money Obtained by Fraud.—Where the teller[41] or cashier[42] of a bank, in order to conceal a defalcation, procured funds of another by fraud

38. Merchants' Nat. Bank *v.* Demere, 92 Ga. 735, 19 S. E. 38.

The officers representing the bank in making the loan not being aware that the money was for the use of the cashier or that the collaterals belonged to him, and not acquiring this information until after the cashier had fraudulently withdrawn the collaterals and applied them to his own use, the bank is not accountable for their value in settling its claim against the borrower for this loan and for other transactions giving rise to a general balance against him in favor of the bank. Merchants' Nat. Bank *v.* Demere, 92 Ga. 735, 19 S. E. 38.

39. Paper left for collection.—City Nat. Bank *v.* Martin, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632.

40. Right of bank to money or paper used to conceal embezzlement.—Richardson *v.* Watson, 51 La. Ann. 1390, 26 So. 422.

41. Money obtained by fraud.—Money fraudulently taken from the owner by his clerk, and paid into a bank, to a defaulting teller therein, at his request, for the purpose of enabling him to exhibit it to the bank officers as money of the bank, and thus to conceal his embezzlement, does not become the money of the bank, although, in examining and settling the accounts of the defaulting teller, and before the discovery of the embezzlement, it was received and counted by different officers of the bank as money of the bank, and treated as such, and put to his credit on the books, and afterwards returned to his custody. Skinner *v.* Merchants' Bank (Miss.), 4 Allen 290.

42. Atlantic Bank *v.* Merchants Bank (Mass.), 10 Gray 532.

By a fraudulent conspiracy between the paying teller of defendant bank, the teller of plaintiff bank, and a broker, the broker drew a check on defendant, where he had no funds, which the paying teller marked "Good," and the broker took it to the teller of the plaintiff, who gave him the money for it in current bills. The broker took these to defendant's bank, and gave them to the paying teller, who, for the purpose of covering a deficit, unknown to any of the bank officers, in his cash, placed them with it. The purpose for which the money was obtained was known to the two other parties, but no other officer of either bank knew anything of the transaction. Held, that the defendant could not hold the money as against the plaintiff, but was liable to the latter, after demand, in an action for money had and received. Atlantic Bank *v.* Merchants' Bank (Mass.), 10 Gray 532.

and placed same in his cash to be counted by the directors, the true owner may recover the same in an action for money had and received; aliter in South Carolina where the money was obtained by the teller of B bank for the teller of A bank, neither having authority to loan or borrow money and not returned to A bank.[43]

§ 112 (4g) Recovery by Bank.—Persons who receive from an officer of a bank money, checks, or drafts of the bank in payment of such officer's personal obligations under circumstances charging them with notice that the money was embezzled from the bank, are liable to the bank therefor; aliter, where the payee is not charged with such notice.[44]

Draft Drawn on Bank's Funds.—If a bank gives a cashier authority to draw drafts for his own account on its funds, or ratifies his acts in known transactions which he openly conducts honestly or dishonestly, it will not be permitted to say that a similar transaction which he secretly and by concealment conducts does not bind it.[45] Where the cashier of a bank transferred a draft drawn on the bank's funds in payment of his individual note, to a payee who was not by any action of the officers of the bank induced to rely on the authority of the cashier to use the bank's funds for his own benefit, the payee was charged with knowledge that the draft was drawn on the bank's funds, and he could not, as against a showing that the cashier acted without authority, insist on the right to retain the funds.[46]

43. South Carolina.—The teller of B., a bank, having abstracted from his till, and fraudulently used, the money of his bank, in order to return the same, and escape detection, borrowed the money of A., another bank, from the teller thereof, and secretly placed it in his, the borrower's till, where it became mingled with the money of his bank, was on the same day counted by the cashier as the bank's money, and was afterwards used by the teller for his bank in its current transactions. Neither teller had the right to borrow, on the one hand, nor to lend, on the other, money for his bank, and the transaction was fraudulent on the part of both tellers. By means of the money thus obtained, the teller of B. escaped detection for some time, and when he left his bank his cash was counted, and found correct. Held, that A. was not entitled to recover from B. the amount thus restored to it by its teller. Bank *v.* Bank (S. C.), 13 Rich. L. 291.

44. Recovery by bank.—A bank can not compel the refunding of the proceeds of a draft fraudulently drawn by its cashier in favor of the state for taxes received by such cashier as tax collector, if the state had no knowledge of the fraud. Goshen Nat. Bank *v.* State, 141 N. Y. 379, 36 N. E. 316.

45. Drafts drawn on bank's funds.—Campbell *v.* Manufacturers' Nat. Bank, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438; Goshen Nat. Bank *v.* State, 141 N. Y. 379, 36 N. E. 316.

A cashier of a bank under its by-laws had power to sign drafts in favor of the bank on its correspondent. There was no rule of the bank forbidding him to obtain drafts for his own use, and he had been allowed to overdraw his personal account. Held, that where he paid for personal property, when his account was overdrawn, with a draft on the correspondent of the bank, payable to the order of the vendor, and signed by him as cashier, and fraudulently entered the draft at a sum much less than its face, the bank could not recover the difference from the payee of the draft. Judgment, 66 App. Div. 434, 73 N. Y. S. 1084, affirmed. Campbell *v.* Upton, 171 N. Y. 644, 63 N. E. 1115.

46. Home Sav. Bank *v.* Otterbach, 135 Iowa 157, 112 N. W. 769.

Where there was no proof that the act of the cashier of a bank in using a draft on the bank to pay his own debt was authorized or ratified by the

There is no estoppel as against the bank. The payee was bound to know that the cashier had no apparent authority to use the bank's funds for his own benefit.[47] The burden of establishing an estoppel was upon the payee.[48]

Drafts Sent by President to Broker.—Brokers who receive from a bank president drafts of the bank in payment for his private losses in board of trade speculations, under circumstances charging them with notice that the drafts represent money embezzled from the bank, are liable to the bank for the proceeds of such drafts.[49]

Checks or Drafts Sent by Cashier to Broker.—Where drafts drawn by the cashier of a bank to his own order are transmitted to a broker for use in speculative transactions on the board of trade, the broker will be held liable to the true owner of the funds so used, though he has no knowledge as to the ownership[50] in the absence of a showing that the misappropriation had been made good by the cashier,[51] and can not base a defense upon any custom or usage to the effect that such checks are used in private transactions and regarded as cash.[52] Where drafts were drawn by the cashier of a bank, payable to himself, and transmitted to a grain broker to be used in speculative transactions on the board of trade, the nature of the drafts

directors, and there was nothing on the face of the draft when it was returned to show that it was not a regular bank transaction, nor by the exercise of any care could the president or directors of the bank have discovered the fraudulent act of the cashier, in issuing the draft in question, the bank was not liable therefor. Campbell *v.* Manufacturers' Nat. Bank, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438.

47. Home Sav. Bank *v.* Otterbach, 135 Iowa 157, 112 N. W. 769; Campbell *v.* Manufacturers' Nat. Bank, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438; Wheeler *v.* Home Sav., etc., Bank, 188 Ill. 34, 58 N. E. 598, 80 Am. St. Rep. 161.

48. **Burden of showing estoppel.**—Home Sav. Bank *v.* Otterbach, 135 Iowa 157, 112 N. W. 769; City Bank *v.* Radtke, 87 Iowa 363, 54 N. W. 435; Redhead *v.* Iowa Nat. Bank, 127 Iowa 572, 103 N. W. 796.

49. **Drafts sent by president to broker.**—Beard *v.* Milmine, 88 Fed. 868.

What constitutes notice.—Knowledge that their customer is president of the bank, that his purchases and sales are purely speculative, and that he has been steadily losing money in such speculations for ten years, is sufficient to charge the broker with notice that the drafts represent money embezzled from the bank. Beard *v.* Milmine, 88 Fed. 868.

50. **Checks or drafts sent by cashier to broker.**—Mendel *v.* Boyd, 3 Neb. 473, 91 N. W. 860.

51. The cashier of a national bank having drawn checks on the bank's correspondent, in favor of defendant, who was a broker, and who used the avails thereof in buying stocks for such cashier individually, the bank brought action to recover the amount thus wrongfully appropriated. During the period covered by the transactions the cashier made certain deposits of his own funds with the correspondent, to his bank's credit. Held, that the defendant was liable for the full amount so misapplied, in the absence of evidence showing that the misappropriations had been made good by the cashier's deposits. Anderson *v.* Kissam, 35 Fed. 699.

52. **Usage or custom.**—A cashier of a national bank drew checks in his official capacity in favor of a broker, the avails of which the latter used in buying stocks for said cashier individually. Held, in an action by the bank against the broker to recover the money so misapplied, that defendant was bound to know that the cashier had no authority to use such checks for his individual use, and that he can not base a defense upon any custom or usage to the effect that such checks are used in private transactions, and regarded as cash. Anderson *v.* Kissam, 35 Fed. 699.

was sufficient in itself to put the broker on inquiry as to the ownership of the funds used in such transactions.[53] Where the cashier of a bank transmitted to a broker, for use in speculative transactions on the board of trade, drafts drawn to his own order, payment to the cashier of the proceeds of such transactions is no defense, in an action against the broker to recover the money lost in such transactions, unless such payments are traced into the hands of the owner of the funds.[54] In such action the broker may be charged with the amount of the funds actually received and converted by him, and is entitled to credit, by way of mitigation of damages, for all money repaid by him which can be traced into the hands of the owner of the funds.[55]

Recovery of Deposit for Safe Keeping as Revesting Title.—See ante, "Misappropriation of Deposits," § 112 (4b).

§ 113. Estoppel to Deny Authority of Officer or Agent[55a]—§ 113 (1) In General.—Where a party deals with a banking corporation in good faith—the transaction not being ultra vires—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.[56] In a transaction in which the officer of a bank acts strictly within the line of the duties devolving upon him as such officer, the bank can not, for the purpose of avoiding the legal consequences of his malfeasance or mistake, be heard to repudiate his authority.[57]

Appointment and Qualification of Cashier.—If a person acts notoriously as cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment.[58] He is the executive officer of the bank through whom its financial transactions are conducted, under the

53. Mendel *v.* Boyd, 3 Neb. 473, 91 N. W. 860.

54. Mendel *v.* Boyd, 3 Neb. 473, 91 N. W. 860.

55. Mendel *v.* Boyd, 3 Neb. 473, 91 N. W. 860.

55a. Officer of trust company, see post, "Representation by Officers and Agents," § 315 (2). Officers of national bank, see post, "Representation of Bank by Officers," § 262.

56. Estoppel of bank to deny liability.—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; Creswell *v.* Lanahan, 101 U. S. 347, 25 L. Ed. 853.

57. Citizens' Bank *v.* Fromholz, 64 Neb. 284, 89 N. W. 775.

Where the president and cashier of a bank, acting as such, collects money and deposits it in the bank to the credit of a customer, and pays out checks drawn by the customer against such deposit, the bank can not, to escape liability for the fraud of such president, deny his authority to represent it. Citizens' Bank *v.* Fromholz, 64 Neb. 284, 89 N. W. 775.

58. Presumption of regular appointment.—Bank *v.* Dandridge (U. S.), 12 Wheat. 64, 6 L. Ed. 552.

directors' supervision.[59] And where he has been duly appointed and permitted to act for a long time, the regular acceptance and approval of his bond is not essential to his legal performance of his duties, and consequent liabilities.[60]

Form in Which Duties Prescribed.—Where the by-law of a bank requires the directors to prescribe the duties of the various offices, there is no particular form in which these duties are to be prescribed, and even if there were, a due prescription might be inferred from circumstances, as from evidence of acts on the part of such officer. And by the performance of certain duties in his office, he is estopped to deny that they had been prescribed by the board.[61]

Knowledge of Board of Directors.—The board of directors of a bank have a general superintendence over and the management of all its business affairs and transactions which ordinarily vest with it, and they are bound to know all that has been done beyond the merest matter of daily routine; and what they ought to know as to the general course of the bank's business they will be presumed to have known, in a contest between the bank and third persons dealing in good faith with it.[62]

Knowledge of Facts by Person Alleging Estoppel.—Where a person dealing with an officer or agent of a bank has or is charged with knowledge of the facts, there can be no claim of estoppel against the bank to deny the authority of such officer or agent, as, for instance, a director of the bank,[63] or a creditor of an officer of the bank who receives in payment

59. **Cashier as executive officer of bank.**—Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008; Martin *v.* Webb, 100 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428; Case *v.* Citizens' Bank, 100 U. S. 446, 25 L. Ed. 695; Bank *v.* Dunn (U. S.), 6 Pet. 51, 8 L. Ed. 316; Minor *v.* Mechanics' Bank (U. S.), 1 Pet. 46, 7 L. Ed. 47; American Surety Co. *v.* Pauley, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552.

60. **Qualification by acceptance of bond.**—Where the cashier of a bank is duly appointed, and permitted to act in his office, for a long time, under the sanction of the directors, it is not necessary that his official bond should be accepted by the board of directors as satisfactory, according to the terms of the charter, in order to enable him to enter legally on the duties of his office, or to make his sureties responsible for the nonperformance of those duties; the charter and the by-laws are to be considered, in this respect, as directory to the board, and not as conditions precedent. Bank *v.* Dandridge (U. S.), 12 Wheat. 64, 6 L. Ed. 552. See, also, Jacksonville, etc., Nat. Co. *v.* Hooper, 160 U. S. 514, 40 L. Ed. 515, 16 S. Ct. 379.

"There need not be express votes of approval and satisfaction. An acceptance of the bond by the directors would, necessarily, in intendment of law, include the approval of it, and be conclusive of it." Bank *v.* Dandridge (U. S.), 12 Wheat. 64, 6 L. Ed. 552.

61. **Form in which duties prescribed.**—Durkin *v.* Exchange Bank (Va.), 2 Pat. & H. 277.

62. **Knowledge of board of directors.**—Union Nat. Bank *v.* Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; S. C., 155 Mo. 279, 55 S. W. 1133.

63. **Directors of bank.**—Where a bank cashier represented to a member of a firm, which was surety on a note due the bank, that the note was partly or wholly paid, whereby the surety was induced to surrender property of the principal to the latter, the bank is not estopped to deny the truth of the statement, where the member of the firm was vice president and director of the bank, in which capacity he is conclusively presumed to know that the note is unpaid. Merchants' Bank *v.* Rudolf, 5 Neb. 527.

of his debt, a draft of the bank on its correspondent.[64]

Unknown Limitation Contained in By-Laws or Resolution of Board.—A bank which has intrusted the conduct of its affairs to its president, such conduct being within the range of the authority customarily given to such an office, is bound to one who has parted with his money in good faith in reliance upon the authority so exercised, whatever may be the limitations which the by-laws or resolutions of the board of directors in fact place upon it, of which he has no knowledge.[65]

§ 113 (2) Receiving and Retaining Benefits of Transaction.—A bank by accepting and enjoying the benefits of an act of its officers or agents is estopped to deny such officers, etc., authority to act in the premises, in order to escape the liabilities.[66] A bank can not hold and enjoy the benefits of and escape the liabilities of the unauthorized acts of its president,[67] cashier,[68] or other officer,[69] which are not criminal or against public policy; but in the absence of any evidence that the bank obtained or enjoyed any of the proceeds of such act it is not estopped.[70]

Contracts.—A bank can not receive and retain the benefits arising from a contract made on its behalf by one of its officers or agents and at the

64. Creditor of officer receiving bank's draft in payment.—Where defendant was not induced by the action of the officers of a bank to rely on the authority of the cashier to use the bank's funds for his own benefit, he was bound to know that the cashier had no apparent authority to do so, and, in an action by the bank to recover funds diverted by the cashier, he can not claim estoppel as against the bank. Home Sav. Bank *v.* Otterbach, 135 Iowa 157, 112 N. W. 769.

65. Unknown limitation contained in by-laws or resolution of board.—Citizens' Bank, etc., Co. *v.* Thornton, 98 C. C. A. 472, 174 Fed. 752.

66. Receiving and retaining benefits.—Where all the parties engaged in the transaction and the privies were agents of the bank, if there were any defect of authority on their part, the retention and enjoyment of the proceeds of the transaction by the bank constitutes an acquiescence as effectual as would have been the most formal authorization in advance, or the most formal ratification afterwards. People's Bank *v.* Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. Ed. 907.

67. President.—First Nat. Bank *v.* Hanover Nat. Bank, 13 C. C. A. 313, 66 Fed. 34; Akers *v.* Ray County Sav. Bank, 63 Mo. App. 316.

68. Cashier.—Hawkins *v.* Fourth Nat. Bank, 150 Ind. 117, 49 N. E. 957. Acts of the cashier of a bank, which are done on behalf of the bank, and which are not criminal, or against public policy, when once executed in whole or in part, are binding on the bank; so that it can not hold and enjoy the benefits, and escape the liabilities. Owens *v.* Stapp, 32 Ill. App. 653.

69. Carr *v.* National Bank, etc., Co., 167 N. Y. 375, 60 N. E. 649, 82 Am. St. Rep. 725; First Nat. Bank *v.* State Bank, 15 N. Dak. 594, 109 N. W. 61.

70. Where there is no evidence that a bank had obtained or enjoyed the proceeds of a discount of his note fraudulently obtained from another bank by its president nor received any interest, commission or other benefit from the transaction; the former is not estopped to question the authority of its president to charge it with liability on the note. First Nat. Bank *v.* Hanover Nat. Bank, 13 C. C. A. 313, 66 Fed. 34.

A New York bank, at the request of the president of a Kansas bank, discounted a note made by him, and by his direction placed the proceeds to the credit of the Kansas bank, and telegraphed him that it had done so. On the receipt of the telegram, he caused the proceeds to be placed to his credit in the Kansas bank, and used the same. Held, that the Kansas bank was not estopped to question the authority of its president to charge it with liability on the note. First Nat. Bank *v.* Hanover Nat. Bank, 13 C. C. A. 313, 66 Fed. 34.

same time repudiate its burdens by denying his authority to act as its agent in making the contract, as, for instance, a contract or agreement made by its president[71] or cashier;[72] thus a bank which receives and retains the proceeds of a rediscount,[73] the proceeds of a sale of its securities,[74] money borrowed in its name upon a pledge of certain of its assets,[75] money paid it on a note under a receipt reciting that it was held for collection and credit;[76] which retains the consideration for a deed;[77] or which takes the

71. **Contract by bank president.**—Swindell & Co. *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13; Bartlett Estate Co. *v.* Fraser, 11 Cal. App. 373, 105 Pac. 130; Akers *v.* Ray County Sav. Bank, 63 Mo. App. 316; First Nat. Bank *v.* State Bank, 15 N. Dak. 594, 109 N. W. 61.

72. **Cashier.**—Hawkins *v.* Fourth Nat. Bank, 150 Ind. 117, 49 N. E. 957; First Nat. Bank *v.* Brown, 20 Utah 85, 57 Pac. 877.

A bank can not be heard to deny its cashier's authority to act as its agent in making a contract, while receiving and retaining the benefits thereof. Porter *v.* Farmers', etc., Sav. Bank, 143 Iowa 629, 120 N. W. 633.

73. **Proceeds of a rediscount.**—Even if the internal policy of a bank requires the indorsements on its rediscounts to be executed by the cashier or other officer, where a bank retained the proceeds of a rediscount of a note obtained from an assignment by the president, it was estopped to deny the president's authority under Civ. Code, § 3519, providing that he who can and does not forbid that which is done on his behalf is deemed to have bidden it. Bartlett Estate Co. *v.* Fraser, 11 Cal. App. 373, 105 Pac. 130.

74. **Sale of bank's securities.**—Where a note was sold by a cashier, and the proceeds received and retained by the bank, it and its receiver are estopped from denying the authority of the cashier to make the sale. Hawkins *v.* Fourth Nat. Bank, 150 Ind. 117, 49 N. E. 957.

Proceeds of sale of bonds held for speculative purposes.—Where a bank received the proceeds of a sale of bonds held by it for speculative purposes, effected by means of fraud on the part of its managing officer, it can not escape liability on the ground that the acts of the officer were individual acts, and its business of buying and selling bonds was not within the scope of its powers. Judgment, 59 N. Y. S. 618, 43 App. Div. 10, affirmed. Carr *v.* National Bank, etc., Co., 167 N. Y. 375, 60 N. E. 649, 82 Am. St. Rep. 725.

75. **Loan on pledge of banks securities.**—Where an officer of a bank without authority borrowed money in the name of his bank and pledged certain of its assets as security, and the borrowed money was received and used by the bank, the transaction was such that the directors had, or ought to have had, knowledge of it, and the bank was estopped to deny the authority of its officer to make the loan in its behalf. First Nat. Bank *v.* State Bank, 15 N. Dak. 594, 109 N. W. 61.

76. **Money on note for collection.**—The cashier of a bank obtained a depositor's consent to loan his deposit through the bank to another of the bank's customers, and the cashier arranged with two customers to continue the unpaid balance of a loan to them, whereupon a note for the same amount as said deposit was given, and the cashier represented to the depositor that he had made the loan consented to; and, at the suggestion of the cashier, the note was left in the bank for collection. The cashier gave the depositor a receipt for the note, reciting that it was held for collection and credit. Afterwards several installments of interest on the note were paid to the bank, and credited to defendant in his account. The bank afterwards collected the note, and refused to credit defendant with the amount collected. Held, that the bank, having received and retained the money, is estopped from disputing the authority of its cashier in the transaction. First Nat. Bank *v.* Brown, 20 Utah 85, 57 Pac. 877.

77. **Retaining consideration for deed.**—In an action against a bank for breach of covenant of warranty in a deed executed by its president and secretary, where the bank has received and retains the consideration for the deed, it can not set up want of authority in such officers to make it. Akers *v.* Ray County Sav. Bank, 63 Mo. App. 316.

profits of speculative stock transactions;[78] receives the benefits of an indemnity bond,[79] or claims credit for payments on a construction contract in violation of its terms,[80] is estopped from denying the authority of its officers or agents to bind it, in order to escape liability therefor.

Allegation and Proof of Notice.—Where acquiescence in and benefits from an unauthorized agreement of a president of a bank are relied on as estoppel, notice of such agreement by the directors and beneficial results to the bank from the agreement must be alleged and proved.[81]

§ 113 (3) Delay or Acquiescence—Established or Settled Course of Business.—Where bank directors through long usage permit an officer or agent of the bank,[82] as, for instance, the president[83] or cashier[84] to act without their express authority, in matters in which they might lawfully authorize him to act, they can not, after such action on his part, deny his authority, to the detriment of those who have relied on it.[85] Where, on numerous previous occasions, the cashier issued the bank's drafts in payment of his individual debt,[86] or guaranteed rediscounts,[87] where the presi-

78. Speculative stock transactions.—National Bank *v.* Fridenberg, 206 Pa. 243, 55 Atl. 960.

Stock transactions on margins.—Where a cashier of a bank was authorized to buy and sell stock, and his authority was apparently general as to the character of the securities he was to purchase, and as to whether they were to be on margins or cash, and he opened an account in the name of the bank with certain brokers, and bought and sold stock both for cash and on margins, and large profits were made for the bank on the cash transactions, it could not claim, where the cashier subsequently absconded, that it was not liable for the losses on the margin transactions. National Bank *v.* Fridenberg, 206 Pa. 243, 55 Atl. 960.

79. Indemnity bond.—Peninsular Bank *v.* Hanmer, 14 Mich. 208.

80. Credits or construction contract.—The performance of a construction contract for a bank was in the hands of the president in so far as it was concerned. Orders by the contractor on the bank were taken to the president, who ordered them paid. Some payments were in violation of the construction contract, which required payments to be made only on certificates and estimates of the architect. Held, that the bank, claiming credit for such payments, could not deny the authority of the president to make them. First Nat. Bank *v.* Fidelity, etc., Co., 145 Ala. 335, 5 L. R. A., N. S., 418, 40 So. 415, 117 Am. St. Rep. 45.

81. Allegation and proof of notice.—Swindell & Co. *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13.

82. When the directors of a bank permit an officer to hold himself out to the public as being invested with absolute power to manage and control its affairs, in such manner and for such length of time as to lead innocent persons to make contracts with him, honestly believing that he has the authority he claims, the bank can not repudiate such contracts. Cox *v.* Robinson, 27 C. C. A. 120, 82 Fed. 277.

83. President.—Lamson *v.* Beard, 36 C. C. A. 56, 94 Fed. 30, 45 L. R. A. 822.

84. Cashier.—Campbell *v.* National Broadway Bank, 65 C. C. A. 664, 130 Fed. 699; National Bank *v.* Equitable Trust Co., 225 Pa. 328, 72 Atl. 794.

85. Without express authority.—National Bank *v.* Equitable Trust Co., 223 Pa. 328, 72 Atl. 794.

86. Cashier's draft payable to individual creditor.—A bank can not recover the amount collected on a cashier's draft issued by its cashier and payable to his individual creditor, where it is shown that he had on numerous previous occasions drawn similar drafts to pay his own debts, and such acts had continued sufficiently long to establish a settled course of business sanctioned by its officers, and was known, or should have been, to its directors. Campbell *v.* National Broadway Bank, 65 C. C. A. 664, 130 Fed. 699.

87. Cashier's guarantying rediscounts.—Where the cashier, intrusted by its directors with its entire management, has been accustomed, in having paper rediscounted, to guaranty its

dent was accustomed to indorse paper for rediscount,[88] and where the manager discharged guarantors of notes and accepted collaterals in lieu thereof,[89] the bank was estopped, by reason of the settled course of business to question his authority to do so.

Where the directors have no knowledge of the prior acts relied on to establish a course of dealing, the bank books having been purposely kept in a manner to conceal the truth, no estoppel arises.[90] Whether in a particular case an estoppel has arisen is a question of fact depending upon the circumstances.[91]

Evidence of Powers Habitually Exercised.—Evidence of powers habitually exercised by a cashier of a bank with its knowledge and acquiescence defines and establishes, as to the public, those powers. And this principle is equally true when applied to the president. But as the inherent power of the president is so much more limited than that of the cashier, the evidence of this character, from which the right to exercise unusual powers can be inferred, should be much stronger in the case of the president than in the case of the cashier of a bank.[92]

payment, the bank will be estopped from denying his authority to so guaranty it. First Nat. Bank v. Stone, 106 Mich. 367, 64 N. W. 487.

A bank which intrusts its entire management to the cashier, and its assignee, are estopped to deny his authority to guaranty the payment of its paper upon his having it rediscounted for the bank. Davenport v. Stone, 104 Mich. 521, 62 N. W. 722, 53 Am. St. Rep. 467.

88. President's indorsing paper for rediscount.—When the directors of a bank have known for many months that its paper was being rediscounted in large amounts, under the president's direction, and without consulting the board, and that the money so obtained was being used in the business of the bank, and they have made no inquiry as to how the paper was indorsed, the bank is estopped to dispute the authority of the president to indorse such paper for rediscount. United States Nat. Bank v. First Nat. Bank, 24 C. C. A. 597, 79 Fed. 296.

89. Discharge guarantors and accept collaterals in lieu thereof.—Where the manager of a bank, with the knowledge of the directors and without objection, habitually exercises the authority to discharge guarantors of notes and accept collaterals in lieu thereof, the bank is estopped, after third persons have, in good faith, acted on such appearances, to deny his authority. Armstrong v. Cache, etc., Co., 14 Utah 450, 48 Pac. 690.

90. Concealment of misappropriation.—Where the president of a bank wrongfully appropriated the bank's funds to his personal use, by means of drafts, which he so entered on the bank's books as to conceal their fraudulent character, the bank is not estopped, by the president's course of dealing, from denying his authority to draw drafts for such purpose. Lamson v. Beard, 36 C. C. A. 56, 94 Fed. 30, 45 L. R. A. 822.

91. Question of fact.—Lamson v. Beard, 36 C. C. A. 56, 94 Fed. 30, 45 L. R. A. 822.

92. Evidence of powers habitually exercised.—First Nat. Bank v. Kimberlands, 16 W. Va. 555.

It may be difficult in some cases to say, when the authority to make the contract or arrangement for the corporation by its president or other officer may be fairly inferred from the proof of the president or other officer being in the habit of doing acts beyond that which were inherent in him by virtue of his office. For the doing of some such acts habitually would not justify the inference, that he had authority to make the contract or arrangement, if it differed essentially in its character from the acts not inherent in his office which he was in the habit of doing, unless the acts, he was in the habit of doing were so numerous and variant as to justify clearly the inference, that a general authority had been impliedly conferred on him to do all acts and make all contracts, which the directors had authority to make and power to confer on the

Failure to Repudiate after Knowledge.—Where a bank, with full knowledge of all the facts, fails to repudiate an unauthorized act of its officers or agents, within a reasonable time, but acquiesces therein and permits the other party to rest in security, to his prejudice, it is estopped to deny the authority of such officer or agent.[93]

Prejudice Question for Jury.—Whether the mere silence of a bank and failure to repudiate its agent's acts within a reasonable time after knowledge thereof, prejudices the other party, so as to amount to an estoppel, is a question for the jury;[93a] as, for instance, where a bank's deposit in a correspondent bank was applied by direction of its cashier to his individual debt,[94] or where the execution of an indemnity bond to a creditor receiving a second mortgage in payment of his debt was not repudiated until limitations had run against his demand.[95]

Loan of Money.—Where a bank acquiesces in a loan of money by its cashier[96] or president[97] it is estopped to question his authority to make the

president to make. If the acts, he was in the habit of doing, were not thus numerous and variant, to justify the inference, that he had authority to do the particular act or make the particular contract for the corporation, the acts so done must be of the same general character, so as to involve the same general power, though it may be applied in the particular act or contract done or made to a different subject. First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

93. Failure to repudiate after knowledge.—Iron City Nat. Bank *v.* Fifth Nat. Bank, 31 Tex. Civ. App. 308, 71 S. W. 612; Creswell *v.* Lanahan, 101 U. S. 347, 25 L. Ed. 853.

93a. Defendant bank, upon being instructed by the cashier of plaintiff bank, applied the latter's deposit to the payment of the cashier's private debt, and sent him the note and collateral therefor. Plaintiff did not learn of this for several months, at which time the cashier, who was not then connected with plaintiff, was hopelessly insolvent, and the collateral, even if he still had it, was worthless. Held, that the question whether prejudice resulted to the defendant from the plaintiff's silence so as to estop plaintiff is a question for jury. Fifth Nat. Bank *v.* Iron City Nat. Bank, 92 Tex. 436, 49 S. W. 368, modifying 47 S. W. 533.

94. Applications of bank's deposit to cashier's debt.—Plaintiff's cashier, who was insolvent, instructed defendant bank to apply plaintiff's deposit in payment of his individual notes, which was done; and at the end of the month defendant sent plaintiff a statement showing the payment. It was the duty of plaintiff's bookkeeper and teller to examine such statements, and the bookkeeper and at least one director examined the statement; and the director questioned the cashier in regard to the items, and testified that he was not satisfied with the answers given. The cashier remained with plaintiff for at least six months thereafter, and several months later became a fugitive from justice, subsequent to which plaintiff sued defendant to recover the money misapplied. Held, that it was the duty of plaintiff's officers to examine defendant's statement, and to have notified defendant of any want of authority of the cashier within a reasonable time, and that plaintiff, by its failure so to do, was precluded from recovering the money. Iron City Nat. Bank *v.* Fifth Nat. Bank, 31 Tex. Civ. App. 308, 71 S. W. 612.

95. Execution of bond of indemnity against a prior mortgage.—A creditor of a bank took a mortgage upon land belonging to a debtor of the bank in satisfaction of his claim, induced by the cashier's giving a bond of indemnity in the name of the bank against a prior mortgage on the debtor's land. Held that, after the bank's acquiescence in the arrangement until the statute of limitation had run against the creditor's demand and receiving its benefits, the bond was binding upon the bank. Peninsular Bank *v.* Hanmer, 14 Mich. 208.

96. Loan by cashier.—Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248.

Overdraft by agent.—An overdraft,

97. Loan by president.—Roe *v.* Bank, 167 Mo. 406, 67 S. W. 303.

loan in an action for the recovery of the money, or to deny the legitimate nature of the loan.[98]

Cashier's Making Loan to Himself.—Acquiescence by the officers of a bank in permitting the cashier to make loans to himself does not estop the bank from claiming that such loans are illegal under the state banking law.[99]

Release.—A bank which acquiesces in a release from liability for a valuable consideration of an indorser[1] or joint maker[2] of a note held by it, or a release of a mortgage lien,[3] is estopped to repudiate the release.

§ 113 (4) Prejudice to Other Party.—Where the apparent scope of authority of an officer or agent of a bank is broad enough to include the acts and agreements, or statements and representations, in reliance upon which the person with whom he was dealing acted to his injury, the bank will not be heard to deny the authority of such officer in that respect;[4] as, for instance, where a person was induced to change his position to his

by an agent, of his principal's account, with the knowledge of the cashier of the bank, the credit being extended to the principal, amounts to a simple loan of money; and, whether the cashier had authority to extend such accommodation or not, his authority can not be questioned in an action by the bank to recover the money. Union Gold Min. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248.

98. Loan for purchase of stock.—Where a bank permits its president as its agent to arrange a loan of money for the purchase of stock, it is estopped to afterwards deny the legitimate nature of the loan. Roe *v.* Bank, 167 Mo. 406, 67 S. W. 303.

99. Cashier's making loan to himself.—Iowa State Sav. Bank *v.* Black, 91 Iowa 490, 59 N. W. 283.

1. Release of indorser.—A cashier loaned the bank's money, without knowledge of the directors, to members of a land company, including plaintiff, and took their notes therefor, but, in consideration of a transfer of his interest to the bank, released plaintiff from liability as indorser on notes of the other members. Later, to prevent failure of the company and loss to the bank, a new company was formed, which paid to such cashier, for the bank, money sufficient to pay all debts of the old company to the bank, including plaintiff's note. The cashier converted most of the money to his own use, and the rest was used by the bank, but none of the notes were surrendered. The directors disclaimed all knowledge of any of such transaction except the receipt by the cashier of the money, which they claimed he received in his former capacity of treasurer of the first land company. Complete control of the bank's affairs was left to the cashier, and the directors, who rarely met, allowed him to do as he chose. Held, that plaintiff's note was paid, and the directors were estopped to repudiate the release by the cashier. Wing *v.* Commercial, etc., Bank, 103 Mich. 565, 61 N. W. 1009.

2. Releasing joint maker of note.—A bank ratifies and estops itself to dispute the act of its cashier and vice-president releasing one of several joint makers of a note, when, with full knowledge of all the facts, it fails to object, and permits the released party to rest in security until the other makers, then solvent, have become utterly insolvent. Bank *v.* Shook, 100 Tenn. 436, 45 S. W. 338, citing Union Bank *v.* Campbell, 23 Tenn. (4 Humph.) 394; Fort *v.* Coker, 58 Tenn. (11 Heisk.) 579; Raht *v.* Union Consol., etc., Co., 73 Tenn. (5 Lea) 1; Hart, etc., Co. *v.* Dixon & Co., 73 Tenn. (5 Lea) 336; Evans *v.* Buckner, 48 Tenn. (1 Heisk.) 291; Williams *v.* Storm, 46 Tenn. (6 Coldw.) 203.

3. Release of mortgage liens.—While the cashier of a bank has no authority to release a mortgage lien, the bank may so acquiesce in the release as to estop it from denying its validity. Brennen *v.* Connecticut Fire Ins. Co., 99 Mo. App. 718, 74 S. W. 406.

4. Prejudice to other party.—Security Sav. Bank *v.* Smith, 144 Iowa 203, 122 N. W. 825, reversing on rehearing 119 N. W. 726, on another point.

injury,[5] to surrender property or securities[6] held as collateral,[7] to refrain from further action,[8] or to allow the bank to proceed to exhaust the only means by which he could have protected himself.[9]

Party Alleging Estoppel Not Injured.—Where the act of the bank's officer or agent does not mislead or injure the person alleging the estoppel, but was an advantage to him, the bank is not estopped from denying his authority to act for it.[10] Thus a bank is not estopped in favor of the surety in a suit for the difference between the amount received and the face of a note, from denying the authority of an attorney who induced a third person to settle the note and deducted his commission therefrom.[11]

§ 113 (5) Loss to One of Two Innocent Persons.—The principal that where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the loss, is

5. Change of position.—Security Sav. Bank *v.* Smith, 144 Iowa 203, 122 N. W. 825, reversing on rehearing 119 N. W. 726, on another point.

6. Surrender of property or securities.—Security Sav. Bank *v.* Smith, 144 Iowa 203, 122 N. W. 825, reversing on rehearing on another point 119 N. W. 726.

Where a bank cashier represented to a surety on a note to the bank that the note was paid, whereby the surety was induced to surrender property of the principal maker to the latter, the bank is estopped to deny the truth of the cashier's statements. Franklin Bank *v.* Steward, 37 Me. 519.

7. Collateral.—The cashier of a bank, knowing that defendant was surety on the note discounted by it, falsely informed him that the note was paid, intending that he should rely on the statement, which he did, thereupon surrendering securities he held as collateral, and signing other notes for the same debtor. Held, that since defendant had changed his position, to his injury, on the faith of the statement, the bank was estopped, as to him, from denying that the note was paid. Cochecho Nat. Bank *v.* Haskell, 51 N. H. 116, 12 Am. Rep. 67.

8. Bank *v.* Shoak, 100 Tenn. 436, 45 S. W. 338.

9. Where sureties on a note payable to a bank failed to proceed against land owned by the maker, relying on the agreement of the cashier to enforce collection out of the land, who concealed from them the existence of unsecured claims of the bank against the maker, the bank, proceeding against the land for the collection of the note and its other claims, could not deny the power of the cashier to make the agreement, and the sureties, when sued on the note, could hold the bank to the extent of the injuries sustained by their reliance on the agreement occasioned by the fact that the proceeds of the land, being insufficient to pay the note and the unsecured claims, were applied to the payment of the unsecured claims. Judgment, 119 N. W. 726, reversed on rehearing. Security Sav. Bank *v.* Smith, 144 Iowa 203, 122 N. W. 825, reversing on rehearing 119 N. W. 726, on another point.

10. Party alleging estoppel not injured.—Bank *v.* Maxey, 76 Ark. 472, 88 S. W. 968.

11. A bank advanced money to a merchant on a note signed by sureties. The merchant having gone into bankruptcy, an attorney retained by the bank generally, but who had no authority to collect claims for it except when specially intrusted to him acting for other creditors, and without special authority, afterwards had a meeting with the merchant and some of his sureties at which it was divulged that a third party was a secret partner and liable for the debts contracted by him. Thereupon the attorney secured evidence against the third party, and induced him to settle for the debts, including the note. The attorney then paid over the sum collected on the note, deducting commissions, and the bank sued the sureties for the difference between the amount received and the face of the note. Held that, since the act of the bank in receiving the money did not mislead or injure the sureties, but was an advantage to them, the bank was not estopped, as against them, to deny the authority of the attorney. Bank *v.* Maxey, 76 Ark. 472, 88 S. W. 968.

applicable to a bank which seeks to deny the authority of its officer or agent to act for it.[12] This principal applies to the acts of the president,[13] vice-president,[14] or cashier[15] within the apparent scope of his authority; aliter, where the act of the officer is not within the apparent scope of his authority.[16]

§ 113 (6) Attempt to Enforce.—A bank seeking to recover on a contract can not claim the benefits arising therefrom and at the same time repudiate its burdens. To allow a bank while suing on a contract to question the authority of the officer or agent who made it on its own behalf to make the statements and misrepresentations which are part of the contract sued on, would be to allow it to accept its benefits and reject its burdens.[17] The same is true where the action is brought by a receiver of the bank.[18]

12. Loss to one of two innocent persons.—People's Bank *v.* Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. Ed. 907.

"The doctrine of ultra vires has no application in cases like this. Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008." People's Bank *v.* Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. Ed. 907.

13. President.—Where one bank contracted and parted with its money on the faith of the representations of another bank by its president that there was to its credit, in a third bank, a specific sum, and the fund which came into the hands of its voluntary assignee is the fund as to which the representations were made, the second bank and its assignee are in equity estopped from asserting, to the prejudice of the first bank, that the character and condition of the fund was otherwise than it was represented to be. Fourth St. Nat. Bank *v.* Yardley, 165 U. S. 634, 41 L. Ed. 855, 17 S. Ct. 439.

14. Vice-president.—People's Bank *v.* Manufacturers' Nat. Bank, 101 U. S. 181, 25 L. Ed. 907.

A bank which has enabled its vice-president to mislead another bank into making a loan under the belief that it was conducting a genuine transaction with the former, which was in fact made by its vice-president in furtherance of his own criminal purposes; is estopped to show the facts and must be held responsible for the fraudulent loan. Stewart *v.* Armstrong, 56 Fed. 167.

The vice-president of the Fidelity National Bank wrote a letter to the Chemical National Bank, signed by himself as vice-president, requesting a loan upon a certain certificate of deposit, and certain bills receivable, as collateral. The Chemical Bank made the loan, crediting the Fidelity Bank with the amount, and so notified the cashier. The amount was thereupon placed to the vice-president's credit by his order, and was used by him so that the bank received no benefit therefrom. The certificate of deposit was false, and notes deposited as collateral were obtained by him for the purpose of raising money for his personal use. Held that, as the Chemical Bank dealt with him solely in his official capacity, the Fidelity Bank is estopped to deny that the loan was made to it, and for its benefit, and it is liable for its repayment. Stewart *v.* Armstrong, 56 Fed. 167.

15. Cashier.—People's Bank *v.* National Bank, 101 U. S. 181, 25 L. Ed. 907.

16. If it be conceded that it was within the power of the board of directors of a national bank to borrow $200,000 on time, it is yet obvious that the vice-president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers. Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572.

17. Attempt to enforce.—Willoughby *v.* Fidelity, etc., Co., 16 Okl. 546, 85 Pac. 713, 7 L. R. A., N. S., 548, approved in 205 U. S. 537, 51 L. Ed. 920.

18. Willoughby *v.* Fidelity, etc., Co., 16 Okl. 546, 85 Pac. 713, 7 L. R. A., N. S., 544, affirming 205 U. S. 537, 51 L. Ed. 920.

Fidelity bond.—Where the bond of a defaulting bank president, issued by a surety company and accepted by the bank, is based on statements and representations made to the surety com-

§ 113 (7) Receiver or Assignee for Creditor.—An estoppel which precludes a bank from denying the authority of one of its officers or agents, binds its assignee for creditors[19] or receivers.[20] Where a bank is estopped to deny the authority of its cashier to sell a note belonging to it[21] or of an agent to make the statement and misrepresentations upon which a fidelity bond was executed,[22] the receiver is also estopped from denying the authority of such officer or agent.

§ 113 (8) Estoppel of Person Dealing with Bank.—A person borrowing money from a bank through its president can not deny the authority of the president either to loan the money to him or to dictate the terms of such loan.[23]

§ 114. Ratification[23a]—§ 114 (1) Authority and Acts Which May Be Ratified.—Where ratification by bank is claimed, it must be by some party that had power to do the act in the first place.[24] The directors of a bank may ratify any act done or contract made by the president,[25] cashier,[26]

pany by the assistant cashier, a receiver of the bank thereafter appointed in an action on the bond can not question the authority of the assistant cashier to bind the bank by his statements and representations as to the duties and accounts of the defaulting president, and at the same time recover on the bond procured on the strength of such statements and representations. Willoughby *v.* Fidelity, etc., Co., 16 Okl. 546, 85 Pac. 713, 7 L. R. A., N. S., 548, affirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920, 27 S. Ct. 790.

19. Assignee for creditors.—Fourth St. Nat. Bank *v.* Yardley, 165 U. S. 634, 41 L. Ed. 855, 17 S. Ct. 439; Davenport *v.* Stone, 104 Mich. 521, 62 N. W. 722, 53 Am. St. Rep. 467.

20. Receiver.—Hawkins *v.* Fourth Nat. Bank, 150 Ind. 117, 49 N. E. 957.

21. Sale of note by cashier.—Hawkins *v.* Fourth Nat. Bank, 150 Ind. 117, 49 N. E. 957.

22. Fidelity bond.—Where the bond of a defaulting bank president, issued by a surety company and accepted by the bank, is based on statements and representations made to the surety company by the assistant cashier, a receiver of the bank thereafter appointed in an action on the bank can not question the authority of the assistant cashier to bind the bank by his statements and representations as to the duties and accounts of the defaulting president, and at the same time recover on the bond procured on the strength of such statements and representations. Judgment. Willoughby *v.* Fidelity, etc., Co., 16 Okl. 546, 85 Pac. 713, 7 L. R. A., N. S., 548, affirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920, 27 S. Ct. 790.

23. Estoppel of person dealing with bank.—Roe *v.* Bank, 167 Mo. 406, 67 S. W. 303.

23a. See ante, "Loans and Discounts," § 108; post, "In General," § 116 (1); as affecting officer's liability for illegal loan. See ante, "Duties and Liabilities with Respect to Loans, Discounts, Overdrafts, etc.," § 54 (3).

Estoppel to deny authority, see ante, "Estoppel to Deny Authority of Officer or Agent," § 113.

24. Authority and acts which may be ratified.—Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572.

25. Directors—Act of president.—First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Swindell & Co. *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13.

Transfer of note.—The directors of a bank may ratify a transfer of a note belonging to the bank made by the president without authority. Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

26. Act of cashier.—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

Where a cashier of a bank undertook to pay his personal indebtedness to the bank by his acceptance as

vice-president,[27] or any other officer or employee, without authority, which they could have authorized him to do or make,[28] but not as ultra vires act or contract.[29]

Directors Personally Interested in Transaction Sought to Be Ratified.—The directors of a bank who are directors of a corporation indebted to the bank and others are incompetent to ratify, on the part of the bank, a transaction whereby the corporation executed a mortgage to secure an indebtedness to the directors and to the bank so as to make the lien of one of the directors superior to the lien of the bank.[30]

Stockholders Who May Ratify Acts of Directors.—Subscribers to the capital stock of a state bank, who have, by fraudulently representing that the stock has been paid up, obtained permission from the auditor to commence business, can not, as stockholders, ratify a resolution which they themselves have adopted as directors of the bank.[31]

Acts of Cashier Undertaken Away from Bank.—A cashier, by continuing an act undertaken while away from the domicile of the bank, after his return, without objection on the part of the directors, makes the act that of the bank, though he could not represent the bank away from its domicile.[32]

cashier of a note of a third person, the bank might ratify his action so as to render it a payment of his obligation. First Nat. Bank *v.* Ganhus, 133 Iowa 409, 110 N. W. 611.

27. **Vice-president.**—Wyckoff *v.* Riverside Bank, 119 N. Y. S. 937, 135 App. Div. 400.

28. First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Parker *v.* Donnally, 4 W. Va. 648.

29. **Ultra vires acts—Excessive loan.**—Where the cashier of a bank contracted to loan to one person more than ten per cent of its capital stock and surplus, the loan not being amply secured by security, the contract could not be rendered legal by ratification or binding by estoppel. Swindell & Co. *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13.

An agreement to work mining property.—Weston *v.* Estey, 22 Colo. 334, 45 Pac. 367.

30. **Directors personally interested in transaction sought to be ratified.**—Shaw *v.* Crandon State Bank, 145 Wis. 639, 129 N. W. 794.

A corporation executed a mortgage to secure notes payable to S., K., and a bank. S. and K. were directors of the corporation and of the bank. The note of S. matured first. The proceeds of the loan from S. were deposited by the corporation with the bank. S. was also interested in the prosperity of the village in which the corporation and bank did business, and he advanced his money as a loan to the corporation, expecting to be paid out of the proceeds of the business of the corporation, but his loan brought no profit to the corporation. Held, that the bank did not thereby ratify the transaction whereby S. claimed a priority of lien under the mortgage to secure his note. Shaw *v.* Crandon State Bank, 145 Wis. 639, 129 N. W. 794.

Where, in a suit to foreclose a mortgage to secure notes payable to S., K., and a bank, brought by S., who claimed a priority of lien under the mortgage, because his note first matured, it was shown that S. and K. were directors of the mortgagor, a corporation, and were also directors of the bank, the act of the bank in setting up a counterclaim for foreclosure and averring a priority of lien over S. did not amount to a ratification of the transaction involving the execution of the mortgage creating a priority of lien in favor of S. Shaw *v.* Crandon State Bank, 145 Wis. 639, 129 N. W. 794.

31. **Stockholder's who may ratify acts of directors.**—McNulta *v.* Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 203.

32. **Acts of cashier undertaken away from bank.**—Valdetero *v.* Citizens' Bank, 51 La. Ann. 1651, 22 So. 425, 26 So. 425.

§ 114 (2) What Constitutes and Requisites—§ 114 (2a) In General.—Unauthorized acts or contracts of the president, cashier, or their assistants may be ratified by the directors, either expressly or impliedly, as by accepting the benefits thereof with knowledge of the facts, or by any course of dealing sufficient in equity and good conscience to work an estoppel.[33] It is not necessarily that they formally ratify his act or conduct.[34]

§ 114 (2b) Knowledge of Facts.—Although the directors of a bank are conclusively presumed to know the financial condition of the bank, its general business, and its receipts and expenditures, as shown by its regular books, they can not be adjudged to have ratified an act of which they have no knowledge actual or constructive, as ratification implies knowledge.[35]

Unauthorized Contracts.—A bank can not be adjudged to have ratified an unauthorized contract or an agreement made on its behalf of which its directors or managing heads have no knowledge actual or constructive, for ratification implies knowledge. Thus ratification of the act of a bank officer in procuring a loan for the bank,[36] in taking a note for value procured by fraudulent representations on part of its president[37] or cashier,[38]

33. What constitutes and requisites.—Apperson *v.* Exchange Bank, 10 Ky. L. Rep. 943, 10 S. W. 801. See post, "Receiving and Retaining Benefits of Transaction," § 114 (2e).

34. The president borrowed, of his bank, money which he loaned to a failing debtor of the bank and of himself. The debtor gave a mortgage, and delivered the mortgaged property to the president, with authority to sell, and apply the proceeds, etc. The president promised that the debtor's debt to the bank should thus be paid. Held, that directors having relied on the president's promise that the debt would be paid by means of such dealings, and having made no other attempt to collect it, but having permitted the president to acquire the mortgage lien on property which otherwise might have been subjected to the debt to the bank, it was not necessary that they should formally authorize or ratify his proceedings. Apperson *v.* Exchange Bank, 10 Ky. L. Rep. 943, 10 S. W. 801.

35. Knowledge of facts.—Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572; First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

Unknown and concealed fraudulent transactions of a cashier can be neither authorized nor ratified by the bank. Campbell *v.* Manufacturers' Nat. Bank, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438.

36. Procuring loan for bank.—Ratification of the unauthorized act of a national bank officer in borrowing $200,000 for the bank can only be made, if at all, by the board of directors, acting with knowledge of the material facts, and can not be inferred from the mere fact that by direction of the same officer the money was placed to the credit of the bank, when it appears that it was drawn out by him and the assistant cashier, and that no part of it came to the use or benefit of the bank. Western Nat. Bank *v.* Armstrong, 152 U. S. 346, 38 L. Ed. 470, 14 S. Ct. 572.

37. Fraud in procuring note.—Where the president, seeking to defraud third persons, told them that they could give the bank their note, and such note would not be enforced, and the bank, without knowledge of such promise, discounted the note, giving full value, there was no ratification of the president's acts. Baker *v.* Berry Hill Mineral Springs Co., 112 Va. 280, 71 S. E. 626.

38. A bank that takes for value a note signed by its cashier and others, without knowledge of a representation by the cashier to his comakers that it would not be delivered until signed by the president of the bank, does not thereby ratify the cashier's representations. First Nat. Bank *v.* Foote, 12 Utah 157, 42 Pac. 205.

can not be inferred from action of the directors in absence of knowledge of the facts.

What Constitutes Knowledge.—In determining whether or not a bank must be deemed to have ratified unauthorized acts of its agents or employees, it is chargeable with knowledge of what in the exercise of ordinary diligence ought to have been known to its board of directors or managing officials.[39] Banks have knowledge of the acts of their officers engaged in the business of their employment and are bound thereby. Thus, where at the end of the month a statement of account was forwarded by one bank, in the usual course of business, to another, and its correctness approved, the latter had knowledge of what occurred in the transactions included in the account and ratified it.[40]

Mere Mention of Unauthorized Contract.—The mere mention by an officer of a bank of a contract which he had no power to make, to the board of directors and their making no objection thereto does not amount to a ratification.[41]

Failure to Object to Course of Business.—Directors will be held to have ratified the cashier's acts where they impose on him a duty which they should perform, and fail to object to his course of business when they know, or could easily know, all the facts.[42]

§ 114 (2c) Negligence.—Knowledge of Irregularities—Failure to Investigate.—Where the bank has notice of irregularities or misappro-

39. **What constitutes knowledge.**—St. Paul, etc., Trust Co. *v.* Howell, 59 Minn. 295, 61 N. W. 141.

Payment not assumed by president and cashier.—The president and cashier of a bank, intrusted with the management of its business, for a valuable consideration paid by the makers, assumed the payment of a note belonging to the bank, and due in ninety days. They subsequently assumed, in behalf of the bank, to extend the time of payment 11 times in succession for ninety days each time, and at each extension paid the interest to the bank. It did not appear that during all this time the directors or other officials of the bank made any inquiry or investigation as to the management of its affairs by the president and cashier. Held, that the jury were justified in finding that the bank was chargeable with constructive notice of the fact that the president and cashier were interested in the note, and hence ratified their acts in making the extensions. St. Paul, etc., Trust Co. *v.* Howell, 59 Minn. 295, 61 N. W. 141.

40. Kennedy *v.* First Nat. Bank, Fed. Cas. No. 7,701a.

The act of a bank president in discounting with another bank, without authority, a note made to the cashier of his own bank, and having the proceeds placed to the credit of his bank, from which he obtained an equal sum for his personal benefit by misrepresenting the character of the transaction to his cashier, held to have been ratified by his bank, through the action of its cashier in drawing for the proceeds of the note, and, together with the vice-president, accepting and approving a statement of the account sent to them at the end of the month by the discounting bank. Kennedy *v.* First Nat. Bank, Fed. Cas. No. 7,701a.

41. **Mere mention of unauthorized contract.**—Plaintiff obtained subscribers to the stock of a national bank just before and after its organization, under agreement with the principal stockholder and president that he should be paid therefor. Held, that the president had no right to make such contract binding on the bank, and the fact that when he mentioned such contract to the board of directors they made no objection thereto did not amount to a ratification. Tifft *v.* Quaker City Nat. Bank, 8 Pa. Co. Ct. Rep. 606.

42. **Failure to object to course of business.**—Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

priation of funds by its cashier and continues him in its service, it is liable for any loss which may result to the customer through his theft or embezzlement.[43]

Negligence in Failing to Discover Fraud of Officer.—Where plaintiff bank acted fraudulently in accepting an unauthorized pledge of another bank's credit from its cashier, the latter bank did not ratify the transaction because its officers and stockholders were negligent in failing to discover the fraud.[44]

§ 114 (2d) Delay or Acquiescence.—Delay to repudiate or long acquiescence in an unauthorized act of a bank official, after knowledge of the same is brought home to the bank, will operate a ratification thereof.[45] Thus long acquiescence in the payment to the president of a debt due to the bank,[46] in the unauthorized release of a judgment lien by the bank's president,[47] or in a cashier's collateral agreement as to presenting a sight draft;[48] have each been held to operate a ratification.

43. Knowledge of misappropriation —Failure to investigate.—Where a bank knew of the misappropriation of funds by its cashier, and continued him in its service, it is liable to the depositor for bonds lost through the gross negligence of the cashier, or through his theft. Steffe *v.* Bank (Pa.), 22 Pittsb. Leg. J. (O. S.) 157.

Knowledge of stock gambling transaction.—A bank which allows its cashier to retain his position, and omits to make an investigation as to the correctness of his affairs, after finding out that he was in the habit of gambling in stocks, is chargeable with gross negligence, and will be liable for loss occurring after such knowledge, through embezzlement by the cashier of securities deposited in the bank. Prather *v.* Kean, 29 Fed. 498.

44. Negligence in failing to discover fraud of officer.—Fort Dearborn Nat. Bank *v.* Seymour, 75 Minn. 100, 77 N. W. 543.

45. Where the transaction was made known to the trustees individually, and they never objected, this intelligent acquiescence was a binding ratification. Creswell *v.* Lanahan, 101 U. S. 347, 25 L. Ed. 853.

46. Payment of debt to president.—Payment of a debt due to a bank, made to the president, will not be set aside at the instance of the bank's creditors, on the ground of such officer's want of authority to receive payment, the control of the affairs of the bank having passed to him by the failure of the directors and cashier to act; and it not appearing that any loss or injury was sustained by the bank or its creditors in consequence of such payment, which was acquiesced in by the bank for many years. Parker *v.* Donnally, 4 W. Va. 648.

47. Release of judgment.—C., a bank, loaned money to A., taking a note and confession of judgment as security therefor. The note was made to "B., President, or Bearer." Subsequently, B. gave a release of lien, signed, "B., President," to enable A. to sell part of the land. The note was not paid at maturity, and execution issued against the sureties was enjoined, and an issue framed and tried between "B., President of the Bank," and the sureties. B. had negotiated the loan, and done all the business connected with it, and the judgment stood in his name. Held, that the long acquiescence of the bank in the acts of B. constituted a ratification of them, and that it was bound by the release given by B. Winton *v.* Little (Pa.), 9 Wkly. Notes Cas. 37.

48. Agreement as to presenting a sight draft.—The cashier of a bank advanced money to a broker to purchase cotton, and the latter gave the cashier a sight draft on a Boston firm, to be kept as a memorandum, and not to be presented until shipments of cotton had been made to the drawee to meet it. The bank kept the draft for nearly nine months, not entering it on its books as a discount draft, but counting it as a cash item. When the cotton adventure proved a failure, the bank presented the draft, and, upon dishonor, it brought an action against the drawer. Held, that the bank's treatment of the draft rendered it subject to the cashier's agreement. National Bank *v.* Williams, 46 Mo. 17.

Delay to Enforce Payment As Ratification of Release.—Mere delay in enforcing payment of notes is not a ratification of an unauthorized agreement to release payment.[49]

§ 114 (2e) Receiving and Retaining Benefits of Transaction.—A bank impliedly ratifies the unauthorized acts or contracts[50] of its president,[50a] vice-president,[51] cashier,[52] or any agent or employee or their assistants[53] by receiving and keeping the benefits thereof with knowledge of the facts. As if under the contract so made by the president or other officer money is to be paid to the corporation, and it is received by the corporation and applied to its use even without the knowledge of the directors, if it is not returned, when it becomes known to the directors that it has been applied to the bank's use, such conduct would be a ratification of the contract of such president or other officer.[54] A bank ratifies the acts of its officer or agent with all its legal consequences and can not be heard to dispute his authority where it receives and retains a loan secured by a pledge of its securities,[55] the proceeds of a discount,[56] the proceeds of a

49. Delay to enforce payment not ratification of release.—Swindell & Co. *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13.

50. First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Parker *v.* Donnally, 4 W. Va. 648.

Ratification need not be shown by direct evidence that it was expressly approved by the board of directors, but such ratification may be inferred from their accepting the benefits of the act or contract. First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

50a. President.—First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Parker *v.* Donnally, 4 W. Va. 648; Apperson *v.* Exchange Bank, 10 Ky. L. Rep. 943, 10 S. W. 801.

51. Vice-president.—Wyckoff *v.* Riverside Bank, 119 N. Y. S. 937, 135 App. Div. 400; Lechenger *v.* Merchants' Nat. Bank (Tex. Civ. App.), 96 S. W. 638, affirmed in 101 Tex. 646, no op.

52. Apperson *v.* Exchange Bank, 10 Ky. L. Rep. 943, 10 S. W. 801.

A bank ratifies the unauthorized act of its cashier by receiving and keeping a part of the fruits thereof. German Nat. Bank *v.* Grinstead, 21 Ky. L. Rep. 674, 52 S. W. 951.

53. Apperson *v.* Exchange Bank, 10 Ky. L. Rep. 943, 10 S. W. 801.

After accepting the benefits of the contract made by its agent, the bank can not be heard to deny his agency, especially where he acted under the direct authority and advice of the president of the bank. Waxahachie Nat. Bank *v.* Vickery (Tex. Civ. App.), 26 S. W. 876. See, also, Panhandle Nat. Bank *v.* Emery, 78 Tex. 498, 15 S. W. 23.

54. First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

Where money is received by the bank cashier for the bank under a contract made by the president; even when such receipt was unknown to the directors, it will be a ratification of the contract unless the money so received is returned, when its receipt becomes known to the directors. First Nat. Bank *v.* Kimberlands, 16 W. Va. 555; Parker *v.* Donnally, 4 W. Va. 648.

Where a president of a bank has without authority transferred a note belonging to the bank, the acceptance and appropriation of a consideration by the directors of the bank is an implied ratification of the president's act, where such acceptance and appropriation is with knowledge of the president's act, and if such acceptance and appropriation have been made by the officers of the bank without the knowledge of the directors, failure of the directors to return the consideration when its receipt becomes known to them will be held, also, a ratification of the president's act. Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

55. Loan secured by pledge.—A savings institute at Fishkill conducted its

56. Proceeds of discount.—Where a bank has received the proceeds of a discount, and used them, it can not dispute its cashier's authority to apply for the discount. Tradesmen's Nat. Bank *v.* Bank, 6 App. Div. 358, 39 N. Y. S. 554.

sale or transfer of notes made payable to it,[57] or the consideration paid for a contract;[58] as, for instance, a payment by an obligor on a note under an agreement for his release from further liability thereon,[59] or a payment by the principal of a portion of his debt under an agreement for an extension of time thereby discharging the surety;[60] where it accepts the benefits of an indemnifying contract[61] or of a bond guarantying the fidelity of an employee;[62] where it accepts the benefits and assumes the burdens of a purchase of real estate,[63] or of a fraudulent purchase of property held by

business through a bank, whose cashier, B., was treasurer of the institute, and active manager of both. Without the knowledge or consent of the other officers of the bank, B. took from a safe-deposit company in New York certain securities of the institute, and pledged them to secure a loan for the bank. In an action against the bank and its receiver, held, that the institute was entitled to recover for the conversion, the bank being chargeable with B.'s knowledge, and the application of the money to its uses being a ratification of his borrowing it. Fishkill Sav. Inst. *v.* Bostwick, 19 Hun 354, affirmed in 80 N. Y. 162.

57. Where notes given to a bank by its cashier in his individual capacity and as treasurer of a company were sold by the cashier, and the proceeds received and retained by the bank, it ratified the acts of the cashier. German Sav. Bank *v.* Des Moines Nat. Bank, 122 Iowa 737, 98 N. W. 606.

If a note for the purpose of raising money be made payable to a bank, and be discounted by the cashier of that bank on his private account, and afterwards be transferred, before maturity, by him, with his indorsement in the name of the bank as cashier thereon, this constitutes a sufficient recognition of the note by the bank to render it binding upon all the parties to it, whether principals or sureties. Keith *v.* Goodwin, 31 Vt. 268, 73 Am. Dec. 345.

58. Wyckoff *v.* Riverside Bank, 135 App. Div. 400, 119 N. Y. S. 937; Merchants' Nat. Bank *v.* McAnulty (Tex. Civ. App.), 31 S. W. 1091, affirmed in part and reversed in part in 89 Tex. 124, citing Ft. Worth Pub. Co. *v.* Hitson, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551.

Retaining money paid in consideration.—Where a bank through its executive committee retained the money paid to its vice-president in consideration of a contract made by him, the act of the vice-president was ratified, though it was originally unauthorized. Wyckoff *v.* Riverside Bank, 135 App. Div. 400, 119 N. Y. S. 937.

59. Payment by one obligor under agreement for his release.—When payments were made on a note by one of the obligors in consequence of an understanding with the president of the payee bank that the obligor was to be released, and the bank, with knowledge of the president's act, retains the money, it adopts the act with all its legal consequences though it was unauthorized when done. Merchants' Nat. Bank *v.* McAnulty (Tex. Civ. App.), 31 S. W. 1091.

60. Discharge of surety.—Where the cashier of a bank grants an extension of time to the principal debtor, on the payment of a portion of the debt, and thereby discharges a surety, the bank ratifies the extension by receiving and retaining the payment. Perkins *v.* Bank, 5 La. Ann. 222.

61. Indemnifying contract.—A bank, being indebted to a depositor, induced him to accept a second mortgage from one of its debtors in payment thereof; and, to induce him to accept, the cashier, in the name of the bank, gave him a contract indemnifying him against the first mortgage. The bank never repudiated the act of the cashier, but accepted the benefits of the transaction. Held, in an action on the contract, that it was binding on the bank, even though it be considered in excess of the cashier's authority. Peninsular Bank *v.* Hanmer, 14 Mich. 208.

62. Fidelity bond.—A bank, in accepting its president's action in procuring a bond guarantying the fidelity of its cashier, must be held to have assented to the conditions of the bond providing that the representations made by the president relative to the duties and accounts of the cashier should constitute an essential part and form the basis of the contract. Warren Deposit Bank *v.* Fidelity, etc., Co., 116 Ky. 38, 25 Ky. L. Rep. 289, 74 S. W. 1111.

63. Purchase of real estate.—The trustees of a bank, without any formal order, directed its cashier to purchase

it as collateral security,[64] or takes and uses a judgment purchased for it;[65] and where it takes and retains the assets of a private banking business under an agreement to take the assets and assume the liabilities of such business.[66]

§ 114 (2f) Attempt to Enforce Contract.—Suing on Contract.—A bank by bringing an action upon a contract made in its behalf by one of its officers, ratifies his action in making the contract, and confirms his agency,[67] even though his duties did not include such transaction.[68] A bank by suing upon a check paid by its cashier,[69] an indemnifying bond;[70] a contract of loan;[71] a lease;[72] or a note, whether made directly to

certain real estate for the use of the bank; and he, acting under such directions, contracted with C. for his interest therein. The bank at once took the benefits and assumed the burdens of the contract, paying the first installment of the price; and thereafter the board of trustees, by a formal order recorded in their minutes, ratified all the acts of the cashier. Held that, though such ratification did not occur until after an action to compel the specific performance of the contract after the vendor had refused to complete the same, it was sufficient to render the acts of the cashier the acts of the corporation from the beginning. Washington State Bank *v.* Dickson, 35 Wash. 641, 77 Pac. 1067.

64. Memphis City Bank *v.* Smith, 110 Tenn. 337, 75 S. W. 1065.

65. **Purchase of a judgment and allowance of credit thereon.**—The acceptance by a bank of a judgment sold to its president under an agreement by which the bank was to allow the judgment creditors a certain credit on account of the transaction, and the use of the judgment by the bank in purchasing the property against which it was a lien, is a ratification of the act of its president in making such agreement, and cures any want of authority on his part in the premises. Goldbeck *v.* Kensington Nat. Bank, 147 Pa. 267, 23 Atl. 565.

66. **Agreement to take over a private bank.**—Where a majority of bank directors informally agree to take the assets and assume the liabilities of a private banking business, and the corporation thereupon takes and retains such assets, it will be held to have ratified the agreement. Bank *v.* Ketcham, 64 Wis. 7, 24 N. W. 468.

67. **Suing on contract.**—Wilson *v.* Pauly, 18 C. C. A. 475, 72 Fed. 129; First Nat. Bank *v.* New Milford, 36 Conn. 93; Lechinger *v.* Merchants' Nat. Bank (Tex. Civ. App.), 96 S. W. 638.

68. Wilson *v.* Pauly, 18 C. C. A. 475, 72 Fed. 129.

69. Though the cashier of a bank who paid a check drawn on another bank as agent of the bank had no authority to pay it with the funds of his principal, his action in so doing was ratified by the bank when it brought suit on the check in its own name. Preston *v.* Dozier, 135 Ga. 25, 68 S. E. 793.

70. **New indemnifying bond substituted for old one.**—In an action against the surety on a bond given to a bank to indemnify it against all discount, etc., of the paper of a certain corporation, the defense was that the bond had been surrendered, and another one, in a larger sum, taken, and plaintiff denied the authority of the cashier to surrender the bond. The president and a co-director testified that they did not know that a new bond had been accepted as a substitute for the old one, but it appeared that all the bank officials knew that the corporation's discounts were in excess of the amount secured by the first bond, and the bank, in endeavoring to recover for the discounts, sued on the second bond first. Held, that the cashier's action had been ratified. Judgment, 78 N. Y. S. 38, 75 App. Div. 393, affirmed. German-American Bank *v.* Schwinger, 178 N. Y. 569, 70 N. E. 1099.

71. **Loan.**—A bank, by bringing an action upon a contract of loan made in its behalf by one of its officers, ratifies his action in making the contract, and is in law chargeable with knowledge possessed by the agent that the loan was in furtherance of an illegal purpose. Singleton *v.* Bank, 113 Ga. 527, 38 S. E. 947.

72. The institution by a bank of a suit based on a lease executed by its vice-president being a ratification of

it,[73] discounted by an incompetent number of directors[74] or by the cashier without the knowledge of the directors,[75] or taken by the cashier, under a contract which he was unauthorized to make,[76] or altered by the payee at the instance of the president of the bank,[77] ratifies the transaction in toto[78] and is in law chargeable with knowledge of whatever he knew at the time of making the contract,[79] thereby binding itself by his knowledge of fraud,[80] or that it was in furtherance of an illegal purpose.[81]

Protesting Check.—A bank may ratify the receipt of a postdated check for collection, by its paying teller, by protesting the same where there was a balance to the credit of its drawer on the day of its date which was paid out on drafts, part of which was held by the bank.[82]

Enforcing Payment of Interest.—Where the cashier of a bank, being at the time a stockholder and director of an insurance company, acted as cashier for the bank, and at the same time, either for the makers of notes, the insurance company, or himself in receiving the notes and carrying them through the books of the bank as discounted paper, evidence that after the bank became fully advised of what the cashier had done in the

his act, his authority to execute it can not be assailed in the suit. Lechenger *v.* Merchants' Nat. Bank (Tex. Civ. App.), 96 S. W. 638.

73. In an action by a national bank on a note made directly to it, the maker may set up the fraud of plaintiff's president in procuring the note, as, by bringing the action, the bank ratifies the agency of the president, even though his duties did not include such transactions. Wilson *v.* Pauly, 18 C. C. A. 475, 72 Fed. 129.

74. Although a note be discounted by an incompetent number of the directors of a bank, yet, if the bank sue upon the note, this is a ratification of the discount, and it is binding upon the parties thereto. Planters' Bank *v.* Sharp (Miss.), 4 Smedes & M. 75, 43 Am. Dec. 470.

75. Where one who was both town treasurer and cashier of a bank drew a note as treasurer, intending to use the proceeds for his own benefit, and discounted it at the bank in which he was cashier, but without the knowledge of the directors, held that, if the bank should sue the town on the note, they would ratify the contract, and confirm his agency, thereby binding themselves by his knowledge of the fraud proposed. First Nat. Bank *v.* New Milford, 36 Conn. 93.

76. A bank, by suing on a note taken by its cashier under a contract made by him, ratifies the contract in toto, though he was unauthorized to make it. La Grande Nat. Bank *v.* Blum, 27 Or. 215, 41 Pac. 659.

77. Where the president of a bank at which the note was payable caused the payee in the note to make an alteration therein, the acceptance by the bank of a payment on the note and the bringing of a suit thereon as altered amounted to a ratification of the alteration. First Nat. Bank *v.* Fricke, 75 Mo. 178, 42 Am. Rep. 397.

78. It ratifies the contract in toto.—La Grande Nat. Bank *v.* Blum, 27 Or. 215, 41 Pac. 659.

79. A bank, by bringing an action upon a contract made in its behalf by one of its officers, ratifies his action in making the contract, and is in law chargeable with knowledge of whatever he knew at the time of so doing. Singleton *v.* Bank, 113 Ga. 527, 38 S. E. 947.

80. First Nat. Bank *v.* New Milford, 36 Conn. 93.

81. Singleton *v.* Bank, 113 Ga. 527, 38 S. E. 947.

82. Protesting check.—A postdated check was given after banking hours to the paying teller, on his promise to carry it to the credit of the holder on the day of its date. On that day there was a balance due the drawer, which was paid out a part on drafts held by the bank itself. The check was protested at the request of the bank, and returned to the payee. Held that, by protesting the check, the bank ratified its receipt for collection by the paying teller, and could apply none of the money on its own drafts until the check was first paid. Averell *v.* Second Nat. Bank, 6 Mackey (17 D. C.) 358.

matter, instead of repudiating his acts, it affirmed them by coercing from the company payment of interest from the date of the notes and by threatening to dishonor its checks, is sufficient to bind the bank.[83]

Foreclosure of Mortgage.—Foreclosure by entry and sale by vote of the board of investment was a sufficient ratification of procuring an assignment of a mortgage to a bank by its treasurer.[84]

§ 114 (2g) Assertion of Individual Liability of Officer.—For a bank to assert the individual liability of one of its officers for his unauthorized act is not to ratify but to disaffirm, as, for instance, to seek to assert his liability for a diversion of its funds.[85]

§ 114 (2h) Bank Seeking to Indemnify Itself against Fraud.—A bank which was induced to make a loan by fraudulent representations does not ratify the transaction by taking steps to protect itself by means of a mortgage upon the payees so as to preclude itself from setting up the fraud in an action by the principal of the payees to reap the fruits of his wrongful act.[86]

§ 114 (3) Operation and Effect—§ 114 (3a) In General.—The ratification by a bank of an unauthorized contract made on its behalf by any of its officers or employees, renders it valid and effective[87] and it is conclusive upon it.[88] Thus an unauthorized alteration of the nature of a debt due the bank,[89] an unauthorized transfer or hypothecation of any note or security of the bank,[90] a loan of money for the purchase of

83. Enforcing payment of interest.—Ellerbe *v.* National Exch. Bank, 109 Mo. 445, 19 S. W. 241.

84. Foreclosure of mortgage.—Gerrity *v.* Wareham Sav. Bank, 202 Mass. 214, 88 N. E. 1084.

85. Assertion of individual liability of officer.—Where a cashier of a bank without authority used the bank funds to pay his individual debt, no ratification of his unauthorized act arose by the bank attempting to hold the cashier individually liable for the funds wrongfully diverted. Home Sav. Bank *v.* Otterbach, 135 Iowa 157, 112 N. W. 769.

86. Bank seeking to indemnify itself against fraud.—Bank *v.* McGilvray & Co. (Ala.), 52 So. 473.

Where defendant's cashier declined to make a loan until proper security should be given, and during his absence plaintiff applied to the acting cashier, and by fraudulently representing that the cashier had agreed to make the loan for the bank obtained a cashier's check to the borrower, which the borrower transferred to plaintiff, and as soon as the cashier returned he attempted to repudiate the transaction, and took steps to protect the bank and himself by taking the mortgage from the payees, such attempt did not constitute a ratification of the transaction by the bank. Bank *v.* McGilvray & Co. (Ala.), 52 So. 473.

87. Effect of ratification.—Hume *v.* Eagon, 73 Mo. App. 271.

88. Bank *v.* Reed (Pa.), 1 Watts & S. 101.

If any act or contract of an officer of a bank made without authority is subsequently ratified by the directors upon full knowledge of all the circumstances of the case, the bank will be bound thereby as fully as if the officer had been expressly authorized to do the act or make the contract. First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

89. Alteration of nature of debt.—Though the cashier of a bank exceeds his authority, in altering the nature of a debt due the bank, a subsequent acquiescence by the bank in such an arrangement is conclusive upon it. Bank *v.* Reed (Pa.), 1 Watts & S. 101.

90. Transfer or pledge of note.—Rev. St. 1889, § 2759, as amended in 1895, providing that the transfer or hy-

stock,[91] and a conveyance, not authorized by resolution of the directors,[92] are, after ratification, binding on the bank or its receiver.[93]

§ 114 (3b) Adoption of Entire Contract.—A bank in ratifying an unauthorized contract in its behalf by one of its agents must adopt the contract in its entirety, and not in part,[94] and this it can not do if the contract is in part ultra vires, as, for instance, an agreement by its cashier to go into the mining business and work mining properties.[95]

§ 114 (4) Pleading and Proof.—Where ratification by the bank of an unauthorized agreement by the president to release its debtor is relied upon, some specific act or acts of ratification should be alleged.[96]

If estoppel from acquiescence is relied upon, knowledge of an unauthorized agreement made by an officer of a bank on its behalf by the directors and the beneficial results accruing therefrom must be alleged and proved.[97]

Evidence of Ratification.—The proof of a ratification of an unauthorized contract made on its behalf by an officer of a bank must be clear

pothecation of any note or security of a bank by any officer or employee without being authorized by the board of directors shall be "null and void," does not render such transfer absolutely void, but only voidable, and its ratification by the directors afterwards renders it valid and effective from the beginning. Hume *v.* Eagon, 73 Mo. App. 271.

91. Loan for purchase of stock.—Though the act of a bank's president in arranging for a loan of money for the purchase of stock is unauthorized, yet, if the loan is afterwards ratified by the bank, the bank can not subsequently question its legitimate character. Roe *v.* Bank, 167 Mo. 406, 67 S. W. 303.

92. Conveyance.—Under Rev. St., p. 591, § 8, providing that no conveyance not authorized by previous resolution of the board of directors shall be made by any moneyed corporation of any of its effects exceeding in value $1,000, a subsequent confirmation of such conveyance, made by the officers of a bank, is equivalent to a previous resolution, and renders the conveyance valid as against a receiver subsequently appointed. Curtis *v.* Leavitt, 15 N. Y. 9.

93. Receiver.—Curtis *v.* Leavitt, 15 N. Y. 9.

94. Weston *v.* Estey, 22 Colo. 334, 45 Pac. 367.

Where a bank manager in general charge of its business procured defendant's signature to a note for the bank's accommodation to enable it to exhibit the note to the bank examiner as an asset, the matter being within the scope of the manager's agency, the bank could not ratify his act in discounting the note and repudiate his agreement. National Citizens' Bank *v.* Bowen, 109 Minn. 473, 124 N. W. 241.

95. Mine owners indebted to a bank made their note, and executed a deed of trust to the bank's cashier, to secure the indebtedness. The note was not paid at maturity, and without the payment of any money to him or to the bank, and without authority, the cashier released the deed of trust, and two other papers were executed between the parties. One was an absolute deed of the property to the cashier; the other, an agreement whereby he was to work the mines till the indebtedness of the bank was paid from the proceeds, and certain amounts paid to the grantors, after which he was to become the absolute owner. Subsequently a creditor of the bank attached the property as belonging to the bank. Held, that the bank could not be held to have adopted the contract of its cashier, since it must have done so in its entirety, and the agreement to operate the mines would have been ultra vires. Weston *v.* Estey, 22 Colo. 334, 45 Pac. 367.

96. Pleading and proof.—Swindell & Co. *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13.

97. Estoppel from acquiescence.—Swindell & Co. *v.* Bainbridge State Bank, 3 Ga. App. 364, 60 S. E. 13.

and not vague and indefinite. Evidence of a vague and indefinite character should not ordinarily be admitted as a basis for inferring a ratification from a habit of the officer to make similar contracts or do similar acts, but such evidence may be admitted where it is to be followed up by proof that the contract or arrangement was subsequently ratified by the board of directors with knowledge of the fact.[98]

Facts Which Are Evidence.—The fact that the directors of a bank unite in making a guaranty note to secure a loan to the bank previously arranged for by the cashier is evidence of ratification of the cashier's act.[99] So also is the fact that, where on the discovery of the robbery of a bank, the cashier, with the advice of a minority of the directors, offered a reward for the capture of the thief and return of money; all the directors lived in the same place, and did not disavow the cashier's act.[1]

Submission to Jury.—Whether a mere silence of the bank in failure to repudiate its agents' acts within a reasonable time after knowledge thereof amounts to ratification is a question for the jury.[2]

§ 115. Rights Acquired by Bank.—Rule as to Addition of Words Descriptio Personæ and Exception Thereto.—The general rule is that the addition of such words as "Agent," "Treasurer," "President," etc., to the name of an officer of a bank is simply descriptio personæ; but there is an exception or partial exception, to the rule in the case of cashiers of banks. It is now held that, where negotiable paper is made to A. B., "Cashier," or any abbreviation of that word, it is prima facie, at least the property of the bank of which A. B. is cashier.[3] In such cases, where the

98. **Proof of accord and satisfaction agreed to by president.**—First Nat. Bank *v.* Kimberlands, 16 W. Va. 555.

99. **Facts which are evidence.**—American Exch. Nat. Bank *v.* First Nat. Bank, 27 C. C. A. 274, 82 Fed. 961.

1. Kelsey *v.* National Bank, 69 Pa. 426.

2. **Submission to jury.**—Fifth Nat. Bank *v.* Iron City Nat. Bank, 92 Tex. 436, 49 S. W. 368.

The cashier of plaintiff bank authorized defendant bank to apply plaintiff's deposit to his private indebtedness. Plaintiff had no knowledge of this until some time after it had ceased to have any business relations with defendant, and after it had severed its connection with its cashier, who had been indicted for the embezzlement of the funds in question. After learning of the act, plaintiff neglected to repudiate it. The cashier was insolvent, and plaintiff received no benefit from the transaction in question. Held, that there was not sufficient evidence of ratification to justify its submission to the jury. Iron City Nat. Bank *v.* Fifth Nat. Bank (Tex. Civ. App.), 47 S. W. 533, modified Fifth Nat. Bank *v.* Iron City Nat. Bank, 92 Tex. 436, 49 S. W. 368, which held that the evidence was sufficient to justify the submission to the jury.

3. Anheier *v.* Signor, 8 N. Dak. 499, 79 N. W. 983; Bank *v.* Muskingums Branch, 29 N. Y. 619; First Nat. Bank *v.* Hall, 44 N. Y. 395.

"This exception to the rule has been established because banks act only through agents, and the cashier is the chief financial agent of the bank, and usage has sanctioned the practice of permitting banks to do business in that manner. This being so, the enforcement of the general rule would often work injustice, and the exception becomes a legal necessity. But we find no case where this exception has been applied to any transactions other than those relating to commercial paper. In Daniel, Neg. Inst., § 417, the exceptions are limited to such transactions. The reason upon which it is based necessarily so confine it. Banks, particularly national banks, do not or-

instrument is indorsed by "A. B., Cashier," and delivered to a bona fide holder, the bank alone is liable on the indorsement.[4] The most that could be claimed for the word "Cashier" in any other case would be that it raised a presumption of fact.[5] Indeed, that is its entire scope in commercial paper, except where the paper is in the hands of a bona fide indorsee.[6]

Cashier Deemed to Hold for Bank.—The cashier of a bank who received money on a mortgage to the bank, and deposited it in his own name holds it for the bank, and the bank, in favor of third parties, must be deemed to have received it when the cashier took it.[7]

Guaranty of Note.—A guaranty of a note, the consideration of which moved from a bank, to whose cashier it was addressed, and whose official action it imported, although not addressed to him as cashier, may well run to the bank.[8]

Defense by Makers of Note Indorsed by Cashier to Bank.—Where directors are chosen and recognized as such by the proprietors of a bank, and they appoint a cashier, and he acts under that appointment by their direction, the maker of a note afterwards indorsed by the cashier can not set up, in defense to a suit brought by the indorsee, irregularities in the choice of the directors and appointment of the cashier.[9]

dinarily deal in real estate. In the exceptional cases where they are permitted to do so, they do not take or convey real estate through an agent. Such matters require more formality, and, in cases of transfer by the bank, they require a corporate seal. A transfer to 'A. B., Cashier,' might, in equity, be enforced by the bank, upon a showing that it was intended as a transfer to the bank. The same might be done to whomsoever the transfer might be made, but it would require evidence to establish such intention." Anheier *v.* Signor, 8 N. Dak. 499, 79 N. W. 983.

4. Anheier *v.* Signor, 8 N. Dak. 499, 79 N. W. 983; Folger *v.* Chase (Mass.), 18 Pick. 63; Farmers', etc., Bank *v.* Troy City Bank (Mich.), 1 Doug. 457.

5. **Assignment to A., "Cashier."**—A land contract was assigned to "C. C. Schuyler, cashier," the assignor knowing that Schuyler was the cashier of a certain bank, and being also at the time indebted to the bank as surety on his mother's notes. The assignor was indebted to Schuyler, and, at the time the indebtedness was incurred, he stated to Schuyler that he owned a certain section of land, and that Schuyler should lose nothing. The assignment of such land was drawn up in the bank by Schuyler, and given to a notary with instructions to go to the assignor's place and get it signed and acknowledged. The assignor stated to the notary that he would not sign it if it was for the bank, as he did not wish to get his property mixed up in his mother's affairs. The notary told him that Schuyler said that he (the assignor) would know what it was for. The assignor replied that he would sign it for Schuyler, but would not sign it for the bank. Thereupon it was signed and delivered to the notary. Held that, conceding a presumption arose that the assignment was to the bank because of the addition of the word "cashier," such presumption was one of fact, and was rebutted by the evidence. Anheier *v.* Signor, 8 N. Dak. 499, 79 N. W. 983.

6. Anheier *v.* Signor, 8 N. Dak. 499, 79 N. W. 983; Baldwin *v.* Bank (U. S.), 1 Wall. 234, 17 L. Ed. 534; Bank *v.* French (Mass.), 21 Pick. 486; Metcalf *v.* Williams, 104 U. S. 93, 26 L. Ed. 665; Southern Pac. Co. *v.* Von Schmidt Dredge Co., 118 Cal. 368, 50 Pac. 650.

7. **Cashier deemed to hold for bank.**—Bridenbecker *v.* Lowell (N. Y.), 32 Barb. 9.

8. **Guaranty of note.**—Woodstock Bank *v.* Downer, 27 Vt. 482, 65 Am. Dec. 210

9. **Defenses by makers of note indorsed by cashier to bank.**—Cooper *v.* Curtis, 30 Me. 488.

Cashier Treasurer of Another Company.—Using Funds of Company to Conceal Embezzlement of Bank.—Where the cashier of a bank who had become indebted to it, in order to conceal his defalcation or pay his indebtedness, transferred to the bank the funds of a company of which he was treasurer, and to account for such transfer, drew checks upon the company payable to the bank and charged the amount of them against the company upon the bank books, the bank in accepting such payment through its cashier, can not retain the benefits of his act without accepting the consequences of his knowledge and becoming liable with the cashier to the company in the amount of the funds so fraudulently transferred.[10]

Cashier's Misappropriation of Deposit of Company of Which Cashier Treasurer.—Where the cashier of a bank who has the entire management of its affairs, draws checks of a company of which he is treasurer, payable to the bank and presents such checks as treasurer to himself as cashier, and misappropriates the proceeds thereof, the bank will be held to knowledge of his fraudulent purpose at the time of presenting the check, and can not base thereon a claim of liability in its favor against the company.[11]

§ 116. Notice to Officer or Agent—§ 116 (1) In General.—It is well established, both in law and in equity, that notice to an agent in relation to the business in which he is employed is notice to the principal.[12] The same rule applies equally to a corporation as to a natural person.[13] Notice to an officer or agent or attorney of a bank, who is at the time acting for the bank and within the limitations of his authority to supervise, is notice to the bank.[14] Notice to an active managing officer of an incorpo-

10. Using funds of company to conceal embezzlement of bank.—Emerado Farmers' Elevator Co. *v.* Farmers' Bank, 20 N. Dak. 270, 127 N. W. 522.

11. Cashier's misappropriation of deposit of company of which cashier treasurer.—Emerado Farmers' Elevator Co. *v.* Farmers' Bank, 20 N. Dak. 270, 127 N. Y. S. 522.

12. Notice to officer or agent.—Bank *v.* Mumford, 6 Ga. 44; Veasey *v.* Graham, 17 Ga. 99, 63 Am. Dec. 228.

13. Applies to corporation.—Bank *v.* Mumford, 6 Ga. 44; Veasey *v.* Graham, 17 Ga. 99, 63 Am. Dec. 228.

Where a cashier has entire charge of the business of a bank its president being such in name only service on the cashier, by the surety on a note, of notice to sue the principal, is service on the bank. Skillern *v.* Baker, 82 Ark. 86, 100 S. W. 764. See post, "Actions on Loans or on Paper Discounted," § 187.

Notice to the agent, attorney, or other appropriate officer of a banking institution, is notice to the company. Messick & Co. *v.* Roxbury, 1 Hand. 190, 12 O. Dec. 95.

As a rule, knowledge to officers of a bank is knowledge to the bank. Baker *v.* Orme, 6 O. C. C., N. S., 289, 17-27 O. C. D. 465, affirmed in 74 O. St. 337.

14. Notice within limitation of authority.—Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319, citing Fulton Bank *v.* New York, etc., Canal Co. (N. Y.), 4 Paige 127; LaFarge Fire Ins. Co. *v.* Belle (N. Y.), 22 Barb. 54; National Bank *v.* Norton (N. Y.), 1 Hill 572; Bank *v.* Davis (N. Y.), 2 Hill 451; North River Bank *v.* Aymar (N. Y.), 3 Hill 262; Smith *v.* South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179; Washington Bank *v.* Lewis (Mass.), 22 Pick. 24; Commercial Bank *v.* Cunningham (Mass.), 24 Pick. 270; Housatonic Bank *v.* Martin (Mass.), 1 Metc. 294; Hoover *v.* Wise, 91 U. S. 308, 23 L. Ed. 392.

In respect to discounts and securi-

rated bank, given during banking hours at the usual place of business is notice to the bank.[15] Hence, where the proper officers of a bank are chargeable with knowledge of the state of its account with another bank, such knowledge is that of the bank,[16] and notice to an officer of a bank, which imposes a duty on the bank, is notice to all agents of the bank acting in their official capacity.[17]

Extent of Constructive Notice Rule.—It seems that a bank will be held to have constructive notice only of such facts as have been brought to the actual notice or attention of its officers or agents or of such facts only as have been constructively brought to the notice or attention of some of its officers or agents, by the actual notice of such other facts as would naturally put the officer or agent upon inquiry.[18] The rule under considera-

ties, see post, "In Respect to Discounts and Securities," § 116 (2).

In respect to deposits, see post, "In Respect to Deposits," § 116 (3).

As to evidence of authority, see post, "Evidence as to Authority," § 118.

As to knowledge or notice with reference to business outside scope of official duties, see post, "Notice Received in Private Business or Outside Scope of Duties," § 116 (4).

Where the president and cashier of a bank, being also members of a partnership composed of themselves and another person, to the capital stock of which they had, under the partnership articles, agreed to contribute a given sum, without the knowledge or consent of the other partner executed and delivered to the bank a note in the name of the partnership, for the purpose of raising the money they had agreed to pay into the partnership business, the bank was affected with notice that the transaction was for the private benefit alone of the two parties raising the money, and hence could not hold the partnership itself, nor the remaining partner, liable on the note. Brobston *v.* Penniman, 97 Ga. 527, 25 S. E. 350.

Where the cashier of a bank in liquidation is also its general agent, he has all the powers of a cashier, and also the power to manage and control the bank, and his knowledge of a transaction with a debtor, resulting in a compromise of the bank's claim against the debtor, is imputable to, and his action binding on, the bank. Metzger *v.* Southern Bank, 98 Miss. 108, 54 So. 241.

Plaintiff's husband took a bond of hers and her bank book to the cashier of a bank. The cashier put the bond in the bank safe, and wrote on plaintiff's bank book a memorandum showing a receipt of the bond from plaintiff. Held, that the bank could not claim that the cashier was acting in his individual capacity alone, and that the bank had no notice of plaintiff's title. Zugner *v.* Best, 44 N. Y. Super. Ct. 393.

A manufacturing company having sold out all its property, thereby determining the agency of its officers, a bank, the president of which was also a director of the corporation, was bound by the legal effect of its president's knowledge in receiving a note executed to it by the officers of the corporation after the sale. Union Bank *v.* Wando Min., etc., Co., 17 S. C. 339.

15. Notice to active managing officer.—Second Nat. Bank *v.* Howe, 40 Minn. 390, 42 N. W. 200, 12 Am. St. Rep. 744.

As to notice to directors, see post, "Notice to Directors," § 116 (5).

16. Knowledge of officers imputed to bank.—Kissam *v.* Anderson, 145 U. S. 435, 36 L. Ed. 765, 12 S. Ct. 960.

17. Notice imposing duty on bank.—Gibson *v.* National Park Bank, 49 N. Y. Super. Ct. 429.

18. Extent of constructive notice rule.—Iowa Nat. Bank *v.* Sherman, 17 S. Dak. 396, 97 N. W. 12, 106 Am. St. Rep. 778, modified on rehearing 19 S. Dak. 238, 103 N. W. 19; Mann *v.* Second Nat. Bank, 34 Kan. 746, 10 Pac. 150.

The fact that the cashier of plaintiff bank knew that the maker of a note discounted by it, who had transferred to it, as collateral, several of defendants bonds, which on their face appeared to be still due, and regular in form, but which had in fact been paid, was the treasurer of defendant, and also of the corporation holding the trust deed to secure the bondholders, did not, as a matter of law, charge plaintiff with knowledge that such

tion alike includes and applies to positive information or knowledge obtained or possessed by the agent in the transaction, and to actual or constructive notice communicated to him therein.[19]

Reason of Rule and Qualifications.—The rule is based on the ground that it is the duty of the agent to communicate to his principal all knowledge which he possesses material to the principal's business, and the presumption that he has done so.[20] When the fact in question comes to the knowledge of an officer of a bank when he is making authorized official inquiries, or is otherwise engaged officially for his principal, it can be of no consequence that he fails to communicate it.[21] The rationale of the rule has been differently stated by different authorities. Some authorities rest the rule entirely upon the presumption of an actual communication between the agent and his principal; others upon the legal conception that for many purposes the agent and the principal are regarded as one.[22] Under the operation of this reason, what are sometimes called exceptions or qualifications to the rule have grown up.[23] For example, an agent is not presumed to have communicated to his principal professional confidences received in representing a third person, or knowledge acquired while acting for himself or for a third person and not for his principal,[24] or where the

maker held the bonds, in a fiduciary capacity, or obtained possession of them by fraud. Rockville Nat. Bank *v.* Citizens' Gas Light Co., 72 Conn. 576, 45 Atl. 361.

A mortgagor of cattle sold them with the consent of the first mortgagee, and deposited the proceeds of the sale to his own credit in a bank, which was a second mortgagee, and applied the money to the payment of the debt due to the bank. Prior to the sale the mortgagor agreed with the first mortgagee that the proceeds of the sale should be sent to the bank to be applied on the first mortgage. Held, that the fact that the bank officers knew of the first mortgage, and of its priority, and that such mortgage was to be paid when the cattle were sold, was not such notice to the bank of the agreement between the mortgagor and the first mortgagee as would charge it with a knowledge of the trust character of the fund. Smith *v.* Crawford County State Bank, 99 Iowa 282, 68 N. W. 690, 61 N. W. 378.

That the president of a bank is a stockholder, and the cashier a stockholder and secretary, of a corporation which is the payee of a note transferred to the bank, does not charge the bank with constructive notice of defenses of the maker against the corporation payee, when neither the president nor cashier had actual notice. Iowa Nat. Bank *v.* Sherman, 17 S. Dak. 396, 97 N. W. 12, 106 Am. St. Rep. 778, modified on rehearing, 19 S. Dak. 238, 103 N. W. 19, 117 Am. St. Rep. 941.

19. Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506.

20. Reason of rule.—Wardlaw *v.* Troy Oil Mill, 74 S. C. 368, 54 S. E. 658, 114 Am. St. Rep. 1004.

21. Failure to communicate.—Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506, citing National Security Bank *v.* Cushman, 121 Mass. 490; Bank *v.* Davis (N. Y.), 2 Hill 451; Farmers', etc., Bank *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362.

22. Rationale of rule.—Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12, 34 S. E. 378.

23. Exceptions or qualifications.—Wardlaw *v.* Troy Oil Mill, 74 S. C. 368, 54 S. E. 658, 114 Am. St. Rep. 1004.

The general rule that a principal is held to know all that his agent knows in a transaction in which the agent acts for him has its exceptions. Niblack *v.* Cosler, 26 C. C. A. 16, 80 Fed. 596.

24. Examples of exceptions.—Wardlaw *v.* Troy Oil Mill, 74 S. C. 368, 54 S. E. 658, 114 Am. St. Rep. 1004; Akers *v.* Rowan, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705.

Promissory note obtained by false representations and transferred to a bank, whose cashier was a partner in

knowledge is such that, according to human nature and experience, the agent is certain to conceal, or where the agent is acting in an adversary relation to the principal, or meditates a fraud against his principal or some third person in his own interest which would be defeated by disclosure.[25] The agent's knowledge will not be imputed to the principal where the legal effect of what the agent did was to wrong, cheat or defraud the principal for his own benefit.[26] Where an officer or agent of the bank, as a party

business with the payee, held enforceable by the bank, where the cashier had no actual knowledge of the fraud. Scott *v.* Choctaw Bank (Ala.), 59 So. 184. See Morris *v.* First Nat. Bank, 162 Ala. 301, 50 So. 137.

As to notice received in private business, see post, "Notice Received in Private Business or Outside Scope of Duties," § 116 (4).

As to officer dealing in dual capacity, see post, "In Respect to Discounts and Securities," § 116 (2); "In Respect to Deposits," § 116 (3); "Notice to Directors," § 116 (5).

25. Wardlaw *v.* Troy Oil Mill, 74 S. C. 368, 54 S. E. 658, 114 Am. St. Rep. 1004; Holm *v.* Atlas Nat. Bank, 28 C. C. A. 297, 84 Fed. 119.

Defendant, at the request of the cashier of a bank who was defendant's partner in a real estate business, gave his note to the cashier to be substituted in the bank's assets for notes of the cashier. He was told by the cashier that the bank would not want the cashier's paper, and that it would not look well to the bank examiner, and he told defendant that he would never be called upon to pay the note. Rev. Codes, § 4001, makes it a penal offense to knowingly make false entries in the books of a bank, or to knowingly subscribe, or exhibit false papers with intent to deceive the state bank examiner. Held, that defendant was chargeable with notice of the statute, and that it was the cashier's purpose to violate it, and therefore the knowledge possessed by the cashier would not be imputed to the bank, and thus give it notice that defendant received nothing for the note, as notice to an agent will not be imputed to the principal, where the conduct of the agent is such as to raise a clear presumption that he would not communicate the fact in controversy to his principal. State Bank *v.* Forsyth, 41 Mont. 249, 108 Pac. 914.

The fact that the president of another corporation with which the bank was dealing knew of a lien which was prior to the claim of the bank, does not constitute notice to the bank, though he is the director of the bank and a member of its loan committee. Wardlaw *v.* Troy Oil Mill, 74 S. C. 368, 54 S. E. 658, 114 Am. St. Rep. 1004.

Fraud upon principal.—If three of the directors, including the president and cashier, of a bank having eighteen directors, make their note and have it discounted, and use the proceeds to make an overdraft of an insolvent depositor, and, by agreement between themselves, keep the whole matter secret from the other directors, from fear that the amount of the overdraft would get to the public and injure the credit of the bank, and agree among themselves that the bank shall make good the amount to them when they deem it safe to notify the other directors, and afterwards, at the instance of one of the makers, the bank becomes the owner of the note, and, after the claim against the depositor has become barred by the act of limitations, they disclose the whole transaction to the board of the bank, and ask that the bank charge off the note to profit and loss, the bank is under no obligation to do so, and in an action on the note by the bank against the makers they can not defeat recovery on the ground that the note was made for the accommodation of the bank. It would be both unreasonable and unjust to impute notice to the bank of a transaction which was wholly unauthorized, and which all the parties connected with it expressly agreed to and did conceal from the bank. Such knowledge on the part of three directors was not notice to the bank. To apply the doctrine of constructive notice to such a case would make it an instrument of fraud. Traders, etc., Bank *v.* Black, 108 Va. 59, 60 S. E. 743.

26. Where agent cheats principal for own benefit.—Niblack *v.* Cosler, 26 C. C. A. 16, 80 Fed. 596; Central Bank *v.* Thayer, 184 Mo. 61, 82 S. W. 142.

As to notice of officer's own fraud, see post, "Notice of Officer's Own Fraud," § 116 (6).

As to individual interest of officer as affecting knowledge or notice, see

in interest, deals for himself with the corporation, the latter is not charged with notice of information possessed by such officer or agent, and this is because in such transaction the assumed agent is in reality the adverse party, and is not to be treated while so dealing as the corporation's agent. Many if not a majority of the cases which announce the doctrine that, when the agent has an interest in the transaction which would be prejudiced by a disclosure of the information, the presumption of its communication does not prevail, will be found to be where the agent or officer acts in his in-

post, "In Respect to Discounts and Securities," § 116 (2); "In Respect to Deposits," § 116 (3); "Notice Received in Private Business or Outside Scope of Duties," § 116 (4); "Notice of Officer's Own Fraud," § 116 (6).

As to individual interest of director as affecting knowledge or notice, see post, "Notice to Directors," § 116 (5).

As to individual interest of officer or agent as affecting person dealing with bank, see post, "Individual Interest of Officer or Agent as Affecting Person Dealing with Bank," § 117.

"This exception has been many times noticed and applied and was the subject of elaborate consideration by this court in Read *v.* Doak, 22 U. S. App. 669, 12 C. C. A. 643, 65 Fed. 341, and in Wilson *v.* Pauly, 18 C. C. A. 475, 72 Fed. 129." Niblack *v.* Cosler, 26 C. C. A. 16, 80 Fed. 596.

Where a bank has loaned money to a corporation, the stock of which is nominally but not actually paid in full, its right to look to the stockholders for repayment to the extent to which they have not paid the face value of their stock is not defeated because the president of the corporation, having a substantial pecuniary interest therein, was also the cashier of the bank and acted for both parties, negotiating the loan without communicating to any other officer of the bank his knowledge that the stock had been issued at a discount, since a corporation in dealing with one of its own officers who acts for himself and not for it is not chargeable with notice of facts known to him. First Nat. Bank *v.* Northup, 82 Kan. 638, 109 Pac. 672.

Where a bank purchased a note from a corporation which had received it without consideration, the fact that its cashier, who discounted the note after consultations with the directors, was the president of such corporation, and knew all the facts, did not bind the bank with notice of the infirmities. People's Sav. Bank *v.* Hine, 131 Mich. 181, 91 N. W. 130.

Knowledge of a cashier and two directors that the cashier has, without authority, pledged the bank's responsibility upon the note of a corporation in which such officers are interested adversely to the bank, is not notice to the bank. Ft. Dearborn Nat. Bank *v.* Seymour, 71 Minn. 81, 73 N. W. 724.

"While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in the case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating. Kennedy *v.* Green, 3 Mylne & K. 699; Cave *v.* Cave, 15 Ch. Div. 639; In re European Bank, 5 Ch. App. 358; In re Marseilles Extension R. Co., 7 Ch. App. 161; Atlantic Bank *v.* Harris, 118 Mass. 147; Loring *v.* Brodie, 134 Mass. 453. * * *" State Sav. Bank *v.* Montgomery, 126 Mich. 327, 85 N. W. 879.

"A bank or other corporation can act only through agents, and it is generally true that, if a director who has knowledge of the fraud or illegality of the transaction acts for the bank—as in discounting a note—his act is that of the bank, and it is affected by his knowledge. National Security Bank *v.* Cushman, 121 Mass. 490." State Sav. Bank *v.* Montgomery, 126 Mich. 327, 85 N. W. 879.

"But this principle can have no application where the director of the bank is the party himself contracting with it. In such case the position he assumed conflicts entirely with the idea that he represents the interests of the bank. To hold otherwise might sanction gross frauds by imputing to the bank a knowledge those properly representing it could not have possessed." State Sav. Bank *v.* Montgomery, 126 Mich. 327, 85 N. W. 879.

dividual capacity, and treats with some other officer or agent of the corporation.[27] Where a bank purchases mortgage bonds of a corporation of which its own president is also president, he knowing that the mortgage is invalid the bank is not chargeable with his knowledge.[28] The knowledge of the president of a bank as to his own insolvency, or that of a firm with which he was connected, could not be imputed to the bank receiving securities in connection with certain overdrafts and loans of the president, where such president dealt with the bank in regard to his own affairs as with a third party.[29] But the principal involved in the foregoing cases can not be fully applicable to a case where one party, having knowledge of the invalidity of the paper of which he is the ostensible owner, discounts it in a bank of which he is the duly authorized agent, and himself acts for the bank, and by his act enables the bank to collect and retain the proceeds of such paper as against the rights of the true owner. In such a transaction if he is not the agent of the bank then the discount is illegal and the owner is entitled to all its proceeds; if he is the agent of the bank, his action would be a fraud upon the rights of the owner of which the bank can not take advantage.[30] However the authorities seem to be divided as to whether the knowledge of an officer of a bank, having a note discounted at the bank for his own personal benefit, as to defenses to the note, is imputable to the bank.[31] It seems to be established that where one is an officer of two corporations which have business transactions with each other, his knowledge can not be attributed to either corporation in a matter in which he does not represent it. If he represents one or both his action will be binding, and his knowledge will attach to the one represented.[32] If a person who is at the

27. Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506.

28. DeKay *v.* Hackensack Water Co., 38 N. J. Eq. 158.

29. Knowledge of insolvency.—Crooks *v.* People's Nat. Bank, 34 Misc. Rep. 450, 70 N. Y. S. 271; S. C., 72 App. Div. 331, 76 N. Y. S. 92, 495, affirmed in 177 N. Y. 68, 69 N. E. 228.

30. Principle inapplicable.—Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506. And see First Nat. Bank *v.* New Millford, 36 Conn. 93.

31. Authorities divided.—Where a person having a note discounted at a bank for his personal benefit is an officer of the bank, the bank is charged with his knowledge of defenses to it. First Nat. Bank *v.* Blake, 60 Fed. 78; Tilden *v.* Barnard, 43 Mich. 376, 5 N. W. 420, 38 Am. Rep. 197; Le Duc *v.* Moore, 111 N. C. 516, 15 S. E. 888; Black Hills Nat. Bank *v.* Kellogg, 4 S. Dak. 312, 56 N. W. 1071; Taylor *v.* National Bank, 6 S. Dak. 511, 62 N. W. 99. See contra First Nat. Bank *v.* Babbidge, 160 Mass. 563, 36 N. E. 462; Merchants' Nat. Bank *v.* Lovitt, 114 Mo. 519, 21 S. W. 825; Buffalo County Nat. Bank *v.* Sharpe, 40 Neb. 123, 58 N. W. 734; City Bank *v.* Barnard, 1 Hall 70.

Where an officer or director of a bank is also an officer of a corporation discounting a note at the bank, his knowledge, acquired in the latter capacity, is not chargeable to the bank. Corcoran *v.* Snow Cattle Co., 151 Mass. 74, 23 N. E. 727; First Nat. Bank *v.* Loyhed, 28 Minn. 396, 10 N. W. 421; Benton *v.* German-American Nat. Bank, 122 Mo. 332, 26 S. W. 975; Commercial Bank *v.* Burgwyn, 110 N. C. 267, 14 S. E. 623, 17 L. R. A. 326; Wilson *v.* Second Nat. Bank (Pa.), 7 Atl. 145, Contra, see First Nat. Bank *v.* Erickson, 20 Neb. 580, 31 N. W. 387; Oak Grove, etc., Cattle Co. *v.* Foster, 7 N. Mex. 650, 41 Pac. 522.

32. Officer acting in dual capacity.—Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506, citing Smith *v.* Farrell, 66 Mo. App. 8. And see First Nat. Bank *v.*

same time cashier of a bank and member of partnership makes, in his dual capacity, a contract between the parties, knowledge possessed by him, though not actually disclosed, will be imputed to both parties.[33] Where an individual has an interest in a promissory note which he knows was given without consideration, and such individual as cashier of a bank, having full authority and control of the discounts of the bank without reference to or consultation with any other officer of the bank, discounts such note with the funds of the bank, the latter is not a bona fide purchaser of the note, without notice. If it ratifies the act of its officer and claims title to the note, it must take it subject to the knowledge which the officer who discounted it had at the time.[34] However, if one though cashier of the bank makes a contract with the bank on behalf of the partnership of which he is a member, dealing in the transaction with other officers of the bank and not through himself alone, his undisclosed knowledge will not be imputed to the bank as notice. The law will not presume that the person occupying such a dual relation dealt with himself alone in making a contract between the partnership and the bank, and the burden of proving that he did so act is upon the person so asserting.[35] Nor will his knowledge be imputed to the bank, when he, acting in such dual capacity, is actually endeavoring to deceive the bank to benefit himself in his adverse interests.[36]

Dunbar, 118 Ill. 625, 9 N. E. 186; Farmers', etc., Bank *v.* Kimball Milling Co., 1 S. Dak. 388, 47 N. W. 402, 36 Am. St. Rep. 739; Bank *v.* Davis (N. Y.), 2 Hill 451; Holden *v.* New York, etc., Bank, 72 N. Y. 286; Webb *v.* Graniteville Mfg. Co., 11 S. C. 396, 32 Am. Rep. 479.

Fraud of president.—"The fraud of a bank president in contriving and negotiating in his bank fraudulent notes of a corporation, for his own use, imputes knowledge to the bank, and it has no claim against the corporation." Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506.

D., who was president of a trust company, was also the controlling stockholder in a manufacturing corporation and the principal partner of D. & Co., a firm acting as the corporation's selling agent. At D.'s dictation, the president and treasurer of the corporation drew drafts on D. & Co., which were accepted by that firm and discounted at D.'s instance by the trust company. Just prior to the discount, the president of the corporation, at D.'s instance, opened an account with the trust company in the name of the corporation, and on the day before the discount was made two checks were drawn on the trust company by the corporation, payable to D. & Co., and cashed through another New York bank, the drafts being discounted to meet the checks. The discounts made by the trust company were authorized by D. under a provision of the trust company's by-laws declaring that the president generally might make investments between meetings of the executive committee, reporting the transactions to the committee on the succeeding day, and, after the discounts were made, the minutes showed the approval of loans made by the trust company. Held, that the trust company was thereby charged with knowledge that the discounts were part of a fraudulent scheme on the part of its president to obtain money for his individual purposes. Cook *v.* American Tubing, etc., Co., 28 R. I. 41, 65 Atl. 641.

33. Cashier acting in dual capacity—Notice to both parties.—Taylor *v.* Felder, 3 Ga. App. 287, 59 S. E. 844.

34. Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506.

35. Cashier dealing through other officer—Notice not imputed.—Taylor *v.* Felder, 3 Ga. App. 287, 59 S. E. 844.

36. Actual intent to deceive.—Where the cashier of plaintiff bank was also president of a printing corporation, and as such permitted the corporation to become indebted to the bank in

President.—The general rule is that knowledge of facts brought home to the president of a bank, he being an executive officer, binds the bank.[37] Where the president of a bank receives notice while engaged in business for the bank, the bank is chargeable therewith.[38] Where a bank is hopelessly insolvent when the deposit is made, the knowledge of the president is the knowledge of the bank.[39] Notice to the president of a bank concerning the untrustworthiness of the cashier of the bank is notice to the bank,

excess of the corporation's charter debt limit, the cashier's knowledge of such debt limit was not notice to the bank as his personal interest was adverse to that of the bank and he was actually deceiving the bank. Randolph *v.* Ballard County Bank, 142 Ky. 145, 134 S. W. 165.

37. President.—Louisiana State Bank *v.* Senecal, 13 La. 525; Fouche *v.* Merchants' Nat. Bank, 110 Ga. 827, 36 S. E. 256.

As to knowledge or notice of president in respects to discounts and securities, deposits, etc., see post, "In Respect to Discounts and Securities," § 116 (2); "In Respect to Deposits," § 116 (3); "Notice Received in Private Business or Outside Scope of Duties," § 116 (4); "Notice of Officers Own Fraud," § 116 (6).

A bank paying to the state governor individually the amount of a draft, which the governor had indorsed to it, is liable to the state for the amount collected by it, where the president of the bank had notice that the state was the real owner of the draft. McCann *v.* State, 4 Neb. 324.

Where a bond and mortgage have been procured by false and fraudulent representations of the president of a bank, they can not be enforced in a court of equity, either by the bank itself or by any person for its use. Curtis *v.* Hutchinson, 10 West. L. J. 134, 1 O. Dec. 471.

Knowledge by a member of a firm of the true consideration of a certificate of deposit, which the firm discounted at a bank in payment of individual notes of one of its members, and which had been negligently altered in making out a duplicate certificate, held to be imputable to the bank, where the other member of the firm was its president, and, as such, acted as the sole representative of the bank in accepting the certificate. 74 Fed. 1000, affirmed. Niblack *v.* Cosler, 26 C. C. A. 16, 80 Fed. 596.

The president of a bank, having embezzled funds of the bank on deposit with its reserve agent, replaced such funds with money borrowed by him on the bank's note, without the directors' knowledge, and such borrowed money was thereafter drawn out to pay the bank's lawful debts. Held that, the bank having received the benefit of the loan through its president, it was affected with his knowledge of the loan, and hence was liable to the lender as for money had and received to its use. Ditty *v.* Dominion Nat. Bank, 22 C. C. A. 376, 75 Fed. 769.

38. Notice while engaged in business for bank.—Bartlett *v.* Woodbine Sav. Bank, 57 Ill. App. 425.

Tagg *v.* Tennessee Nat. Bank, 56 Tenn. (9 Heisk.), 479; Union Bank *v.* Campbell, 23 Tenn. (4 Humph.), 394; Winslow *v.* Harriman Iron Co. (Tenn.), 42 S. W. 698; Memphis City Bank *v.* Smith, 110 Tenn. 337, 75 S. W. 1065.

A bank is chargeable with the knowledge of its president that a payment made by an obligor on a note was with the understanding that he was to be released when the president was acting for the bank, and had no other interest in the transaction. Merchants' Nat. Bank *v.* McAnulty (Tex. Civ. App.), 31 S. W. 1091.

Where the president of a bank knew that its cashier had purchased sheep from plaintiff, and was in debt therefor, that outside of them he could not pay the price, and that he had gone with the sheep to market, to sell them, the bank is chargeable with notice that a draft sent to it by the cashier was the proceeds of the sheep, and of plaintiff's interest therein as mortgagee of the sheep, and was liable to plaintiff for a portion of the draft applied on its own debt. Rock Springs Nat. Bank *v.* Luman, 6 Wyo. 123, 42 Pac. 874.

39. Knowledge of bank's insolvency.—St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390; Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428; Manhattan Bank *v.* Walker, 130 U. S. 267, 32 L. Ed. 959, 9 S. Ct. 519.

unless the president is an accomplice of the cashier.[40] A bank is chargeable with notice of the insolvency of a debtor from whom it receives a payment, and that such payment constitutes an unlawful preference under the bankruptcy act, where its president had knowledge of such insolvency, gained while acting for the bank in the matter of such indebtedness.[41] The knowledge of a president of a bank that certain stock had not been fully paid up is imputable to the bank, if he, acting for it and in its behalf, accepted a transfer of the stock to it, and it thereunder retained the same.[42] Notice to a bank president of an outstanding mortgage is notice to the bank.[43] And notice to the president of a banking corporation that stock standing upon the books of the bank in the name of one person is held by him in trust for another is notice to the corporation. And it is not necessary, in order to affect the corporation with notice of such trust, that there should have been a full communication of all the circumstances connected with it. It is enough, in such case, if the party be put upon inquiry.[44] It seems that an officer of a bank may have dealings altogether independent of his connection with the bank, and that the bank will not be affected thereby.[45] But a bank can not receive the proceeds of a diverted trust in payment of the debt due it, the diversion and its reception of the funds being the result of the action of its president, and then hold the fund against the rightful beneficiary under the trust, because of the averment of the corporation that it did not know that its debtor was paying the proceeds of a diverted trust asset, or because its receiving officer did not know from what source its debtor got the money he paid to it.[46]

Vice-President.—Where a bank joins as a partner with certain persons in forming a joint stock company and the vice-president of the bank becomes a member of the joint stock company, the bank is charged with

40. Notice of cashier's dishonesty.—Merchants' Nat. Bank *v.* Guilmartin, 93 Ga. 503, 21 S. E. 55, 44 Am. St. Rep. 182.

41. Notice of insolvency of debtor.—In re Gillette, 104 Fed. 769.

42. Notice that stock not fully paid.—Foushe *v.* Merchants' Nat. Bank, 110 Ga. 827, 36 S. E. 256.

43. Notice of outstanding mortgage.—Burgoyne *v.* Clarkson, 2 West L. J. 325, 1 O. Dec. 119.

44. Notice that stock held in trust.—Porter *v.* Bank, 19 Vt. 410.

45. Dealing independent of connection with bank.—Hughes *v.* Settle (Tenn.), 36 S. W. 577; Holm *v.* Atlas Nat. Bank, 28 C. C. A. 297, 84 Fed. 119.

That the president of a corporation for which a bank discounted notes, in the ordinary and usual course of its business, was vice-president of the bank, does not charge the bank with notice of a secret infirmity in one of such notes, where he did not represent the bank in the transaction. Holm *v.* Atlas Nat. Bank, 28 C. C. A. 297, 84 Fed. 119.

46. Diversion and reception of trust fund—Action of president.—Hughes *v.* Settle (Tenn.), 36 S. W. 577.

The president and sole manager of a bank transferred a number of shares of the stock which he held in his own name to himself as executor and trustee, giving a check on the trust funds, and having such funds transferred to his individual account, which was largely overdrawn. The bank was at the time insolvent, and the investment of trust funds in its stock was highly improper. Held, that all his knowledge as an individual, executor, and trustee, or as president, was imputable to the bank, and, being in fraud of the cestuis que trustent, was void as to them; and that the bank was liable for the full amount of the trust fund misapplied. Holden *v.* New York, etc., Bank, 72 N. Y. 286.

knowledge of the company's authority to borrow money and where certain officers of the company, without proper authorization, borrow money from the bank, the bank can not recover from such company.[47]

Cashier.—The cashier of a bank being an executive officer of the bank, his acts, done in the ordinary course of business, bind the bank, and notice to him is ordinarily notice to the bank.[48] Thus the cashier of a bank is held out to the world as the bank's agent for the management of its notes

47. Vice-president.—Camerson *v.* First Nat. Bank, 4 Tex. Civ. App. 309, 23 S. W. 334.

48. Cashier.—First Nat. Bank *v.* Ledbetter (Tex. Civ. App.), 34 S. W. 1042.

As to knowledge or notice of cashier in respect to discounts, securities, deposits, etc., see post, "In Respect to Discounts and Securities," § 116 (2); "In Respect to Deposits," § 116 (3); "Notice Received in Private Business or Outside Scope of Duties," § 116 (4); "Notice of Officer's Own Fraud," § 116 (6).

Notice to the cashier of a bank or banker, as to matters coming within the scope of his duties, is notice to them. Duncan *v.* Jaudon (U. S.), 15 Wall. 165, 21 L. Ed. 142; Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

And knowledge acquired by the cashier in the course of the business of the bank, and not communicated by him to the board of directors, should be regarded as the knowledge of the bank. Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 46 L. Ed. 1193, 22 S. Ct. 833, reaffirmed in Cherry *v.* Fidelity, etc., Co., 205 U. S. 537, 51 L. Ed. 920, 27 S. Ct. 790.

"Beyond all question the cashier of the plaintiff bank represented his bank, he was an agent with full authority, and what he knew in respect to the transaction in question must be regarded as known to his bank." Merchants' Nat. Bank *v.* State Nat. Bank (U. S.), 10 Wall. 604, 19 L. Ed. 1008.

The cashier drew a check on the estate's account payable to another bank, obtaining therefor a certificate of deposit, which he indorsed and deposited in his bank to his individual account, checking it out for his own use. It did not appear in whose name the certificate was issued, and hence whether the officers of the bank other than the cashier had notice of the ownership of the funds. Held, that the cashier's knowledge bound the bank and rendered it liable for the amount of the certificate; the directors having for a long time failed to supervise the bank's affairs and having allowed him to run it as he pleased for his individual benefit. Whatever knowledge he had acquired in his individual capacity was carried with him into the exercise of his duties as cashier. Lowndes *v.* City Nat. Bank, 82 Conn. 8, 72 Atl. 150.

Where the cashier of a bank had information sufficient to put him on inquiry, the bank was bound to make the inquiry. Groff *v.* Stitzer, 75 N. J. Eq. (5 Buch.) 452, 72 Atl. 970.

A bank is chargeable with the knowledge of its cashier of facts relating to a transaction in the line of its business. McLeod *v.* Fourth Nat. Bank, 20 Fed. 225; New Hope, etc., Bridge Co. *v.* Phenix Bank, 3 N. Y. 156.

Notice to the cashier of a bank is ordinarily notice to the bank. Grant County Deposit Bank *v.* Points, 22 Ky. L. Rep. 105, 56 S. W. 662.

In an action growing out of the refusal of a bank to allow certain shares of stock to be transferred on its books, it appeared that, with the knowledge of the cashier, who was ex officio a member of the committee charged with buying and selling notes, the stock had been pledged by the stockholder as security for a debt; that this debt was subsequently renewed; and that, after the renewal, a note of the stockholder was discounted by the bank. Held, that the cashier's knowledge of the original debt and pledge was sufficient to put him on inquiry, and therefore it should be presumed that he knew that the renewal did not, as a matter of law, release the pledge. Bank *v.* McNeil (Ky.), 10 Bush 54.

Knowledge of facts brought home to the cashier, the bank's executive officers, binds it. Louisiana State Bank *v.* Senecal, 13 La. 525.

Notice to the cashier of a bank is notice to the bank. First Nat. Bank *v.* Ledbetter (Tex. Civ. App.), 34 S. W. 1042.

and other securities.[49] Notice to the cashier of a bank is notice to the bank, in transactions conducted by him for it within the scope of his authority, regardless of his bona fides in conducting such transactions, where the bank adopts his acts.[50] Where a bank cashier makes purchase of a certificate of stock as such cashier, he acts within the scope of his authority, and the knowledge that he has of the condition of the stock must be imputed to the bank.[51] So if he knowingly takes a note a firm indorsed by a partner in payment of an individual debt, the bank is affected by his knowledge.[52] Notice to the cashier of a bank that certain stock which is pledged is trust stock,[53] that a certain fund assigned to the cashier is to be applied to a debt of the assignors to the bank,[54] that a mortgage is unrecorded,[55] or that certain bills will not be paid,[56] is notice to the bank. Where a bank cashier, who is also agent of a trustee, receives in payment of the trustee's individual debt to the bank money which he knows belongs to the trust estate, the bank is chargeable with the knowledge.[57] Notice to the cashier of a bank that its modification of the proposals of a party is acceded to by him is notice to the bank.[58] Where a bank, by its president and cashier, executed a deed of land to the president individually, the execution by the cashier constituted express notice of the sale to the bank.[59] So notice to the cashier of a bank of equities between the maker and indorser of a note, is chargeable to the bank where he was allowed full liberty and the widest authority to discount paper, and the board of directors

49. Cashier held out as agent.—Bank *v.* Mumford, 6 Ga. 44; Veasey *v.* Graham, 17 Ga. 99, 63 Am. Dec. 228.

50. Scope of authority and not good faith criterion.—Farmers' Bank *v.* Saling, 33 Ore. 394, 54 Pac. 190.

51. Purchase of certificate of stock.—Farmers', etc., Bank *v.* Loyd, 89 Mo. App. 262.

52. Indorsement by partner—Payment of individual debt.—Fall River Union Bank *v.* Sturtevant (Mass.), 12 Cush. 372.

53. Notice that stock pledged is trust stock.—Duncan *v.* Jaudon (U. S.), 15 Wall. 165, 21 L. Ed. 142.

54. Notice of application to be made of fund.—Stebbins *v.* Lardner, 2 S. Dak. 127, 48 N. W. 847.

Where an assignment is made to the cashier of a bank to be applied to the satisfaction of a particular debt of the assignors to the bank, and is received by the cashier under an agreement to that effect, notice to the cashier of such understanding is notice to the bank itself, and the bank is bound thereby, and it was error in an action on said note to exclude evidence of such agreement. Stebbins *v.* Lardner, 2 S. Dak. 127, 48 N. W. 847.

55. Notice that mortgage unrecorded.—The articles of incorporation of a bank provided that "it is to act as an agent in the investment of funds," and "to transact any business that may properly be done by a financial agent." Its cashier made a loan for a customer who had money deposited therein, took the acknowledgment to the mortgage securing the loan, had possession of the unrecorded mortgage, and received two or three installments of interest, which he placed to such customer's credit, on his pass book. Held, that the knowledge of its cashier was the knowledge of the bank, affecting it with notice of such unrecorded mortgage. Christie *v.* Sherwood, 113 Cal. 526, 45 Pac. 820.

56. Notice that bills will not be paid.—Notice to the cashier of a bank that certain bills will not be paid is notice to the bank. Boggs *v.* Lancaster Bank (Pa.), 7 Watts & S. 331.

57. Knowledge of trust fund.—Loring *v.* Brodie, 134 Mass. 453.

58. Notice of modification of proposals.—Branch Bank *v.* Steele, 10 Ala. 915.

59. Execution of deed to president.—Veasey *v.* Graham, 17 Ga. 99, 63 Am. Dec. 228.

and discount committee rarely met, and did not look after the discounts as was their duty.[60]

Teller.—Knowledge of the teller of a bank is considered as knowledge of the bank, where it pertains to a matter within the scope of the teller's official duty, and as to which he acts officially.[61] As the public is not supposed to have notice of the appointment of duties relating to bank matters among bank officers, knowledge of its teller in regard to the collection of money must be regarded as the knowledge of the bank, and notice to him is notice to the bank.[62]

Attorney.—In general it may be said that notice to an attorney is notice to his client,[63] but obviously notice is not imputed to an attorney in all his personal, professional and official connections from the fact that one of his clients has notice.[64]

Manager of Branch Bank.—Where a banking corporation has several branches in different places, the managers of which are treated as its agents, and a draft in favor of the bank was payable at, and sent for acceptance to, one of such branches, the acceptor has a right to presume that the manager of such branch has authority to receive notice that the acceptance is for the accommodation merely of the drawer, so that such notice will bind the bank.[65]

Bookkeeper.—The knowledge of a bookkeeper of a bank is knowledge of the bank, where it pertains to a matter within the scope of the book-

60. **Notice of equities between maker and indorser of note.**—Bank *v.* Penland, 101 Tenn. 445, 47 S. W. 693.

61. **Teller—Official duty and action.**—Where the teller and bookkeeper, after having paid worthless checks of a company, the manager of which was also cashier of the bank and administrator of an estate and carried them as cash, took the cashier's checks against the estate's account to cover his company checks, knowingly relieving the bank from liability, and depleting the estate's resources for a purpose they knew to be wholly foreign to its affairs, the bank was liable to it for the amount so drawn; knowledge of its teller and bookkeeper being imputed to it. Lowndes *v.* City Nat. Bank, 82 Conn. 8, 72 Atl. 150.

Plaintiff drew a draft in favor of defendant bank, and delivered it to the bank's teller for collection, and directed the teller to deposit the proceeds to plaintiff's own credit, or to the account of the teller as trustee. The teller deposited the proceeds to his own personal account, and immediately checked out the entire amount, and converted it to his own use. Plaintiff sued the bank for the proceeds. Held, that when the bank received the draft through the teller for collection, the teller acted for the bank; and the knowledge had by him as to the proper disposition to make of the proceeds of the draft was the bank's knowledge, because it pertained to a matter within the scope of the teller's official duty, and as to which he acted officially. Ihl *v.* Bank, 26 Mo. App. 129.

62. **Knowledge of teller as to collection.**—City Nat. Bank *v.* Martin, 70 Tex. 643, 8 S. W. 507, 8 Am. St. Rep. 632.

63. **Notice to attorney.**—Wardlaw *v.* Troy Oil Mill, 74 S. C. 368, 54 S. E. 658, 114 Am. St. Rep. 1004.

64. **Rule of notice to attorney limited.**—The bank could not be charged with notice through M, its president, of a mortgage of another corporation of which M was the attorney, when M himself had no notice of such mortgage. Wardlaw *v.* Troy Oil Mill, 74 S. C. 368, 54 S. E. 658, 114 Am. St. Rep. 1004.

65. **Manager of branch bank.**—Canadian Bank *v.* Coumbe, 47 Mich. 358, 11 N. W. 196.

keeper's official duty and as to which he acts officially.[66] A bank is charged with notice of letters duly mailed to it and received by the general bookkeeper, whose duty it is to open and distribute mail matter, although he conceals such letters to hide certain irregularities in his office, and thereby prevents their coming into the hands of the other bank officers.[67]

Notice to Trustee.—Notice to a trustee, not otherwise an officer of a bank, is not notice to the bank of any matter within the peculiar control of the officers in charge.[68]

Messenger.—A bank is not affected by information given to its messenger, by a third party, which is without the scope of the messenger's agency, where such information is not in fact communicated to the bank.[69]

Effect of Change of Personnel of Officers.—Where a bank is charged with notice of the character of a transaction, it continues to be affected by such notice whatever changes may occur in its officers.[70]

Evidence—Question of Fact.—Whether entries in the books of a bank are sufficient to charge the officers with notice of the transactions involved is for the jury.[71]

§ 116 (2) In Respect to Discounts and Securities.—The rule seems to be that knowledge or notice on the part of an officer or agent, with respect to discounts and securities, when such matters are within the scope of his duties or agency, are chargeable to the bank and bind it in subsequent proceedings.[72] But the rule can not hold good when the officer is also acting

66. **Bookkeeper.**—Lowndes *v.* City Nat. Bank, 82 Conn. 8, 72 Atl. 150.

A bookkeeper's knowledge of a firm's dissolution, acquired because of his position, was not notice to a bank of which he was assistant cashier and bookkeeper. Morris *v.* First Nat. Bank, 162 Ala. 301, 50 So. 137.

67. First Nat. Bank *v.* Fourth Nat. Bank, 6 C. C. A. 183, 56 Fed. 967.

68. **Notice to trustee.**—Bank *v.* Blakesly, 42 O. St. 645.

69. **Information given to messenger without scope of agency.**—A bank was not affected by information given to one of its messengers by a member of a former partnership, to whom a draft upon which the partnership was liable, and which was subsequently renewed, was presented, to the effect that the partnership had been dissolved, and that the other partner was liable for its debts, where the information was not in fact communicated to the bank, and the messenger's agency was confined to mere collections. Camp *v.* Southern Banking, etc., Co., 97 Ga. 582, 25 S. E. 362.

70. **Effect of change of personnel of officers.**—United States Nat. Bank *v.* Forstedt, 64 Neb. 855, 90 N. W. 919.

"This was an action by Per Forstedt against the United States National Bank of Holdredge to recover the penalty provided for in § 5198, Rev. St. U. S. (National Banking Act). In our opinion, there is no fairly debatable question in the case. The jury were well warranted in finding that the defendant knowingly contracted for and received interest in excess of ten per cent, and that the amount so received was at least fifty per cent of the verdict and judgment. The contention of counsel for the bank that the bank officers who actually received the last payments upon the usurious contract were not connected with the bank at the time the contract was made, and were therefore ignorant of the fact that it was tainted with usury, is, of course, without merit." United States Nat. Bank *v.* Forsedt, 64 Neb. 855, 90 N. W. 919.

71. **Evidence—Question of fact.**—Searle *v.* First Nat. Bank (Pa.), 2 Walk. 395.

72. **Rule with respect to discounts and securities.**—A note with the words, "Credit the drawer," written across its face by the payee, and involving a usurious bank discount, held, in a suit

by the bank thereon, to be void, although only the president of the bank knew of the usurious character of the transaction. Newport Nat. Bank *v.* Tweed (Del.), 4 Houst. 225.

As to knowledge or notice of director, see post, "Notice to Directors," § 116 (5).

The cashier of a bank is held out to the world as its general agent, for the management of its notes, and other securities. Bank *v.* Mumford, 6 Ga. 44; Veasey *v.* Graham, 17 Ga. 99, 63 Am. Dec. 228.

As to knowledge or notice of cashier, see ante, "In General," § 116 (1).

Where the cashier of a bank has full authority to make loans and discounts, notice to him of equities against a note discounted by the bank is notice to the bank. Merchants', etc., Bank *v.* Penland, 101 Tenn. 445, 47 S. W. 693.

G., cashier of a bank which had express notice that W. was manager of H. & Co., and was prohibited from selling or discounting drafts received in the course of business, having, as agent of L., bought a draft indorsed to W., manager, and then, as cashier, received the proceeds of the check given by L., and placed it to the individual credit of W., and the draft having afterwards been received by the bank for collection, and the proceeds when collected having been paid to L., the bank is liable to H. & Co. therefor. Heinz *v.* Fourth Nat. Bank (Tenn.), 48 S. W. 133.

A bank declared on a note payable to defendant's order and by him indorsed to the bank. Defendant's defense was that the note was given to the president of the bank with the understanding that it was not to be used by him, and that, when it was used by such person in his capacity of president and passed to the bank in violation of the agreement, the bank was affected with notice of the agreement under which it was given, and could not recover on the note because its use was in violation of the agreement and in fraud of the defendant's right. Held, that it was proper to instruct that if the president of the bank came to the knowledge of the defect in the note in his capacity as such president, and failed to communicate his knowledge to the bank when the note was received, the bank was thereby affected with constructive notice of the defect in the note. Tagg *v.* Tennessee Nat. Bank, 56 Tenn. (9 Heisk.) 479.

A bank which, as assignee of an accommodation note, receives the same with notice either to its president or cashier of its true character, and that it was made under an agreement that designated collaterals should be held to secure its payment, and that such collaterals were not so held but the contract to hold them was violated by their transfer without the consent of the maker, can not enforce payment against the maker of the accommodation note. Smith *v.* Traders' Nat. Bank, 74 Tex. 457, 12 S. W. 113.

Notice to note teller as notice to bank.—Where a borrower from a bank presented collaterals to the assistant cashier, who was authorized to represent the bank in the transaction, and was directed by the latter, in accordance with custom, to take such collaterals to the note teller, who had charge of the collaterals to be checked up, notice to the teller in regard to the rights of a third person in one of the securities pledged was notice to the bank. Zeis *v.* Potter, 44 C. C. A. 665, 105 Fed. 671.

Absence of evidence as to scope of employee's authority.—Prior to the execution of a firm note sued on in renewal of other notes by one of the members of the firm, defendant, another member of such firm, applied to plaintiff bank, the holder of such note, to open an account, and, in conversation with one of plaintiff's employees, notified him that the firm had been dissolved. Held that, in the absence of evidence as to the scope of such employee's authority, such notice to him was insufficient to bind the bank. Marsh *v.* Wheeler, 77 Conn. 449, 59 Atl. 410, 107 Am. St. Rep. 40.

Evidence to show knowledge of officer.—In an action by a bank on a note discounted by it, defendants contended that the note was payable two months after date, and not four, as alleged by plaintiff, and that they were relieved from liability by nonprotest. It was doubtful whether the time written in the note was two or four months after date. Held, that checks drawn on plaintiff by the maker of the note were admissible for the purpose of charging plaintiff with knowledge of the maker's peculiar way of writing the word "two," though the checks passed only the paying teller and the bookkeeper, and were not before the directors, as in the case of notes offered for discount. State Bank *v.* Postal, 12 Misc. Rep. 546, 34 N. Y. S. 18, 67 N. Y. St. Rep. 873.

Cashier presumed to have been present at transaction.—A cashier of a bank who was ex officio member of

in part for himself and in his own behalf.[73] A bank whose president has knowledge of a defect in a guaranty on negotiable bonds at the time that it, acting through him, makes a loan thereon, is not charged with notice; he being a part owner in the bonds, and the loan being in part for his benefit.[74] The knowledge of an officer of a bank, being also a member of its discount committee, who takes part in discounting a note made to him individually for an unlawful purpose, in which he participates, is not imputable to the bank.[75] Knowledge of a president and cashier of a bank of a proposed loan, and their conduct in assisting to procure it, is the knowledge and act of the bank.[76] And knowledge by one of the officers of a bank, who participated in the acceptance for the bank of a negotiable note before due, of a fact which could put a prudent person upon inquiry as to the power of the maker to execute the paper, is sufficient to charge the bank with notice of a disability, if such existed.[77] So where an agent of a bank has notice that notes and a mortgage securing them were without consideration and fraudulent, the bank can not hold the notes as collateral, it being charged with the knowledge of its agent.[78] But the mere fact that the president or cashier of a bank which purchased municipal bonds had notice or knowledge of facts which would have required inquiry as to what the bonds were given for, had he made the purchase, is not notice

the committee charged with buying and selling notes and bills, and who knew that a stockholder had pledged his stock to secure a debt, held to be presumed, in the absence of evidence to the contrary, to have been present when a note of such stockholder was discounted by the bank; and therefore his knowledge that the stock had been pledged was a sufficient notice to the bank. Bank *v.* McNeil (Ky.), 10 Bush 54.

73. Rule inapplicable where officer acting in own behalf.—Where the interest of the president of a bank, who was also its attorney, in the discount of a note sued on, was adverse to the bank, his knowledge of an infirmity in the paper was insufficient to charge the bank therewith. Davis *v.* Boone County Deposit Bank, 25 Ky. L. Rep. 2078, 80 S. W. 161.

The president of a bank, acting in his own interest and not in that of the bank, procured the discount of certain notes of a cattle company, given by its treasurer, from the directors of the bank, who had no knowledge or notice of any fact affecting the validity of the notes. Held, that the bank was not chargeable with the president's knowledge of any such fact, and, in the absence of evidence to the contrary, was warranted in assuming that the company had the power to issue, and its treasury the authority to give, the notes. Corcoran *v.* Snow Cattle Co., 151 Mass. 74, 23 N. E. 727.

As to notice received in private business, etc., see post, "Notice Received in Private Business or Outside Scope of Duties," § 116 (4).

As to individual interest as affecting knowledge or notice, see ante, "In General," § 116 (1); post, "Notice of Officer's Own Fraud," § 116 (6); "Individual Interest of Officer or Agent as Affecting Person Dealing with Bank," § 117.

74. President interested in loan.—Louisville Trust Co. *v.* Louisville, etc., R. Co., 22 C. C. A. 378, 75 Fed. 433, modified, 174 U. S. 552, 43 L. Ed. 1081, 19 S. Ct. 817.

As to knowledge of notice of president, see ante, "In General," § 116 (1).

75. Discounting note made to officer individually.—Graham *v.* Orange County Nat. Bank, 59 N. J. L. 225, 35 Atl. 1053.

76. Knowledge as to proposed loan.—Harris *v.* American Bldg., etc., Ass'n, 122 Ala. 545, 25 So. 209.

77. Acceptance of negotiable note before due.—Hager *v.* National German-American Bank, 105 Ga. 116, 31 S. E. 141.

78. Knowledge of fraud and want of consideration.—Baldwin *v.* Davis, 118 Iowa 36, 91 N. W. 778.

to the bank, where the purchase is not made by him, but by another, having no such notice or knowledge.[79] Nor is the knowledge of one member of the discount committee of a bank, being also president of the bank, who was not present when the renewal of a note was taken, and had no part in the transaction, enough to charge the bank with notice of the fact, known to him, that the indorser of the note had become incompetent to do business.[80] Where a bank cashier acting within the scope of his authority has notice that bonds deposited by a debtor as collateral are held in trust by such debtor,[81] that there exists a mortgage prior to one accepted by him,[82] that there are defenses existing against a note accepted by him,[83] or that a note discounted was obtained by fraud,[84] such knowledge is imputed to the bank. Where a bank president acting in his official capacity, receives information that there is an outstanding mortgage,[85] that a guaranty of certain bonds on which, he acting for the bank, had loaned money, had been repudiated by the guarantors,[86] or that certain stock, on which a loan is subsequently made by the bank, is pledged to another, although such information was received some time prior,[87] the bank is bound thereby. Where the president of a bank, acting for the bank and having no interest

79. Purchase made by another officer than one having knowledge.—Thompson *v.* Mecosta, 141 Mich. 175, 104 N. W. 694.

80. Officer not present and taking no part in transaction.—Bank *v.* Sneed, 97 Tenn. 120, 36 S. W. 716, citing Union Bank *v.* Campbell, 23 Tenn. (4 Humph.) 394.

81. Knowledge that bonds are held in trust.—Knowledge of a bank cashier that stocks and bonds which a debtor of the bank deposited as collateral security were held by the debtor as trustee merely, will be binding on the bank. Loring *v.* Brodie, 134 Mass. 453; Gaston *v.* American Exch. Nat. Bank, 29 N. J. Eq. 98.

82. Existence of prior mortgage.—Where the cashier of a bank accepts a mortgage with actual notice of a prior mortgage, the bank will be bound thereby. Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117.

83. Existence of defenses to note.—Notice to a bank's cashier of defenses against a note received by him in the regular course of the bank's business is notice to the bank. Messick & Co. *v.* Roxbury, 1 Handy 190, 12 O. Dec. 95.

84. Fraud in obtaining note.—Notice to the cashier of an incorporated bank that a note discounted with the bank was obtained by fraud is notice to the bank, so that the defense is available against it. Citizens' Sav. Bank *v.* Walden, 21 Ky. L. Rep. 739, 52 S. W. 953.

85. Notice of outstanding mortgage.—Notice to the president of a bank of an outstanding mortgage is notice to the bank. Burgoyne *v.* Clarkson, 2 West. L. J. 325, 1 O. Dec. 119; Ottaguechee Sav. Bank *v.* Holt, 58 Vt. 166, 1 Atl. 485.

86. Repudiation of guaranty.—A bank whose president acted for it in making a loan on guarantied negotiable bonds, after he had learned that the stockholders of the company making the guaranty had repudiated it as unauthorized, will be charged with notice. Louisville Trust Co. *v.* Louisville, etc., R. Co., 22 C. C. A. 378, 75 Fed. 433, modified Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 43 L. Ed. 1081, 19 S. Ct. 817.

87. Existence of pledge of stock.—The president of a bank, to whom a pledgee of stock exhibited the certificate held by him to ascertain with certainty that it had been regularly issued, stating the fact of the pledge, received such information while acting in his official capacity, and the bank was thereby charged with notice of the pledge, so as to render its statutory lien on the stock for a loan subsequently made to the pledgor, although some two or three years afterwards, subject to the rights of the pledgee, whose debt had not been paid. Curtice *v.* Crawford County Bank, 56 C. C. A. 174, 118 Fed. 390.

adverse to it, accepts payment from an obligor on a note held by the bank, under an agreement as to the effect of such payment on the obligors liability, the bank is chargeable with notice of the agreement.[88] While it may be as a general rule, that the discounting of bills and notes is not within the scope and duty of the president of a bank, and therefore notice to him would not generally be notice to the bank in relation to such transactions, still where it appears, that the officers of the bank consulted and acted upon the question as to whether a note should be accepted by the bank as collateral for an existing debt, notice to any of the officers who participated in the conference would be notice to the bank, and, in the absence of proof as to what officers were in such consultation, it might be inferred that the president and directors were those referred to.[89]

Notice to Cashier to Sue.—Notice to sue to the principal maker of a note, by the security, directed to the cashier of a bank, which is the holder of the note, is sufficient notice to the bank, especially if the bank acts upon such notice.[90]

Want of Knowledge by Officer as Evidence.—Where a bank had no committee or agent to make loans excepting their cashier, evidence that he had no knowledge that a note indorsed to them for value was procured by fraud is prima facie sufficient to show want of such notice by the bank.[91]

Sufficiency of Excuse Rebutting Constructive Knowledge.—The knowledge possessed by a bank president, or acquired by him in connection with the discount of a note, is the knowledge of the bank, and his accidental absence at a particular time is no legal excuse for the failure of the bank to act upon such knowledge.[92]

§ 116 (3) In Respect to Deposits.—The general rule that knowledge or notice of facts by an agent or officer of a bank within the scope of his agency is the knowledge of or notice to the bank of such facts, applies when questions respecting deposits arise. Thus where a depositor notifies the receiving teller of the application to be made of the deposit such notification is binding on the bank, as the transaction with the teller

88. **Agreement as to effect of payment by obligor.**—Where the president of a bank accepted a payment from one of the obligors of a note held by it, under an agreement that such obligor was to be released from all further liability thereon, the bank was chargeable with the knowledge possessed by its president of the character of this transaction where the president was acting for the bank and had no interest adverse to it. Merchants' Nat. Bank *v.* McAnulty (Tex. Civ. App.), 31 S. W. 1091, affirmed in part and reversed in part in 89 Tex. 124, citing Traders' Nat. Bank *v.* Smith (Tex. Civ. App.), 22 S. W. 1056; Harrington *v.* McFarland, 1 Tex. Civ. App. 289, 21 S. W. 116, affirmed in 93 Tex. 663, no op.

89. **Knowledge obtained in performance of duty.**—Hager *v.* National German-American Bank, 105 Ga. 116, 31 S. E. 141.

90. **Notice to cashier to sue.**—Bank *v.* Mumford, 6 Ga. 44.

91. **Want of notice by officer as evidence.**—Drovers' Nat. Bank *v.* Potvin, 116 Mich. 474, 74 N. W. 724.

92. **Excuse rebutting constructive knowledge.**—Central Nat. Bank *v.* Levin, 6 Mo. App. 543.

is binding on the bank.[93] Where the cashier of a bank has notice that a deposit is a married woman's separate estate, the bank is chargeable with such notice in an action against it for conversion of the deposit.[94] Where the president of a bank, in the course of its business, learns that moneys deposited with it in the depositor's individual account belong to an estate of which he is the assignee for creditors, the bank is charged with notice and can not appropriate the moneys to the payment of notes held by it, and personally made by the depositor.[95] Where the president of a bank, at the time of the reception of a check for deposit, knew that it had been given in payment to a curator for his ward's lands, and the cashier knew that the curator and the drawer of the check were on a trade as to the ward's lands, such facts justify an inference that the bank knew that the amount called for belonged to the ward's estate.[96] But the fact that the president of a bank knew that a person depositing money in the bank on account of a corporation had no authority to draw out such money, if he had no knowledge that the depositor intended so to do, where the depositor afterwards withdrew the money, without the knowledge of the president, the notice to the president was not such notice to the bank as to render it liable for the loss of the deposit.[97] When the cashier of a bank acts as agent for the depositor, the bank is not bound by his knowledge, but where he is acting for and on behalf of the bank the bank is bound thereby.[98] In

93. With respect to deposits.—Straus *v.* Tradesman's Nat. Bank, 122 N. Y. 379, 25 N. E. 372.

As to individual interest of officer or agent as affecting knowledge or notice, see ante, "In General," § 116 (1).

As to knowledge or notice of president, see ante, "In General," § 116 (1).

As to knowledge or notice of cashier, see ante, "In General," § 116 (1).

As to individual interest as affecting knowledge or notice, see ante, "In General," § 116 (1); post, "Notice of Officer's Own Fraud," § 116 (6); "Individual Interest of Officer or Agent as Affecting Person Dealing with Bank," § 117.

As to officer or agent dealing in dual capacity, see ante, "In General," § 116 (1); post, "Notice of Officer's Own Fraud," § 116 (6).

Where the depositor of a certified check notified the receiving teller of the application to be made of it, evidence of the president of the bank as to when he first heard of the transaction is immaterial, as the transaction with the teller will of itself be binding on the bank. Straus *v.* Tradesman's Nat. Bank, 122 N. Y. 379, 25 N. E. 372.

94. Knowledge that deposit is married woman's separate estate.—A complaint by a married woman against a bank for conversion, alleging that plaintiff sold her separate property, placing the conveyance with defendant's cashier to deliver on payment of the purchase money, and that defendant, through such cashier, collected such purchase money and placed it to the credit of her husband, in violation of the agreement to deposit it to her account, states a cause of action, as the knowledge acquired by the cashier in the reception of the deposit was chargeable to the bank. Rhinehart *v.* People's Bank, 89 Mo. App. 511.

95. Notice to president of ownership of deposit.—First Nat. Bank *v.* Peisert (Pa.), 2 Penny 277.

96. Knowledge as to ownership of deposit.—Mayer *v.* Citizens Bank, 86 Mo. App. 422.

97. Mere knowledge that depositor had no authority to draw on deposit.—Fulton Bank *v.* New York, etc., Canal Co., (N. Y.), 4 Paige 127.

98. When cashier's knowledge binds bank.—Where a cashier of a bank, acting as a special agent for a third party, purchase bonds for him, and then, as agent of the bank, receives them as a special deposit, and afterwards, to conceal certain embezzlements of his own, he, without the knowledge of the depositor transfers these bonds from the special deposit, and enters them as part of the assets of the bank his agency

order to prevent the title to a deposit vesting in the bank it may be shown that the bank had notice of its insolvency, thereby constituting such fraud as will enable the depositor to repudiate the deposit and reclaim the same;[99] and in such a case the knowledge of the cashier as to its hopeless insolvency should be imputed to the bank.[1] This question of knowledge on the part of the officer or agent of a bank, being imputed to the bank has arisen in various and different kinds of cases, some more favorable to the bank, others less favorable, yet the voice of the authorities seems to sustain the general rule that knowledge or notice on the part of the officer or agent of the bank acting within the scope of his agency is binding upon the bank.[2]

for the depositor ceases with the purchase. Throughout the remainder of the transaction he is the agent of the bank, and his knowledge of the depositor's rights is notice to the bank. The bank does not become a purchaser for value without notice. First Nat. Bank *v.* Dunbar, 118 Ill. 625, 9 N. E. 186. Followed in First Nat. Bank *v.* Strang, 138 Ill. 347, 27 N. E. 903.

99. Knowledge of insolvency.—Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968; Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9.

1. Cashier's knowledge imputed to bank.—Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

Where a deposit was received into a bank at a time when it was insolvent and just before it failed, and knowledge of such insolvency was known to the cashier and vice-president, who were owners of more than half of the capital stock of the bank and caused its insolvency by using the bank's funds in the prosecution of outside enterprises, and the books showed their entire course of dealing, which were open to the directors and all officers of the bank, the knowledge of such officers of its insolvency was the knowledge of the bank. Baker *v.* Orme, 6 O. C. C., N. S., 289, 17-27 O. C. D. 465, affirmed in 74 O. St. 337.

Where a director of a banking corporation as its cashier was placed in control and made the active manager of the business, and, during the last year of the bank's existence, there was no meeting of the directors, and during that time the bank became hopelessly insolvent through the fraud of the cashier and its vice-president, who was a director, who, both being insolvent, used the funds of the bank for their own purposes without the knowledge of the directors, and an examination of the bank at any time within thirty days before it closed would have shown its insolvency, and on the last day the bank was open for business a customer, being ignorant of its insolvency, made a general deposit, which was entered on his pass book to his credit, but was not entered on the books of the bank, and the cash was mingled with other funds of the bank, and two days before the deposit, the cashier and the vice-president absconded, leaving persons in charge who knew the bank was insolvent according to its books, and on the second day thereafter a receiver took possession and caused the cash deposited to be entered to the credit of the depositor, and collected the amount called for by the checks deposited, the knowledge of the cashier as to its insolvency should be imputed to the bank. Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

2. Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

"In Smith *v.* Anderson, 57 Hun 72, 10 N. Y. S. 278, 32 N. Y. St. Rep. 5, the plaintiff delivered monies to the president of a bank to be deposited therein and the latter without plaintiff's knowledge or consent, deposited them in his own name as her attorney, and afterwards unlawfully appropriated a large part thereof to his own use. It was held that the bank is liable, since it is charged with the knowledge possessed by its president. On page 279 the court says 'if Warner (the president) had converted the money without the bank having received it, or without credit being given on its books, it would not be liable. But when its president receives funds which go into the bank, it is chargeable with all the knowledge possessed by him; otherwise those dealing with banks would be without remedy in case of fraud or misappropriation on the part of its president.' And on page 280, it

§ 116 (4) Notice Received in Private Business or Outside Scope of Duties.—Notice or Knowledge Outside Scope of Duties.—The general rule seems to be that notice to a bank officer binds the bank only when it is the duty of such officer to act on the information, or transmit

is said: 'the bank created its president, and if, through his fraud, it or a third person must suffer, the maxim protects the customer.'" Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

"In Black Hills Nat. Bank *v.* Kellogg, 4 S. Dak. 312, 56 N. W. 1071, the cashier took a note payable to himself, as an individual, and transferred it to the bank of which he was cashier. It was held that knowledge of the cashier as to defenses and equities existing against the note was the knowledge of the bank." Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

"In Le Duc *v.* Moore, 111 N. C. 516, 15 S. E. 888, J. had executed his promissory note to M., the president of a bank, who before its maturity and for value, but for his own benefit, indorsed the note over to the bank. The president and cashier composed the discount committee of the bank, and the president participated in discounting the note. It was held, that the bank took the note subject to all the equities by which the president as an individual was bound, the presumption being that his knowledge was the knowledge of the bank." Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

"Of like import is Oak Grove, etc., Cattle Co. *v.* Foster, 7 N. Mex. 650, 41 Pac. 522. In Hardy *v.* First Nat. Bank, 56 Kan. 493, 43 Pac. 1125, it appeared that the president and cashier, respectively, of a bank, were part owners of a note sued on by the bank, which note was taken in the name of S. by the procurement of the president and cashier, who had full knowledge of the transaction in which it was given. It was held, that the endorsement of the note by S. without recourse did not operate to transfer it to the bank free from defenses existing between the original parties to it." Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

The same principle is maintained in City Bank *v.* Phillips, 22 Mo. 85, 64 Am. Dec. 254; Bank *v.* New Milford, 36 Conn. 93; Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

"In Loring *v.* Brodie, 134 Mass. 453, it is held that if the cashier of a bank receives securities on a loan from the bank to a trustee, with knowledge that the securities belong to a trust, the bank is affected with the knowledge of its cashier, and is put upon inquiry as to whether the trustee has authority to pledge the securities." Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

"In Farmers', etc., Bank *v.* Loyd, 89 Mo. App. 262, it was held that where a bank cashier makes purchase of a certificate of stock as such cashier, he acts within the scope of his authority and the knowledge that he has of the condition of the stock must be imputed to the bank." Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

"In Baldwin *v.* Davis, 118 Iowa 36, 91 N. W. 778, it is held that where an agent of a bank has notice that notes and a mortgage securing them were without consideration and fraudulent, the bank can not hold the notes as collateral, it being charged with the knowledge of its agent. See, also, Bank *v.* Smith, 110 Tenn. 337, 75 S. W. 1065, where the same doctrine is approved." Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

"Goshorn *v.* People's Nat. Bank, 32 Ind. App. 428, 69 N. E. 185, 102 Am. St. Rep. 248, is a case where a depositor, desiring to withdraw his bank deposit and commit it to a trust company, received from the bank cashier a suggestion as to a particular trust company, and drawing a check delivered it to the cashier, with instructions to deposit the amount named with the company suggested. Instead of doing so, the cashier substituted the depositor's money for paid checks of his own on the bank which he was carrying in cash. It was held that even on the theory that the cashier was the depositor's agent for the transmission of the fund, the bank was liable for its misappropriation, and transaction amounting to a payment of the depositor's check merely with the evidences of the cashier's indebtedness, and the bank being cognizant of the fraud through its cashier." Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

"In Martin *v.* Webb, 110 U. S. 7, 28 L. Ed. 49, 3 S. Ct. 428, it was held that knowledge of the president of a bank

it to the bank.[3] When several agents are employed by a bank with distinct and separate duties, the knowledge of one of those agents of the residence of an indorser, who was not the proper agent to give notice, is not the knowledge of the bank, and therefore can not be set up to charge negligence in giving notice.[4] Notice of facts concerning transactions which it is the duty of the cashier of a bank to conduct is not binding on the bank when received by the president in conducting business of another company, of which the president was director, and which business was in no way connected with the bank.[5] A president of a national bank has no power, in the ordinary course of business, to certify to the fidelity or integrity of the cashier for the purpose of enabling him to procure a bond insuring his fidelity; and hence the bank can not be deemed, merely by virtue of the president's relation to it, to have any knowledge of the giving by him of such certificate.[6] Where a partner sells to a bank of which he is cashier a note due the firm, and the bank acts wholly through its discount committee, of which he is not a member, it is not affected with knowledge possessed by him of infirmities in the note.[7]

Unofficial Knowledge or Notice.—Some of the authorities maintain that it is essential that the knowledge to be attributed to the bank should

is its knowledge." Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

"In Cragie *v.* Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9, the court held that the acceptance of a deposit by a bank irretrievably insolvent, constituted such a fraud as entitled the depositor to reclaim his drafts or their proceeds." Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

"Indeed there are peculiar and urgent reasons for a more stringent enforcement of the rule against corporations than against individual principals, from the fact that the only way of communicating actual notice to a corporation is through its agents. Fulton Bank *v.* New York, etc., Canal Co. (N. Y.), 4 Paige's ch. 127: 'A corporation can not see or know anything except by the eyes and intelligence of its officers.'" Orme *v.* Baker, 74 O. St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

3. Notice as to matters without agent's scope of duty.—Fulton Bank *v.* New York, etc., Canal Co. (N. Y.), 4 Paige 127.

As to notice received outside scope of official duties, see ante, "In General," § 116 (1); "In Respect to Discounts and Securities," § 116 (2); "In Respect to Deposits," § 116 (3); post, "Notice to Directors," § 116 (5).

As to individual interest of officer or agent, see ante, "In General," § 116 (1); post, "Individual Interest of Officer or Agent as Affecting Person Dealing with Bank," § 117.

A bank is not chargeable with notice of fraud in the inception of a note which it discounted merely because its president had knowledge of the facts, which was gained by him in his capacity as an officer of another corporation, where he had nothing to do with the discounting of the note, and had no knowledge of it at the time. McCalmont *v.* Lanning, 84 C. C. A. 138, 154 Fed. 353.

The fact that the president of a bank received a note executed by a depositor payable at the bank to his order under an agreement to hold the proceeds for the benefit of a charitable organization did not give the bank notice of the existence of the note, for the bank had no interest in the disposition of the depositor's funds in its hands but was a mere stake holder, and the president was under no duty to communicate his knowledge to the bank. Organized Charities Ass'n *v.* Mansfield, 82 Conn. 504, 74 Atl. 781.

4. Goodloe *v.* Godley (Miss.), 13 Smedes & M. 233, 51 Am. Dec. 150.

5. Washington Nat. Bank *v.* Pierce, 6 Wash. 491, 33 Pac. 972, 36 Am. St. Rep. 174.

6. American Surety Co. *v.* Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552, affirming 18 C. C. A. 644, 72 Fed. 470.

7. National Bank *v.* Feeney, 9 S. Dak. 550, 70 N. W. 874.

have been acquired by its officer not casually, through his individual relations to the other parties, but in an official capacity; and because of a necessity for him to inquire and to know the fact on behalf of the bank.[8] Thus it is held that knowledge of the cashier or other officer of a bank, obtained by reason of his interest, and connection with other parties, but not obtained in the performance of any duty he owed to the bank, is not notice to the bank[9] and that notice acquired by the president in a private transaction is not chargeable to the bank.[10] Other cases hold that the

8. Merchants' Nat. Bank *v.* Clark, 139 N. Y. 314, 34 N. E. 910, 36 Am. St. Rep. 710; Scott *v.* Choctaw Bank (Ala.), 59 So. 184.

Knowledge acquired by officers acting in individual capacity.—"On the issue as to notice to the bank of vices in the note when it was negotiated, the bank requested the following charge, to wit: 'In determining whether or not the plaintiff had knowledge of the defenses, if any, of the defendant, H. L. Hall, to the note sued on at the time it acquired the same, you will not consider any knowledge or information that may have some to any person who was an officer or agent of the plaintiff at a time, when he was not engaged in the plaintiff's business. Knowledge or information derived by persons who occupied the relation of officers or agents of the plaintiff at times and in transactions when and where they were acting for themselves individually and not for the plaintiff would not be binding on the plaintiff or affect its rights.' This charge embraces a correct principle of law and should have been given. Allen *v.* Garrison, 92 Tex. 546, 50 S. W. 335, affirmed in 48 S. W. 554; Texas Loan Agency *v.* Taylor, 88 Tex. 47, 29 S. W. 1057." Grayson County Nat. Bank *v.* Hall (Tex. Civ. App.), 91 S. W. 807.

To charge a bank discounting a note with the president's knowledge of equities between the parties, it is necessary that the knowledge should have come to him in his official capacity. Merchants' Nat. Bank *v.* Clark, 139 N. Y. 314, 34 N. E. 910, 36 Am. St. Rep. 710.

9. Knowledge obtained when acting in his own interest.—National Bank *v.* Fitze, 76 Mo. App. 356.

A bank, purchasing a note subject to certain defenses in the hands of the payee, is not bound by the knowledge or information of such defenses that may have come to its officers at a time when they were not engaged in its business, but when they were acting for themselves individually. Grayson County Nat. Bank *v.* Hall (Tex. Civ. App.), 91 S. W. 807.

The cashier of a bank, in pledging stock of the bank, owned by him, as security for a personal debt, acts in his individual capacity, and not as an officer of the bank; and his knowledge of the transaction is not attributable to the bank to affect the validity of its statutory lien on the stock as security for a loan subsequently made him. Curtice *v.* Crawford County Bank, 110 Fed. 830.

10. President's private transaction.—Smith *v.* Carmack (Tenn.), 64 S. W. 372.

A bank is not to be charged with notice of facts of which its president acquires knowledge while dealing in his private capacity and in his own behalf with third persons; nor is knowledge on his part thus acquired imputable to the bank when, acting through another official, it deals with him at arm's length as with any other individual representing himself alone. People's Bank *v.* Exchange Bank, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep. 144.

Notice that a stockholder in a bank has pledged his stock to a third person, acquired by the president, who has no part in the active management of the bank's business, and who is not at the time acting in its behalf, is not notice to the bank which will affect its statutory lien on such stock for a loan subsequently made to the stockholder without the president's knowledge. Curtice *v.* Crawford County Bank, 110 Fed. 830.

Instructions.—A bank, suing upon a note held by it, requested a charge that "in determining whether or not the plaintiff had knowledge of the defense, if any, of defendant," the jury should not "consider any knowledge or information that may have come to any person who was an officer or agent of the plaintiff at a time when he was not engaged in the plaintiff's business." Although the evidence tended to show that other officers of the

principal is not bound by such unofficial information unless it is present to the agent's mind at the time of the transaction.[11] Upon the question whether a principal is bound by knowledge or notice which his agent had previous to his employment in the service of the principal, the authorities disagree.[12] The negative of the question has been uniformly maintained in Pennsylvania and some other of the states.[13] While the decisions in other states maintain that the better rule is that the knowledge of an agent, obtained prior to his employment as agent, will be an implied or imputed notice to the principle, under certain limitations and conditions, which are these: the knowledge must be present to the mind of the agent when acting for his principal, so fully in his mind that it could not have been at the time forgotten by him; the knowledge or notice must be of a matter so material to the transaction as to make it the agent's duty to communicate the fact to his principal; and the agent must himself have no personal interest in the matter which would lead him to conceal his knowledge from his principal, but must be at liberty to communicate it.[14] How-

bank knew of the whole transaction, the charge only related to the knowledge of the bank's president. It was held that this charge was not sufficiently comprehensive to cover the knowledge of other officers and did not sufficiently cover the charge requested. Grayson County Nat. Bank v. Hall (Tex. Civ. App.), 91 S. W. 807.

11. Unless present to agent's mind.—Campbell v. First Nat. Bank, 22 Col. 177, 43 Pac. 1007; Armstrong v. Abbott, 11 Colo. 220, 17 Pac. 517.

Whether one who, at different times during a period extending from three years down to ten or eleven months prior to a levy of a writ of attachment in a suit by the bank of which he was and had been the president, had been frequently told in the course of his private business of a third ownership of the property levied on, still retained that knowledge at the time the attachment suit was begun, is a question for the jury. Campbell v. First Nat. Bank, 22 Colo. 177, 43 Pac. 1007.

"Whatever knowledge he had in that respect, although acquired in his individual capacity, under the circumstances of this case, he carried over with him into the exercise of his duties and powers as cashier. He carries it with him into every transaction in which the bank participated through him. In re Carew's Estate, 26 Beav. 39; New York, etc., R. Co. v. Schuyler, 34 N. Y. 30; Holden v. New York, etc., Bank, 72 N. Y. 286; Loring v. Brodie, 134 Mass. 453." Lowndes v. City Nat. Bank, 82 Conn. 8, 72 Atl. 150.

Notice to individuals who are presidents of banks which subsequently become creditors of the insolvent corporation is not sufficient to charge the bank with notice, in the absence of evidence that they acted for the banks in extending the credit to the corporation at such time and under such circumstances as to authorize the inference that the knowledge formerly acquired was still present before their minds. Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Parties can not be required to store away in their minds all facts which they learn, so as to be able to call them up at any time in the future to affect other transactions than that in which the knowledge was acquired. Such information has not the characteristics of notice in law, unless the transactions affected thereby took place under such circumstances as would lead to the reasonable conclusion that the fact reported was still remembered. Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015.

12. Information received prior to agency.—Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am Rep. 319.

13. Pennsylvania rule.—In the late case of Housman v. Girard Mut. Bldg., etc., Ass'n, 81 Penn. 256, it was said that notice to an agent twenty-four hours before the relation commenced is no more notice than twenty-four hours after it has ceased would be.

14. Rule imputing knowledge or notice to principal.—Fairfield Sav. Bank v. Chase, 72 Me. 226, 39 Am. Rep. 319.

A bank taking from payees notes of third persons as collateral security is

not charged with notice of the understanding between the payees and the makers from the fact that one of the third persons, unconnected with the bank when the notes were executed was president on the making of the loan. Cooke *v.* Mesmer (Cal.), 128 Pac. 917. See Christie *v.* Sherwood, 113 Cal. 526, 45 Pac. 820; Wittenbock *v.* Parker, 102 Cal. 92, 36 Pac. 374.

A trustee of a bank, who was also an attorney, had actual knowledge of an existing unrecorded deed of lands. With that knowledge, he, as such attorney, afterwards wrote and took an acknowledgment of a mortgage on the same lands from the same grantor to the bank, and the deed was recorded. Held, that the bank was not chargeable with his knowledge, unless the fact was in his mind at the time, nor unless he was acting for the bank in the making of the mortgage. Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319.

If an agent receive notice while he is concerned for the principal, the principal would be bound by it, though the agent might forget the facts, and have no memory of them during the transaction to which they relate; so, if the agent receive the notice before the agency, and have knowledge at the time of the transaction; but it would be otherwise if he have notice in his own transaction before the agency, and have forgotten it when he comes to act as agent. Union Bank *v.* Campbell, 23 Tenn. (4 Humph.) 394.

"Again, it is insisted that notice, to have been effectual, must have been conveyed to the officers of the bank while they were acting, and although Mr. Simpson, with other officers of the bank, may have known beforehand of Mrs. Wolfe's rights, unless they had notice at the time of executing the mortgage, it would be of no avail to her; and we are cited to 4 Thomp. Corp. § 5197. It is true that this distinguished author does say that notice will not be imputed to the principal unless the knowledge of the fact reaches the agent while acting for his principal, either generally, or with reference to the transaction to which the notice relates. But this statement, we take it, was never intended by the author to apply to that class of cases where the defendant was relying upon the doctrine of innocent purchaser." Wolfe *v.* Citizens' Bank (Tenn.), 42 S. W. 39.

"In this class of cases it can certainly make no difference, if the agent who was acting on the matter in hand had knowledge of the rights of third parties, how he got it, or when it was communicated. The class of cases to which the doctrine as quoted applies is that where an active duty is imposed upon persons seeking to assert rights to give a notice. The doctrine of innocent purchaser requires for its maintenance the utmost good faith. This could not exist where either a principal or an agent, acting upon the matter, has either actual knowledge, or sufficient to put him upon inquiry, and disregards the rights of others to their loss." Wolfe *v.* Citizens' Bank (Tenn.), 42 S. W. 39.

"But this question, we think, is conclusively settled in this state in the case of Tagg *v.* Tennessee Nat. Bank 56 Tenn. (9 Heisk.) 479, and Union Bank *v.* Campbell, 23 Tenn. (4 Humph.) 394. In the case of Tagg *v.* Bank, Judge Freeman, speaking of the knowledge of the president of the bank as to a defect in a note discounted, although the knowledge had been acquired previous to the transaction, said, 'If he fails afterwards to communicate his knowledge when acting further for his principal, his principal is bound as fully as if the communication had been actually made.' See, also, Bank *v.* Davis (N. Y.), 2 Hill 451." Wolfe *v.* Citizens' Bank (Tenn.), 42 S. W. 39.

"In the case of Union Bank *v.* Campbell, 23 Tenn. (4 Humph.) 394, Judge Green, with incisive logic, shows how utterly futile an attempt would be to establish notice if the principal contended for in that case, as in this, could be maintained. And he says, 'The existence of knowledge in an agent when acting for his principal is notice to the principal, however that knowledge may have been acquired.'" Wolfe *v.* Citizens' Bank (N. Y.), 42 S. W. 39.

In a suit to enforce a resulting trust in certain land alleged to have been purchased by one of the defendants with funds belonging to complainants, the title to which he wrongfully took in himself, and which he subsequently mortgaged to the defendant bank, it appeared from the testimony of one of the directors of the bank that he understood, from having been told by the mortgagor, that the property in controversy belonged to complainants, but that he did not know at the time on what property the mortgage was to be given. It also appeared from the testimony of the president and cashier that the loan in question was discussed and passed upon by the directors, that it was understood that the deed of trust was to be given on the property

ever, additional modifications might be required in some cases.[15] Where these evidences appear it seems just to say that such previous knowledge on the part of the agent constitutes a present knowledge on the part of the principal. The presumption that an agent will do what it is his right and duty to do, having no personal motive or interest to do the contrary, is so strong that the law does not allow it to be denied. There may be instances where this rule operates harshly, but under the other rule previously stated any fraud can be easily perpetrated.[16] Of course the knowledge must be that of the principal who is executing some agency, and not acting merely in some ministerial capacity as servant or clerk.[17] Although it be conceded that an officer of a bank may have dealings altogether independent of his connection with the bank and that the bank will not be affected thereby,[18] yet a bank can not receive the proceeds of a fund in payment of a debt due it, the diversion and its reception of the funds being the result of the action of its officer or agent, and then hold the fund against the person justly entitled to it, because of an averment of the corporation that it did not know that its debtor was paying the proceeds of such a fund, or because its receiving officer did not know from what source its debtor got the money he paid to it.[19] The knowledge of officers of a bank, that a firm, of which they are also members, is insolvent, is imputable to the

in controversy and other property, and that they knew that complainants were occupying such property as their home, and understood that it had been furnished them by the mortgagor, and that the title was in him. Held sufficient to put the bank on inquiry, and to affect it with notice of complainants' rights. Wolfe *v.* Citizens' Bank (N. Y.), 42 S. W. 39.

Question of fact.—It is for the jury to say, when the knowledge of fact had been communicated previous to the agency, whether, in view of all the circumstances, it was reasonably to be inferred that the fact was remembered, and the knowledge still existed. Union Bank *v.* Campbell, 23 Tenn. (4 Humph.) 394.

15. Additional modifications.—Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319.

16. Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319.

17. Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319.

18. Hughes *v.* Settle (Tenn.), 36 S. W. 577.

19. Hughes *v.* Settle (Tenn.), 36 S. W. 577.

Where an agent of an undisclosed principal, holding bonds as collateral, with notice that, subject to such pledge, they have been transferred as collateral to another, surrenders them to the pledgor, who, from proceeds obtained from a sale thereof, pays a debt to a bank of which such agent is president, having been urged by such president to make a payment, the bank will be liable, for the money so received, to the one having the secondary rights in the bonds as security; the president, and through him the bank, being charged with notice how the money was obtained. Hughes *v.* Settle (Tenn.), 36 S. W. 577.

The cashier having drawn checks against his personal account, certifying them himself, and subsequently having drawn checks against an estate's account, of which he was administrator, payable to his personal account, to meet the other checks, the sum being subsequently used to take up the certified checks, the bank benefited to the amount of the certified checks made good and was liable therefor to the estate, though the certification was not binding. Lowndes *v.* City Nat. Bank, 82 Conn. 8, 72 Atl. 150.

It was not liable for the amount of a check drawn on the estate's account by the cashier as administrator to him individually, where it did not appear for what the money was used, since the check was not irregular on its face. Lowndes *v.* City Nat. Bank, 82 Conn. 8, 72 Atl. 150.

bank, where such firm has made an assignment to the bank.[20]

§ 116 (5) Notice to Directors.—Notice to Directors as Officials.—Knowledge of a material fact communicated by a bank director to the board at a regular meeting is notice to the bank.[21] Where the directors of a bank were informed of all facts essential to put them upon notice that collateral upon which they were making a loan was held by the party pledging it in a trust capacity, this was the knowledge of the bank and the trust property could be followed into the hands of the bank and recovered.[22] If a director knows of fraud or illegality in the inception of a note discounted by his bank, the bank can not recover thereon, if he acted for the bank in discounting the note.[23]

Effect of Entire Change of Personnel of Board.—Notice to the board of directors of a bank that certain stock of the bank is held in trust is notice of the trust to a subsequent board of directors, and binding on the bank.[24]

Knowledge While Acting as Director—Duty to Communicate.—Where a director acts for his bank in a business transaction, either individually or as a member of the board of directors, knowledge which he may have obtained in relation thereto is binding upon and imputable to the bank, as the director is bound to communicate such knowledge to his bank.[25] Notice to the director of a bank of facts affecting the character

20. Officers members of insolvent firm.—An insolvent firm, two members of which were president and cashier of a bank, on the eve of bankruptcy conveyed their bank stock to the bank, in pursuance of a prior verbal hypothecation. An action was brought by the receiver of the firm to set aside the transfer. Held, that the knowledge of the officers of the insolvency of their firm was the knowledge of the bank. Nisbit *v.* Macon Bank, etc., Co., 12 Fed. 686, 4 Woods 464.

21. Knowledge communicated by director to board.—Bank *v.* Whitehead (Pa.), 10 Watts 397, 36 Am. Dec. 186.

22. Smith *v.* Ayer, 101 U. S. 320, 25 L. Ed. 955.

A subsequent board of directors of a bank is to be considered as knowing all the circumstances communicated, or known, to a previous board. Mechanics' Bank *v.* Seton (U. S.), 1 Pet. 299, 7 L. Ed. 152. See post, "Bank's Lien," V, G, 2.

23. National Security Bank *v.* Cushman, 121 Mass. 490.

24. Effect of change of personnel of board.—Mechanics' Bank *v.* Seton (U. S.), 1 Pet. 299, 7 L. Ed. 152.

A subsequent board of directors of a bank is to be considered as knowing all the circumstances communicated or known to a previous board. Mechanics' Bank *v.* Seton (U. S.), 1 Pet. 299, 7 L. Ed. 152.

25. Knowledge obtained while acting as director—Duty to communicate.—Union Bank *v.* Campbell, 23 Tenn. (4 Humph.) 394; Bank *v.* Rhea (Tenn.), 59 S. W. 442.

In an action by a bank on a note, against accommodation indorsers, it appeared that one K., a director of the bank, drew the notes, and procured defendant's indorsement, and that he agreed with them that a certain other person should also indorse the note. One witness testified, without objection, that, so far as he knew, K. was the bank's counsel. Plaintiff gave no proof on the subject of K.'s agency. Held, that the evidence was sufficient to show that notice to K. was notice to the bank of the agreement to procure such additional indorser. Twenty-Sixth Ward Bank *v.* Stearns, 148 N. Y. 515, 42 N. E. 1050, affirming 7 Misc. Rep. 276, 27 N. Y. S. 883.

Where the principal directors of a bank are also directors of a corporation whose property is heavily mortgaged to the bank, the bank should be held to have notice that fixtures of considerable value covered by the mortgage were not paid for, and were bought

of negotiable paper taken by the bank is notice to the bank, where the director is present, as a director, at a meeting when the note is offered for discount and received.[26] So where notice of the dissolution of a firm is communicated to a bank director for the purpose of being communicated to the board of directors, or where he is called upon to act as a director in a transaction affecting the interests of the members of the dissolved firm, he is bound to communicate that knowledge to the bank, and, if he do not, the bank is by law charged with notice of the facts so withheld.[27]

Knowledge of Director as Individual.—Notice to a director of a bank as an individual, and not acting as such director, can not operate to the prejudice of the bank.[28] Knowledge obtained by him, while not engaged

under a conditional contract providing title should remain in the seller till paid for in full. State Bank *v.* Fish (Sup.), 120 N. Y. S. 365.

Where a director of a bank, which purchases an order assigning the profits of a county contract, knows that the maker received no consideration therefor, the bank is chargeable with notice thereof, which will prevent a recovery from the maker. Bank *v.* Rhea (Tenn.), 59 S. W. 442.

Evidence insufficient to show director acting for bank.—At the trial of an action by the assignee of an insolvent corporation to recover from a bank as an unlawful preference a payment upon a note of the insolvent corporation, indorsed by one R., it appeared that R. was president of the insolvent corporation and one of its active managers, and was also a director of the defendant bank, and, with the treasurer of the insolvent corporation, conducted the transactions relied upon to constitute the preference. Held, that there was no sufficient evidence that R. was acting in behalf of the bank in any of these transactions. Clarke *v.* Second Nat. Bank, 177 Mass. 257, 59 N. E. 121.

26. Director present as director when note is received.—Clerks' Sav. Bank *v.* Thomas, 2 Mo. App. 367.

27. Notice of dissolution.—The knowledge of two of the directors of a bank of the dissolution of a firm was held to be knowledge of the bank, although not communicated in the discount of a note by the board of directors, one of the directors having knowledge participating in the act, and the other only retiring because he was interested in the proceeds of the note, so as to release one of the late partners from liability on an endorsement of the firm name by the other partner, the firm having had such dealings with the bank as to render direct notice of the dissolution necessary. Union Bank *v.* Campbell, 23 Tenn. (4 Humph.) 394. The above case is cited in Bank *v.* Rhea (Tenn.), 59 S. W. 442, to a similar proposition.

28. Notice to director as individual.—Westfield Bank *v.* Cornen, 37 N. Y. 320, 93 Am. Dec. 573; Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606; Clarke *v.* Second Nat. Bank, 177 Mass. 257, 59 N. E. 121; Holm *v.* Atlas Nat. Bank, 28 C. C. A. 297, 84 Fed. 119.

As to information received in private business, etc., see ante, "Notice Received in Private Business or Outside Scope of Duties," § 116 (4).

The knowledge of a director of a bank, as to the object for which certain bills of exchange were delivered to a party applying to the bank for a discount thereof, such director not being present at the meeting of the directors at which such application was made and such bills discounted, and not having communicated his knowledge to any other director or officer of the bank, is not to be regarded as notice to the bank. Farmers', etc., Bank *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362.

Knowledge of a director of a bank that a grantee holds land as trustee is not notice to the bank. Home, etc., Sav. Bank *v.* Peoria Agricultural, etc., Soc., 206 Ill. 9, 69 N. E. 17, 99 Am. St. Rep. 132.

Where one of the directors of a bank obtained possession of a note under the pretense of getting it discounted for the maker, and pledged it to the bank for a loan to himself, and to secure a prior existing debt due from such director, it was held that, as he did not act in his capacity of a director in procuring the discount and making the pledge, the bank was not

either officially or as an agent or attorney in the business of the bank, can not bind the bank;[29] otherwise, corporations would incur the same liability for the unofficial acts of directors that partnerships do for the acts of partners, which would end in extraordinary confusion of the corporate business and create hazards.[30] Where he is not acting for the bank and is not an organ of communication with the corporation though he is present when the corporate act is afterwards done, which is sought to be affected by the notice, notice to him can not be imputed to the bank.[31] Hence notice of the dissolution of a firm with which a bank has business relations, where published in a newspaper, and accidentally reaching a director, who has no power to act for the bank except in conjunction with others, is not equivalent to actual notice to the bank.[32] The fact that one who recommends to the managing officers of a bank to discount certain negotiable paper is a director of the bank does not

affected by his knowledge of the circumstances under which he received the note, and might recover against the maker the amount of the whole note, provided it did not exceed the amount of the money advanced and the prior debt. Washington Bank *v.* Lewis (Mass.), 22 Pick. 24.

Notice to a director of a banking corporation privately, or acquired by him generally through channels open to all persons, and which he does not communicate to his associates in the management of the corporation, is not binding on the name. Black *v.* First Nat. Bank, 96 Md. 399, 54 Atl. 88.

Notice to a bank director, or knowledge obtained by him while officially not engaged in the business of the bank, will not affect the bank. Bank *v.* Davis (N. Y.), 2 Hill 451.

Where the payee of a note happens to be a director of the bank that discounts the note for his benefit, without notice of the maker's claim for recoupment, the bank can recover as an innocent bona fide holder without notice. The private knowledge of an officer is not the knowledge of the bank. Loomis, etc., Co. *v.* Eagle Bank, 1 Disn. 285, 12 O. Dec. 625.

29. Unofficial information or notice. —Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319.

Notice to a director and stockholder of a bank, who was not an officer, concerning the character of paper held by it, is not notice to the bank. Murphy *v.* Gumaer, 12 Colo. App. 472, 55 Pac. 951.

In an action by the receiver of a corporation which had deposited money with a trust company, organized under the banking law, subject to payment on checks signed by the president and treasurer of the corporation, for the deposit paid by the trust company on forged checks, a conversation with a director of the trust company and a member of its executive committee and one of the regular attorneys for the company, importing notice to him of the payment by the trust company of the deposit on forged checks, was incompetent to bind the company in absence of a showing that the director acted for the company in the matter or communicated the information to the company. Shattuck *v.* Guardian Trust Co., 145 App. Div. 734, 130 N. Y. S. 658.

30. Fairfield Sav. Bank *v.* Chase, 72 Me. 226, 39 Am. Rep. 319.

An oil-dealing firm made K. an attorney in fact to make and indorse notes in conducting its business. D., who was factor for the firm, drew a note for his own accommodation to the order of the firm, which, without the knowledge of either of the firm, was indorsed in the firm name by K., and discounted by an unincorporated banking association in which D. was a stockholder, and which had discounted business paper of the firm for him. Held that, D., being a partner in the bank, it was not a bona fide holder of the note, protected against D.'s improper use of it. Stockdale *v.* Keyes Bros., 79 Pa. 251.

31. Presence of director immaterial. —Custer *v.* Tompkins County Bank, 9 Pa. 27.

32. Notice of dissolution of firm transacting business with bank. National Bank *v.* Norton (N. Y.), 1 Hill 572.

charge the bank with knowledge which the director possessed.[33] The mere fact that a director knew of fraud or illegality in the inception of a note discounted by his bank will not prevent the bank from recovering thereon, where he does not act for the bank in the discounting.[34] So if a note is discounted by a bank, at the instance of a director, who knows, but fails to disclose, a condition on which it was given, the bank will not be considered cognizant of the condition.[35] When a bank deals with a mortgagor on the faith of his apparent title, a private knowledge of its simulation in two of the directors, who are not clothed with any special authority in the premises, and who constitute a small minority of the whole number, which knowledge was undisclosed to the board, can not destroy the rights of the corporation as a bona fide mortgagee.[36]

Dual Capacity of Director.—Where a director of a bank is a member of a firm discounting a note at the bank, his knowledge in respect to the note, not actually communicated to other officers or directors, does not charge the bank.[37] The fact that a bank director is also a director in a corporation discounting a note is not notice to the bank of equities between the parties.[38] Where a bank director is also president of a railroad company, his knowledge, in respect to notes discounted at the bank by the railroad company, is not chargeable to the bank, where he refused to take any part in the proceedings of the discount committee.[39]

Individual Interest of Director.—Where a director deals with his bank in behalf of his individual interest, the bank is not charged with the director's knowledge in regard to matters relating to the transaction,[40] even

33. **Effect of recommendation by director.**—Shaw *v.* Clark, 49 Mich. 384, 13 N. W. 786, 43 Am. Rep. 474.

34. National Security Bank *v.* Cushman, 121 Mass. 490.

A bank discounting a note before maturity is not chargeable with knowledge of illegality or want of consideration acquired by one of its directors in other than his official capacity, if such director did not act with the board in making the discount. First Nat. Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262.

35. **Failure of director to disclose knowledge.**—Louisiana State Bank *v.* Senecal, 13 La. 525.

36. **Undisclosed knowledge of two directors with no special authority.**—Mercier *v.* Canonge, 8 La. Ann. 37.

37. **Director member of both firm and bank.**—First Nat. Bank *v.* Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; Atlantic State Bank *v.* Savery, 82 N. Y. 291.

38. **Dual capacity of director.**—Casco Nat. Bank *v.* Clark, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705, affirming 64 Hun 634, 18 N. Y. S. 887.

39. **Refusal to take part in proceedings of discount committee.**—Waynesville Nat. Bank *v.* Irons, 8 Fed. 1.

40. **Individual interest of director.**—Innerarity *v.* Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710.

As to individual interest as affecting knowledge or notice, see ante, "In General," § 116 (1); "In Respect to Discounts and Securities," § 116 (2); "In Respect to Deposits," § 116 (3).

As to a director's own fraud, see post, "Notice of Officer's Own Fraud," § 116 (6).

As to individual interest of director as affecting person dealing with bank, see post, "Individual Interest of Officer or Agent as Affecting Person Dealing with Bank," § 117.

Notice or knowledge of failure of consideration of a negotiable note, which the director of a bank sells to it before the maturity of the paper, is not imputable to the bank, when in the transaction the seller did not act for it at all, but exclusively for himself, and the bank was represented by another of its officials, who alone

though the director is present when the board of directors passes on the transaction.[41] Where a bank discounts a note for a director, he not being present, it is not charged with his knowledge of antecedent illegalities.[42] So where a director is interested in protecting his own title, his knowledge in regard to matters relating thereto, which he has not disclosed to the board of directors, is not notice to the bank.[43] A bank, when making a loan, is not chargeable with notice of a fact because it is known to two of its directors, when they do not act for it in the transaction, but, on the contrary, act for the borrower, and are indorsers on the note.[44] The cir-

acted for it. English-American Loan, etc., Co. *v.* Hiers, 112 Ga. 823, 38 S. E. 103.

Where the director of a bank presented a note as an applicant for discount, and did not act officially with the other members in deciding whether it should be discounted, his knowledge is not to be regarded as notice to the bank. Frost *v.* Belmont (Mass.), 6 Allen 152.

That a borrower was officially connected with a bank as director is insufficient to charge it with notice of his fraudulent purposes in negotiating a loan. Southern Commercial Sav. Bank *v.* Slattery, 166 Mo. 620, 66 S. W. 1066.

Where a bank director and a cashier executed a note as makers, the director being in fact only a surety for the cashier, who obtained a loan on it from the bank, without any other bank official having knowledge of the suretyship, the director was liable as principal, since knowledge to him and the cashier, in such case, was not knowledge to the bank. First Nat. Bank *v.* Briggs, 70 Vt. 594, 41 Atl. 580.

Notice to a director of a matter affecting the interest of the bank, which it is to the interest of such director to conceal, is not notice to the bank. First Nat. Bank *v.* Lowther-Kaufman Oil, etc., Co., 66 W. Va. 505, 66 S. E. 713.

Where the payees of a note fraudulently acquired offered it to a bank of which they were directors and members of the discount committee, but withdrew from the meeting of the committee, and took no part in the committee's determination of the advisability to purchase, and did not disclose any facts which would have led to the discovery of the fraud, the payees' knowledge thereof was not imputed to the bank because of their relation to it, under the rule that the law will not impute notice from an agent to his principal where such notice would necessarily prevent the consummation of the transaction in which the agent was engaged. Lilly *v.* Hamilton Bank, 102 C. C. A. 1, 178 Fed. 53.

41. The fact that one who pledges to a bank, as security for a loan to him, goods consigned to him for sale, was a director of such bank, does not charge the latter with knowledge, though the director was present at the meeting when the loan was voted. Innerarity *v.* Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710.

"A shipped a cargo of sugar to B, and gave him authority to sell the same. The bill of lading recited that the shipment was by order of B, and that the sugar was delivered to his order, and made no mention of any agency. B indorsed the bill of lading, and delivered it to a bank of which he was a director, and pledged the cargo to the bank as security for a loan by the bank to him. This loan was approved by the board of directors, at a meeting at which B was present. Held, that B's knowledge of the fraud was not imputable to the bank; and that an action by A against the bank, for the conversion of the sugar, could not be maintained." Webb *v.* Stasel, 4 N. P., N. S., 587, 17 O. D. N. P. 317.

42. Discounting note for director.—Third Nat. Bank *v.* Harrison, 10 Fed. 243, 3 McCrary 316.

43. Where a director of a bank was one of the grantees in an unrecorded deed of property, which the grantor subsequently conveyed to the bank, the director's knowledge of the prior deed is not notice to the bank of its existence, if such director be interested in protecting his own title by not communicating his knowledge to the board of directors. Lyne *v.* Bank (Ky.), 5 J. J. Marsh. 545.

44. Martin *v.* South Salem Land Co., 94 Va. 28, 26 S. E. 591.

cumstance that the indorser of a discounted note was a director in the bank by which it was discounted will not be deemed constructive notice to the bank that the note was made for his accommodation,[45] or that the consideration of the note was illegal.[46]

Indirect Interest.—Where a director does not communicate his knowledge to his bank, the fact that he is indirectly interested in the transaction may be sufficient to prevent the knowledge from being imputed to the bank.[47]

Presumption of Director's Knowledge.—The authorities establish the presumption that there is, as to the directory, a certain legal presumption of knowledge as to the transactions, business and condition of the bank, which is conclusive upon the bank, and against the existence of which, as a matter of fact, no testimony will be received.[49] The doctrine is one founded on public policy, essential to the safety of third persons in their dealings with the bank, and to the protection of the stockholders interested in its welfare and safe management. So far as is necessary to accomplish these results, this doctrine should be carefully and strictly upheld.[50] But this doctrine should not be carried beyond this, or to such extent as to work an injury to the bank. The purpose is to enforce the strictest fidelity and watchfulness upon the directors as custodians of a most important and delicate trust; a purpose which would be thwarted if it were turned into an instrument of injury and destruction to the bank and its stockholders.[51] Hence this doctrine should not be invoked to uphold a wrongful appropriation of moneys of the bank that the cashier or another officer thereof made and entered upon the bank's books without the actual knowledge of the director.[52] Persons dealing with the directory have a right to presume that it knows all the affairs of the bank, that is, all that the bank as a principal ought to know as of its condition and business. On the other hand persons who are pecuniarily interested in the management and prosperity of the bank, stockholders and the depositors, look to the directors for the protection of their interests and have a right to demand that such directors watch after those interests in the minutest details.[53] But as to

45. **Discounted note indorsed for director's accommodation.**—Commercial Bank v. Cunningham (Mass.), 24 Pick. 270; Washington Bank v. Lewis (Mass.), 22 Pick. 24.

46. **Illegality in consideration in note discounted.**—Where a bank director procures a note on which he is indorser to be discounted for his benefit at a bank, his knowledge of illegality in the consideration does not charge the bank. Third Nat. Bank v. Tinsley, 11 Mo. App. 498.

47. **Indirect interest.**—Knowledge of the cashier and of a director of a bank of a transaction with it, in which the cashier and the father of the director were interested, and which they never imparted to other officers or stockholders, will not be imputed to the bank. Central Bank v. Thayer, 184 Mo. 61, 82 S. W. 142.

49. **Presumption of director's knowledge.**—First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646.

50. **Basis of doctrine.**—First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646.

51. **Extent and limitation of doctrine.**—First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646.

52. **Should not be invoked to uphold wrongful appropriation.**—First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646.

53. First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646.

an officer and director the reason for this doctrine—that is, this conclusive presumption as to the knowledge of the directors—fails, and therefore the presumption should not be held to exist. Presumptions are for the benefit of those outside, who can not in fact know, and who must rely upon the representations and acts of those inside. There is no need of any presumption for those inside, for the simple reason that they are where they may in fact know.[54] No officer should be permitted to enforce his own wrong against his principal, the bank, through the inattention or neglect of any other agents of the bank. Clearly, one agent can not empower another to do wrong. Nor can the inattention and neglect of one officer make the wrong of another effective and remediless.[55]

Director's Knowledge as Evidence of Bank's.—Where the issue is whether the plaintiff bank had knowledge of the preference of a creditor of its debtor, although the bank is not chargeable with knowledge of its directors acting individually, yet the jury may consider the knowledge of the directors as tending to prove knowledge on the part of the bank.[56]

§ 116 (6) Notice of Officer's Own Fraud.—The general rule that knowledge of the agent will be imputed to a principal rests upon the agent's duty to disclose such facts to his principal; hence it is seen that one of the exceptions to the rule is where the agent engages in a scheme to defraud his principal,[57] or to defraud a third person where actual knowl-

54. Doctrine does not apply to officers or directors.—First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646.

55. First Nat. Bank *v.* Drake, 29 Kan. 311, 44 Am. Rep. 646, citing Minor *v.* Mechanics' Bank (U. S.), 1 Peters 44, 7 L. Ed. 47.

56. Director's knowledge as evidence of bank's.—Continental Nat. Bank *v.* McGeoch, 9 Wis. 286, 66 N. W. 606.

57. Where agent undertakes to defraud principal.—American Surety Co. *v.* Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552; Henry *v.* Allen, 151 N. Y. 1, 45 N. E. 355.

As to imputing to bank officer's knowledge or notice where officer is attempting to perpetrate a fraud upon his principal, see ante, "In General," § 116 (1).

To the same effect are Benedict *v.* Arnoux, 154 N. Y. 715, 49 N. E. 326, and Kettlewell *v.* Watson (N. Y.), 21 Ch. Div. 685. In the latter case it was said that the presumption arising from the duty of the agent to communicate what he knows to his principal "may be repelled by showing that, whilst he was acting as agent, he was also acting in another character, viz, as a party to a scheme or design to defraud, etc."

In Commercial Bank *v.* Cunningham (Mass.), 24 Pick. 270, which involved the question whether certain notes held by a bank were to be deemed to have been made for the accommodation of a firm, one member of which was a director of the bank at the time the notes were taken, it was held that the knowledge of the latter, although a director, was not proof of notice to the corporation, "especially if he was a party to all these contracts, whose interest might be opposed to that of the corporation."

This principle is reaffirmed in Innerarity *v.* Merchants' Nat. Bank, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710, in which the court said: "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he did not communicate the fact in controversy, as where the communication of such fact would necessarily prevent the consummation of a fraudulent

edge of the facts by the principal would defeat the consummation of the fraud.[58] The presumption that the agent will inform its principal of that which his duty and the interest of his principal requires him to communicate does not arise where the agent acts or makes declarations not in the execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal.[59] In such cases the prin-

scheme which the agent was engaged in perpetrating." The court here cites Kennedy *v.* Green, 3 Myl. & K. 699; Cave *v.* Cave, 15 Ch. Div. 639; In re European Bank, L. R. 5 Ch. App. 368; In re Marseilles Extension Ry., L. R. 7 Ch. App. 167; Atlantic Nat. Bank *v.* Harris, 118 Mass. 147; Loring *v.* Brodie, 134 Mass. 453.

Prior to the issue of a bond by a fidelity insurance company guarantying a bank against dishonesty of its cashier, the cashier and president of the bank had conspired to rob it, and had been engaged in fraudulent practices. When application was made for the bond, the company required a certificate from the bank of the cashier's good character, which was made by the president, apparently without any direct authority from the board of directors, or any knowledge on their part that the certificate was made or required. Held, that the president's knowledge of the cashier's dishonesty could not be imputed to the bank, so as to make it responsible for the misrepresentations contained in the certificate. American Surety Co. *v.* Pauly, 18 C. C. A. 644, 72 Fed. 470.

A cashier of a bank, who was also a director of a manufacturing company, and as such director assisted in promulgating false statements as to the financial condition of the company, for the purpose of defrauding all of its creditors, including the bank, was not the agent of the bank in such matter so as to affect the validity of its claims against the company. Decree Hadden *v.* Natchaug Silk Co., 84 Fed. 80, reversed in Hadden *v.* Dooley, 34 C. C. A. 338, 92 Fed. 274; S. C., 35 C. C. A. 554, 93 Fed. 728; reversed in Dooley *v.* Hadden, 179 U. S. 646, 45 L. Ed. 357, 21 S. Ct. 259.

Where the president of a bank, as agent of a shareholder, fraudulently and without authority has such shareholder's certificates canceled and new certificates issued to himself as transferee he is acting in a double capacity, and the bank is bound by his knowledge of the fraud and want of authority. Withers *v.* Lafayette County Bank, 67 Mo. App. 115.

58. Though generally the knowledge of an agent, acquired in the course of his agency, is imputed to the principal, a bank is not chargeable with notice of its cashier's fraud in inducing defendant to make a note to the bank for discount by it, the proceeds to be invested by the cashier for defendant's benefit, though he intended from the beginning to misappropriate the proceeds, since knowledge of an agent's fraud is not imputable to the principal, where actual knowledge of the facts by the principal would defeat the consummation of the fraud. Hilliard *v.* Lyons, 103 C. C. A. 651, 180 Fed. 685.

As to individual interest of officer as affecting knowledge or notice, see ante, "In General," § 116 (1); "In Respect to Discounts and Securities," § 116 (2); "In Respect to Deposits," § 116 (3); "Notice to Directors," § 116 (5); post, "Individual Interest of Officer or Agent as Affecting Person Dealing with Bank," § 117.

59. American Surety Co. *v.* Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552.

Knowledge by the president of a bank of his misappropriation of its funds in personal transactions is not notice to the bank. Lamson *v.* Beard, 36 C. C. A. 56, 94 Fed. 30, 45 L. R. A. 822.

The cashier of a bank sold cattle in which he and complainant were jointly interested, receiving payment in a draft and credit slip payable to the bank. These he deposited to his own credit, and collected and thereafter checked out the entire amount, and converted it to his own use. He transacted the entire business on behalf of both the bank and himself, and no one else connected with the bank had any knowledge of complainant's interest in the cattle or their proceeds. Held, that the bank was not chargeable with notice that complainant had any interest in the fund deposited, and occupied no trust relation to him which ren-

cipal is not bound for the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them failed to disavow what was assumed to be said and done in his behalf.[60] So when the circumstances are such as to render it certain that the officer did not communicate his knowledge to his principal, the principal can not, on the ground of imputed knowledge, be held liable.[61] Where a cashier, acting for his bank, makes an agreement with a third party whereby they enter into an unlawful transaction, the cashier's knowledge is not chargeable to or binding on the bank.[62] It would seem to follow that a bank is presumed to know what its president knows only while he acts within the scope of his agency; hence knowledge of his fraudulent intent in drawing a fund from the bank in his private capacity as trustee of

dered it accountable for such interest. Bank *v.* Thompson, 56 C. C. A. 554, 118 Fed. 798.

Where the other bank officers were ignorant of the acts of the vice president in his personal dealings with the bank, which were against its interests, the bank is not bound by his knowledge of such dealings. Findley *v.* Cowles, 93 Iowa 389, 61 N. W. 998.

The knowledge of the vice-president of a bank of his own interest to misappropriate funds obtained by him from the bank as treasurer of a corporation doing business with the bank is not the knowledge of the bank, so as to enable the corporation to set off the amount obtained by him against the notes of the corporation. Gunster *v.* Scranton, etc., Power Co., 181 Pa. 327, 37 Atl. 550, 59 Am. St. Rep. 650.

60. American Surety Co. *v.* Pauly, 170 U. S. 133, 42 L. Ed. 977, 18 S. Ct. 552.

61. Where the cashier of a bank fraudulently procures plaintiff's note as an accommodation for his personal benefit, and, selling the same, receives in payment a draft, which he indorses to his bank, it being ignorant, except through him, of the circumstances of the transaction, the bank is not charged with notice of the fraud, the usual presumption that an agent has disclosed his knowledge to his principal not arising, as the circumstances render it certain that the cashier did not so disclose his knowledge to the bank. Hummell *v.* Bank, 75 Iowa 389, 37 N. W. 954.

A bank is not chargeable with notice of the misappropriation of money by its cashier, acting as agent for a third party, in his individual capacity, although the cashier was in fact sole manager of the bank, and the money was, in the first instance, deposited to its credit with a correspondent, when it was immediately transferred on the books to the credit of the cashier, and checked out by him; nor is it liable to the principal for such money, when it realized no benefit therefrom. School Dist. *v.* De Weese, 100 Fed. 705.

62. Unlawful transaction in pursuance of an agreement.—Where, with the knowledge of both parties of a rule of a bank prohibiting an officer thereof from becoming its debtor, its cashier, in order to obtain money from the bank to purchase corporate stock, makes an agreement with a third party by which he is to purchase the stock, the cashier advancing the bank's money to pay therefor, and the purchaser giving his note to the bank for the money, and depositing the stock as collateral, and the cashier assuming payment of the note, such transaction is illegal, and the cashier's knowledge in respect thereto is not chargeable to, or binding on, the bank. Savannah Bank, etc., Co. *v.* Hartridge, 75 Ga. 149.

The fact that a cashier of a bank, who had abstracted funds therefrom, knew the bank was insolvent, is not notice of such insolvency to the other officers. Perth Amboy Gaslight Co. *v.* Middlesex County Bank, 60 N. J. Eq. 84, 45 Atl. 704.

Where a cashier of a bank pledges a certificate of stock indorsed in blank to secure a loan to him, the bank was not chargeable with the knowledge of the cashier that he had no authority to pledge such stock. Brady *v.* Mt Morris Bank, 65 App. Div. 212, 73 N. Y. S. 532.

the fund, with intent to misappropriate it, is not imputed to the bank.[63] Where the cashier of a bank has fraudulently obtained a draft, and indorsed the same to his bank, his knowledge of the fraud is no ground for charging the bank with constructive notice thereof.[64] And where the maker of a note, for a blank amount, hands it to a bank director to be filled up with a certain amount to use in renewal of another note, if the director fraudulently fills up the note for a larger amount, and discounted it for his own use at the bank, without communicating the facts to any other director, but sits as one of the discount board, the bank is not charged with knowledge of his fraud.[65] But where the cashier of a bank in a given transaction alone represents the bank and a third party, whose agent he is, the bank is chargeable with knowledge of the cashier's fraud in the transaction.[66] And where the cashier of a bank conspires with a third person to sell worthless property to defendant at par, in order that the proceeds may be applied to the payment of a debt due the bank, the bank is chargeable with the knowledge that the cashier had of such conspiracy.[67]

§ 117. Individual Interest of Officer or Agent as Affecting Person Dealing with Bank.—It is an old doctrine that an agent can not bind his principal, even in matters touching his agency, where he is known to be acting for himself or to have an adverse interest.[68] And where a bank

63. **Fraud in his private capacity.**—Knobeloch *v.* Germania Sav. Bank, 50 S. C. 259, 27 S. E. 962.

Possession of books by a bank, containing entries of drafts fraudulently drawn by the president in personal brokerage transactions, is not notice thereof to the bank, where the books were under the sole control of the president, and kept in such a manner as to conceal his defalcations. Lamson *v.* Beard, 94 Fed. 30, 36 C. C. A. 56, 45 L. R. A. 822.

64. **Cashier fraudulently obtaining draft.**—Hummel *v.* Bank, 75 Iowa 689, 37 N. W. 954.

A bank cashier's fraud in procuring the execution of a note can not be imputed to the bank merely from the fact that he was its cashier, on the cashier's transferring the note to the bank as security for a loan, so as to preclude the bank from recovering on the notes as indorsee. First Nat. Bank *v.* Bevin, 72 Conn. 666, 45 Atl. 954.

65. **Fraud in filling up note made out in blank.**—Terrell *v.* Branch Bank, 12 Ala. 502.

66. **Where officer alone represents bank and a third party as agent.**—Leonard *v.* Latimer, 67 Mo. App. 138.

A holder of bank stock placed it in the hands of the bank's cashier for negotiation. The cashier obtained a loan on the stock, and was advised by the owner to remit the proceeds to him. The owner was at the same time indebted to the bank, and the cashier, without authority, deposited the proceeds in the bank, by which it was appropriated in payment of the indebtedness. Held, that the bank was chargeable with notice of the cashier's fraud, and could not make the appropriation. Winslow *v.* Harriman Iron Co. (Tenn.), 42 S. W. 698.

67. **Proceeds applied to debt due bank.**—Merchants' Nat. Bank *v.* Tracy, 77 Hun 443, 29 N. Y. S. 77, distinguishing New York *v.* Tenth Nat. Bank, 111 N. Y. 446, 18 N. E. 618.

68. **Agreement by agent having interest.**—Fowler *v.* Walch, 119 App. Div. 542, 104 N. Y. S. 54.

As to officer acting in dual capacity, see ante, "In General," § 116 (1).

As to individual interest of officer or agent as affecting imputation of knowledge or notice to his principal, see ante, "In General," § 116 (1); "In Respect to Discounts and Securities," § 116 (2); "In Respect to Deposits," § 116 (3); "Notice to Directors," § 116 (5).

The manager of a bank conducted by a firm has no authority to bind it by the payment of the individual debt of a partner out of firm assets. Blake

officer acts in his individual capacity or as agent for a third party, the bank can not be held liable to one with notice for the acts or on the representation of such officer.[69] So it may be generally stated that acts of officers of a bank in any transaction in which both the bank and the officers are interested do not bind the bank.[70] An officer of a bank can not bind the

v. Third Nat. Bank, 219 Mo. 644, 118 S. W. 641.

That one who as cashier and for a bank issued its draft had an interest therein did not differentiate him from any other payee thereof having an interest. Milmo Nat. Bank *v.* Cobbs (Tex.), 128 S. W. 151.

"It is a well-established principle of law that agents can not act so as to bind their principals, where they have an adverse interest. Story on Agency, §§ 210, 211. The principle is illustrated by examples; thus, an agent employed to sell can not become the purchaser, nor can one employed to buy become the seller, nor indeed can the agent represent his principal in any transaction where he may derive a benefit at the expense of the principal out of the transaction, or where the interests of the agent and principal are antagonistic." Morgan & Co. *v.* Merchants' Nat. Bank, 81 Tenn. (13 Lea) 234.

The rule of equity jurisprudence that a party holding a fiduciary relation to trust property can not become the purchaser of such property either directly or indirectly, and if he does the sale is voidable and will be set aside at the mere pleasure of the beneficiaries, although such fiduciary may have paid a full price and gained no advantage, is not confined to trustees and fiduciaries in the technical sense of those terms, but it embraces cashiers of banks. Reilly *v.* Oglebay, 25 W. Va. 36.

69. Officer acting in individual capacity and not an agent of bank.— Where the vice-president and manager of a bank is also manager of a partnership of which the bank is a member, his mismanagement of the partnership business is not chargeable to the bank, since in that business he does not act as agent of the bank. Cameron *v.* First Nat. Bank, 4 Tex. Civ. App. 309, 23 S. W. 334, affirmed in 93 Tex. 656, no op.

The act of a bank cashier in inducing defendant to execute a note to the bank for discount by it, the proceeds to be invested by the cashier for defendant's benefit, and his act in receiving the proceeds were acts of defendant's agent and not the bank's and hence defendant can not assert failure of consideration as a defense to the note, although the cashier appropriated the proceeds to his own use; the bank having discharged its duty to defendant by turning the proceeds over to the cashier as the defendant's accredited agent. Hilliard *v.* Lyons, 103 C. C. A. 651, 180 Fed. 685.

70. Acts in which both interested.— First Nat. Bank *v.* Gifford, 47 Iowa 575.

"Such rule seems to be sustained by the decided weight of authority. Washington Bank *v.* Lewis (Miss.), 22 Pick. 24; Farmers', etc., Bank *v.* Payne, 25 Conn. 444, 68 Am. Dec. 362; Farrel Foundry *v.* Dart, 26 Conn. 376; Seneca County Bank *v.* Neass (N. Y.), 5 Denio 329; Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231; Platt *v.* Birmingham Axle Co., 41 Conn. 255." First Nat. Bank *v.* Gifford, 47 Iowa 575.

"The only case in seeming conflict with the foregoing to which our attention has been called is Scripture *v.* Francestown Soapstone Co., 50 N. H. 571, but even this case does not sustain the claim made by the defendant. In that case the party seeking to avail himself of notice to the officer was an outside party, in no way connected with the corporation; while here the defendant seeks to avail himself of his own knowledge, or, as it were, of notice to himself, and by this bind the corporation. Such doctrine we are unwilling to sanction." First Nat. Bank *v.* Gifford, 47 Iowa 575.

So, where, under a private agreement between the cashier and the president, whereby stock of the bank was purchased by the cashier with money borrowed from the bank, for which he gave his note indorsed by the president, the bank was not bound to hold the note for the protection of the president. First Nat. Bank *v.* Gifford, 47 Iowa 575.

The directors of a railroad company made their personal promissory note, payable to the order of one I., who was one of the makers, and the president of the company, and was the president of the bank to which the same was transferred. The note was given in renewal of others upon which money had been obtained for the com-

bank by an agreement adverse to its interests made with another party, when such party and officer are at the time such agreement is made engaged in serving their own interests or the interests of another corporation in which they are jointly interested, and where the sole purpose of the agreement is to benefit themselves or the corporation or company in which they are interested.[71] Nor can he bind the bank by his representations or acts in relation to a transaction in which he is acting for his own behalf, to the knowledge of the other party, without ratification by the bank;[72] it is generally conceded that where an agent has a personal interest adverse to that of his principal, which would tend to prevent him from communicating his knowledge, a third person having notice of this adverse interest can not hold the principal bound by such knowledge.[73] But where

pany purposes. Held, that the bank could not be bound by an agreement made by such directors with a third party, whereby he agreed to pay this note, and release the makers from all responsibility, though L., the president of the bank, was present, and consented to such agreement; being liable on the note, he could not act for the bank so as to release himself. Gallery *v.* National Exch. Bank, 41 Mich. 169, 2 N. W. 193, 32 Am. Rep. 149, affirming Lewis *v.* Westover, 29 Mich. 14.

71. Fowler *v.* Walsh, 119 App. Div. 542, 104 N. Y. S. 54; Bank *v.* Purdy, 100 App. Div. 64, 91 N. Y. S. 310.

Where the president of a bank procured a note, signed by himself and others and payable to himself, as trustee, to be discounted by the bank solely for the joint benefit of himself and the other makers, he had no authority, as president, to bind the bank by an agreement that the note should be paid from the proceeds of the investment of the borrowed money, nor by an agreement that the bank should accept another note signed by one of the makers of the original note alone, in full payment of such original note. Fowler *v.* Walch, 119 App. Div. 542, 104 N. Y. S. 54.

72. As to personal sale of stock and issue of certificate.—Moores *v.* Citizens' Nat. Bank, 111 U. S. 156, 28 L. Ed. 385, 4 S. Ct. 345.

There is no precedent for holding that one who has dealt with the cashier individually, and lent money to him for his private use, and received from him a certificate in her own name, which stated that shares were transferable only on the books of the bank and on surrender of former certificates, and no certificate having been surrendered by him or by her, and there being no evidence of the bank having ratified or received any benefit from the transaction, can recover from the bank the value of the certificate delivered to her by its cashier. Moores *v.* Citizens' Nat. Bank, 111 U. S. 156, 28 L. Ed. 385, 11 S. Ct. 345.

B. lent money to A., cashier of a national bank, for his private use, on his representations to her that he owned stock in the bank, and that such stock had been transferred to her. These were representations made by him personally, and not as cashier; and there is no evidence that the plaintiff understood, or had any reason to understand, that those representations were made by him in behalf of the bank. The duty of transferring his stock to the plaintiff before taking out a new certificate in her name was a duty that he, and not the bank, owed to the plaintiff. The making of such a transfer was an act to be done by him in his own behalf as between him and the plaintiff, and in the plaintiff's behalf as between her and the bank. There is nothing, therefore, in his extrinsic representations, for which the bank is responsible. Moores *v.* Citizens' Nat. Bank, 111 U. S. 156, 28 L. Ed. 385, 4 S. Ct. 345.

73. Third person with notice of adverse interest.—Traders' Nat. Bank *v.* Smith (Tex. Civ. App.), 22 S. W. 1056.

A cashier of a bank executed notes to the bank in his individual capacity and as treasurer of a company. These notes he, as cashier, sold to a third person. The company note was renewed several times by the cashier as treasurer, the new notes being indorsed or guarantied by him as cashier of the bank. The individual notes were also renewed several times. Subsequently the cashier gave notes for the amount of the renewal notes directly to the third person, with the bank's guaranty.

the agent acts for the principal in the particular transaction, and the third person does not know of such adverse interest, and one of them must suffer through his fraud, it would seem upon principle that the one who

Held, that the third person took the notes with notice that the cashier could not deal with himself individually or as treasurer of a company, and hence the bank could not be bound by the guaranty. German Sav. Bank *v.* Des Moines Nat. Bank, 122 Iowa 737, 98 N. W. 606.

Where the president of a bank and member of its discount committee sold to the bank a third person's note, negotiable upon its face and delivered by the third person under a personal contract between him and the president that the proceeds should be used to purchase land upon such person's account and the profits equally divided between them, the president was acting for himself and third person jointly in negotiating the note, and the bank was not charged with knowledge of lack of consideration and diversion to an unauthorized purpose, known only to the president. First Nat. Bank *v.* Persall, 110 Minn. 333, 125 N. W. 506, rehearing denied in 125 N. W. 675.

A bank cashier personally procured the discount, by his bank's correspondent, of a note of a land company in which he was interested. The correspondent bank discounted the note upon the condition that it be allowed to charge it against the cashier's bank at its option, to which the cashier agreed. The cashier's bank was not a party to the note, and, except for the knowledge of its president and two directors who were also interested in the land company, did not know of the transaction. Held that, since the cashier's agreement amounted to a pledge of his bank's responsibility upon the note, it was beyond the scope of his authority and void. Ft. Dearborn Nat. Bank *v.* Seymour, 71 Minn. 81, 73 N. W. 724.

The cashier of a St. Paul bank, who was the secretary of a land company, drew a check for $25,000, as such secretary, on his bank, to pay a note of the land company, and then accepted the check, as indorsed by the payee of the note, to be deposited in the bank to the credit of the payee. On the next day the amount of the check was credited to the payee on the books of the bank, and the land company was charged with the amount. At the same time, the cashier drew up a note from the land company to plaintiff bank in Chicago, credited it to the account of the land company in the books of his bank, and inclosed it to the cashier of the Chicago bank, with a letter, in his individual name, stating that he had been called on to take up $25,000 for a company in which he was interested, and did not want to borrow the money from his own bank, and asked if the Chicago bank would place the inclosed note to the account of the St. Paul bank, adding that the latter bank would not draw against it. The cashier of the Chicago bank replied that he had placed the proceeds of the land company note to the credit of the St. Paul bank, with the understanding that none of it was to be paid out, and that they reserved the privilege of charging the land company note to the St. Paul bank, at their option. The cashier replied, accepting the conditions. The Chicago bank then discounted the land company's note, and placed the proceeds to the credit of the St. Paul bank, which then paid the $25,000 to the land company. The St. Paul bank was not a party to the note of the land company, and had no interest in it. None of the officers of the St. Paul bank, except those who were stockholders in the land company, ever authorized, knew of, or ratified the agreement between their cashier and the Chicago bank, and they had no notice that the credit of $25,000 by the bank to the St. Paul bank was not an actual and unconditional credit for cash deposited. Held, that the fraud of the Chicago bank injured the St. Paul bank, though the latter honored the check drawn by the land company in favor of the payee of the note before the Chicago bank discounted the new note of the land company, since the acts of the cashier in acting for both the land company and the St. Paul bank were voidable by the latter, if it acted promptly, as it would have done, were it not for the acts of the Chicago bank. Ft. Dearborn Nat. Bank *v.* Seymour, 75 Minn. 100, 77 N. W. 543.

Where the president of a bank agreed with the maker of a note, indorsed to the bank for discount for the benefit of a corporation, of which both the president of the bank and the maker of the note were officers, without knowledge on the part of the di-

employed such an agent should bear the loss rather than the other.[74] Then the question arises, whether the officer or agent has such adverse interest to the bank as will prevent the bank from being charged with notice to him, which must be determined according to the facts of each particular case as they arise. It seems, though, that his interest must be really adverse, and if his interests on both sides equally balance, generally speaking, he can not be said to hold such an interest as will prevent his knowledge from being imputed to the bank.[75]

Unauthorized Use of Bank's Funds to Pay Third Person.—Where a transaction between the president of a bank and defendants, in which

rectors of the bank, that the maker should not be required to pay the note, such agreement was no defense to the maker's liability thereon; the latter knowing that the interest of the president of the bank in the corporation was in conflict with his duties to the bank. Bank v. Purdy, 100 App. Div. 64, 91 N. Y. S. 310.

Where the president of a bank, the stock of which is, under its charter, subject to a lien in favor of the bank for the indebtedness of the holder of such stock to the bank, assigns a certificate of stock, of which he is the owner, as collateral security for a personal loan, notice of the bank's lien being expressly given by the certificate so transferred, the president's knowledge of the assignment thus made by him is not notice to the bank of such assignment, so as to preclude it from asserting its lien upon such stock as to debts to the bank incurred by the president after the assignment, but before the bank has received any other notice of such assignment. Franklin Bank v. Commercial Bank, 5 O. Dec. 339.

Plaintiffs were the assignees of a corporation which had a deposit with defendant bank. Defendant held three of the corporation's notes, which defendant's cashier, who was treasurer of the corporation, had personally indorsed. On the assignment plaintiffs informed defendant's cashier of the same, who agreed to transfer the deposit account of the corporation to plaintiffs, and to honor the checks of one of them. Held, that the defendant's cashier was not the proper bank officer with whom the plaintiffs should have dealt, because of his interest in the affairs of the corporation, and hence the agreement to transfer the deposit, being repudiated by the directors, was void. Ellis v. First Nat. Bank, 22 R. I. 565, 48 Atl. 936.

74. **Third person without notice of adverse interest.**—Traders' Nat. Bank v. Smith (Tex. Civ. App.), 22 S. W. 1056.

Under an agreement with the cashier of defendant bank, complainant company mortgaged its property to secure bonds, which were left in the mortgagee's possession, to be delivered to the cashier for sale, on his demand, the proceeds to be credited on complainant's debt to the bank. In the cashier's absence, complainant was notified that certain notes given to the bank were due, and the assistant cashier, under instructions from the directors, agreed to extend credit till the cashier should return, on condition that the unsold bonds should be held by the bank as collateral, and complainant thereupon gave a note reciting that it was secured by said bonds. The cashier, on his return, surrendered this note to complainant, taking renewal notes, with the agreement that the bonds should be security for all complainant's indebtedness to the bank; and, after obtaining the bonds from the mortgagee, the cashier pledged them to the bank as collateral security for his own debt. Held, that the bank could not apply the bonds on the cashier's indebtedness, but should hold them as collateral security for complainant's debt. Detroit Motor Co. v. Third Nat. Bank, 111 Mich. 407, 69 N. W. 726.

75. **Interest must be adverse.**—Where the president of the plaintiff bank purchased from an investment company, of which he was a stockholder and director, a note given to the company under an agreement to which he, as director, was a party, the plaintiff is chargeable with notice of the condition upon which the note was executed at the time it acquired the same. Traders' Nat. Bank v. Smith (Tex. Civ. App.), 22 S. W. 1056.

Where one who is an officer of an incorporated bank acts in a given mat-

the president paid defendants money belonging to the bank, which he wrongfully appropriated, was concealed from the bank, and the mere statement of the facts to the directors would have disclosed the fraud, defendants are liable to the bank for the money so received.[76] In the absence of special authority, conferred by the directors of a bank by resolution, acquiescence, or implied assent, the president of a bank has no authority to draw drafts on its funds in payment of personal debts.[77] That the president was permitted to draw them through the culpable negligence of the directors is unavailing, where there was no finding of such negligence, or that defendants were influenced thereby to accept the drafts, of which they had notice the president was making improper use.[78] But if the directors of a bank, trusting the president's integrity or individual responsibility, authorized him to use drafts drawn on its funds for private purposes, whether paid for at the time or not, any loss resulting from the misuse of such authority would fall on the bank, and not on a third person, who had taken the drafts for value and in good faith, which, in such case, would be determined by the established rules governing the transfer of negotiable paper.[79]

Cashier.—A bank may recover funds misappropriated by its cashier from one receiving them with knowledge of the misappropriation.[80] Where the cashier of a bank pays his individual debts by entering the amount to the credit of his creditor, the bank may recover of the creditor the money it may pay out on checks drawn on the faith of the unauthorized credit.[81] And where the cashier's creditor accepts the cashier's false statement that he had deposited a sum to creditor's account, the creditor is liable to the bank for overdrafts caused by reason thereof, and the bank is not liable to the creditor on account of the cashier's agreement.[82] Where the

ter in behalf of the bank, his acts are binding on the corporation, although at that time and in the same matter he may have been acting also in his individual interest. Smith *v.* Wilson, 1 Tex. Civ. App. 115, 20 S. W. 1119 (see 85 Tex. 402).

76. Unauthorized use of bank's funds to pay third person.—Lamson *v.* Beard, 36 C. C. A. 56, 94 Fed. 30, 45 L. R. A. 822.

77. Necessity for special authority.—Lamson *v.* Beard, 36 C. C. A. 56, 94 Fed. 30, 45 L. R. A. 822.

78. Negligence of directors.—Lamson *v.* Beard, 36 C. C. A. 56, 94 Fed. 30, 45 L. R. A. 822.

79. Effect of existing authority.—Lamson *v.* Beard, 36 C. C. A. 56, 94 Fed. 30, 45 L. R. A. 822.

80. Misappropriation of funds by cashier.—Hier *v.* Miller, 68 Kan. 258, 75 Pac. 77; Kitchens *v.* Teasdale Comm. Co., 105 Mo. App. 463, 79 S. W. 1177.

A custom of bank cashiers to draw on their own banks to pay their personal indebtedness would be contrary to law, and could not affect the legal consequence that a payee of drafts so drawn, who knew that the funds were to be applied on the cashier's personal transactions, would be liable to repay the same to the bank. Kitchens *v.* Teasdale Comm. Co., 105 Mo. App. 463, 79 S. W. 1177.

81. Payment of individual debts.—Hier *v.* Miller, 68 Kan. 258, 75 Pac. 77.

82. Overdrafts caused by cashier's false agreement. A cashier of a bank in sole charge thereof, promised his creditor to deposit in the bank the amount of the debt at maturity. The amount was not credited on the pass-book of the creditor, nor was any entry made thereof on the books of the bank. The creditor accepted the false statement of the cashier that the deposit had been made, and drew against the deposit, and his checks were paid

cashier of a bank places the amount of his debt to the credit of his creditor on his pass book, the fact that the cashier is personally interested is sufficient to put the creditor on inquiry as to the extent of the cashier's power.[83] Where a bank cashier transmits funds to a commission company by draft on the bank's correspondent, over his official title, to be used in grain speculation, the commission company is apprised that the cashier, by the abuse of his power, is employing the funds of the bank in speculation on his individual account.[84]

Authority of Cashier.—The general authority of a cashier of a bank does not authorize him to issue drafts of the bank for himself or for his private use.[85] And he has no such implied authority, the bank having received nothing of value in the transaction.[86] The cashier of a bank, as such, has no authority to issue cashier's drafts to his own order in payment of his individual debts, and a creditor accepting a draft so drawn takes the risk of such lack of authority.[87] Where checks are drawn for the cashier's individual use on his bank, the payee can not assume that he is acting in the scope of his official duties, and such payee is under obligation to ascertain the special authority of the cashier to make out checks outside such official duties.[88]

Misappropriation of Assets—Rights of Assignee.—Where the directors and trustees of a defunct bank have no authority to pledge the assets of the bank, an assignment of a life policy held by it, as security for a note, to a third person in consideration of their personal indebtedness to

on presentation. Subsequently the bank went into liquidation. The creditor did not show that he could have made his claim out of the cashier. Held, that the creditor was liable to the bank for his overdrafts, and the bank was not responsible to him as a depositor for the amount the cashier agreed to deposit to his credit. Langlois *v.* Gragnon, 123 La. 453, 49 So. 18.

83. **Sufficient notice of third party.**—Hier *v.* Miller, 68 Kan. 258, 75 Pac. 77.

84. **Fund to be used in speculation.**—Kitchens *v.* Teasdale Comm. Co., 105 Mo. App. 463, 79 S. W. 1177.

85. **Authority, generally, of cashier.**—Mendel *v.* Boyd, 71 Neb. 657, 99 N. W. 493.

86. **Cashier has no implied authority.**—The cashier of a bank has no implied authority to pay his individual debts by entering the amount of them as a credit on the pass book of his creditor, who keeps an account with the bank, and permitting the creditor to exhaust such account by checks, which are paid; the bank having received nothing of value in the transaction. Hier *v.* Miller, 68 Kan. 258, 75 Pac. 77.

87. **Right to use cashier's drafts for personal use.**—Gale *v.* Chase Nat. Bank, 43 C. C. A. 496, 104 Fed. 214.

88. **Duty of payee to ascertain cashier's authority.**—The cashier of a bank kept an account with defendants, who were brokers and bought and sold stocks for him, and from time to time defendants received checks of his bank on another bank, its correspondent, drawn by him in his official capacity, and collected them and applied them to the cashier's individual account. In an action by a receiver of the bank of the cashier to recover of defendants the amount of the checks received by them, held that, the checks being made payable to the order of defendants for the cashier's individual use, defendants took them under an obligation to ascertain that the cashier had authority outside his ordinary official authority to make the checks, and could not assume that he was acting in the scope of his official duties. Anderson *v.* Kissam, 35 Fed. 699, judgment reversed on other points. Kissam *v.* Anderson, 145 U. S. 435, 36 L. Ed. 765, 12 S. Ct. 960.

such assignee, is invalid.[89]

As Affecting Purchaser of Negotiable Paper.—Where a person accepts, in good faith, negotiable paper in a bank, the same being pledged to him by the cashier, he acquires a good title, and such title can not be divested by a fraudulent recovery thereof by the cashier.[90] Where a note executed solely for the accommodation of a bank was made payable to the order of the bank's cashier, and indorsed in blank, the mere fact that the president of the bank negotiated the note for his personal benefit to a third person, who knew his office, was not of itself notice to the purchaser of the facts, or sufficient to put him on inquiry as to the legality of the president's act.[91] A creditor of the president who in good faith received the note from him before its maturity and without notice of the equities existing between the makers and the payee, was a bona fide holder for value in the due course of business, although the creditor took the note as collateral security for an existing debt of the president, and for this purpose and upon this consideration only.[92]

As Affecting Depositor—Depositor for Collection.—Where the cashier of a bank receives deposits, and evidences of debt for collection, the bank can not avoid accounting to the depositor, on the ground that the cashier, without the banker's knowledge, acted in furtherance of an independent, fraudulent scheme to appropriate the funds to his own use.[93]

Estoppel of Bank.—Where the cashier actually makes a false entry of deposit in favor of his creditor, the bank is estopped to deny the validity of the creditor's check to that amount, which it has paid and not objected to until after its failure, and can not recover against him.[94]

§ 118. Evidence as to Authority.—Presumptions.—The general rule is that a bank acts through its president, and through him executes its contracts and agreements: and an act pertaining to the business of the corpo-

89. **Invalid assignment of assets for personal indebtedness.**—New York Life Ins. Co. *v.* Kansas City Bank, 121 Mo. App. 479, 97 S. W. 195.

90. **Acceptor, in good faith, of negotiable bond.**—Ringling *v.* Kohn, 4 Mo. App. 59.

"As a general rule, where a trustee or agent has converted the subject of his trust or agency into money, and pays the same in the due course of business, in discharge of his own indebtedness, to one ignorant of the nature of his title, the payee acquires a perfect and indefeasible right against the real owner." Charlotte Iron Works *v.* American Exch. Nat. Bank (N. Y.), 34 Hun 26; Stephens *v.* Board, 79 N. Y. 183, 35 Am. Rep. 511.

91. **As affecting purchaser of negotiable paper.**—Kaiser *v.* United States Nat. Bank, 99 Ga. 258, 25 S. E. 620.

92. **Bona fide holder without notice.**—Kaiser *v.* United States Nat. Bank, 99 Ga. 258, 25 S. E. 620.

93. **As affecting depositor—Depositor for collection.**—Hanson *v.* Heard, 69 N. H. 190, 38 Atl. 788.

94. **Estoppel to deny validity of checks.**—The cashier of a bank, being individually indebted to a depositor, informed him that he had placed $2,000 to his credit at the bank on account of such debt, but only entered a credit of $1,000 to the depositor on the bank books, and actually paid nothing to the bank. The depositor having drawn checks for the entire $2,000, the receiver of the bank sued him therefor. Held, that the receiver was estopped to deny the credit of $1,000 shown by the bank books, but that he might recover the $1,000 for which no credit was given. Williams *v.* Dorrier, 145 Pa. 445, 19 Atl. 1024.

ration, not clearly foreign to the general power of the president, done through him, will, in the absence of proof to the contrary, be presumed to have been authorized to be done by the corporate body.[95] But an exception to this general rule may be created by the provisions of the by-laws of the corporation.[96] The directors of a bank having the power to authorize the president to assign or transfer a note for the purpose for which it was assigned, or subsequently to ratify it if unauthorized, such assignment will be presumed to be binding on the bank until it is shown that it was not authorized or ratified by its directors.[97] In the absence of evidence to the contrary, it will be presumed that the president of a bank has authority to offer a reward for information leading to the arrest of a defaulting teller.[98] The cashier, as one of the executive officers of a bank, has prima facie authority to receive deposits and collect notes, checks, etc., as an incident to the banking business, and to bind the bank to that extent.[99] The cashier of a national bank stands no different in this respect from the cashiers of other banks of discount. Such banks have authority to make collections, etc., as an incident to the business, although the authority is not expressly mentioned in the national banking act.[1] The cashier is presumed to have all the authority he exercised in dealing with the executive functions legally within the power of the bank itself, or which are usually or customarily done, or held out to be done by such agent. But the test of the transaction is whether it is with the bank and its business or with the cashier personally and in his business.[2] As to the former, all presumptions are in favor of its regularity and binding force. In the latter, no such presumption arises.[3] In fact, upon proof that it was known to the

95. **Presumptions as to acts done.**—Bank v. Griffin, 168 Ill. 314, 48 N. E. 154; Moser v. Kreigh, 49 Ill. 84; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621; Smith v. Smith, 62 Ill. 493; Glover v. Lee, 140 Ill. 102, 29 N. E. 680.

96. **Exception to rule.**—Bank v. Griffin, 168 Ill. 314, 48 N. E. 154.

97. **Authority to make assignment.**—Harris v. Randolph County Bank, 157 Ind. 120, 60 N. E. 1025; National State Bank v. Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330; First Nat. Bank v. New, 146 Ind. 411, 45 N. E. 597; Hawkins v. Fourth Nat. Bank, 150 Ind. 117, 49 N. E. 957.

98. Bank v. Griffin, 168 Ill. 314, 48 N. E. 154.

99. **Prima facie authority of cashier.**—Hanson v. Heard, 69 N. H. 190, 38 Atl. 788; Eastman v. Coos Bank, 1 N. H. 23; Corser v. Paul, 41 N. H. 24, 77 Am. Dec. 753; Bank v. Haskell, 51 N. H. 115; Hunter v. New York, etc., R. Co., 116 N. Y. 615, 23 N. E. 9.

1. **Same rules apply to cashiers of national banks.**—Hanson v. Heard, 69 N. H. 190, 38 Atl. 788; Yerkes v. National Bank, 69 N. Y. 382, 25 Am. Rep. 208; Keyes v. Bank, 52 Mo. App. 323. See post, "Representation of Bank by Officer," § 262.

2. **Presumption in favor of authority exercised.**—Campbell v. Manufacturers' Nat. Bank, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438; Claflin v. Farmers', etc., Bank, 25 N. Y. 293; Moores v. Citizens' Nat. Bank, 111 U. S. 156, 28 L. Ed. 385, 4 S. Ct 345.

In the absence of statute, the acts of a bank cashier in the ordinary course of business actually confided to him are prima facie within the scope of his authority. Third Nat. Bank v. St. Charles Sav. Bank (Mo.), 149 S. W. 495.

3. Campbell v. Manufacturers' Nat. Bank, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438.

Where a transaction is had with a cashier personally and in relation to his business, there is no presumption

claimant to be an individual transaction, and not one for the bank, the burden is cast upon the claimant to establish by proof that the act of the cashier thus done for his own benefit was authorized or ratified. These are fundamental principles applicable to principal and agent in every transaction arising out of that relation.[4] Where a bank is shown to be rightfully in the collection business, including the collection of rents, the presumption is that the cashier of the bank, in receiving money due plaintiff on a lease and depositing it subject to plaintiff's check, is acting officially, rather than individually.[5] It will be presumed, until the contrary is shown, that a cashier who sold a note on behalf of a bank was authorized to do so by the directors, or that they ratified his act.[6] In the absence of proof to the contrary, the cashier of a bank will be held to have authority to turn out assets of the bank in payment of its indebtedness.[7] Usually the authority of the cashier of a bank is a limited authority, and a party seeking to show a release by the cashier from liability upon commercial paper held by the bank, except from the ordinary course, must show that the cashier had authority from the directorate, or that the act had been ratified or acquiesced in by the bank. Such authority, however, may be shown expressly or by necessary implication, or it may be established by the particular usage, practice, or mode of doing business of the bank.[8] It is not presumed that the cashier of a bank has authority, on receiving a deposit, to promise interest at a usurious rate.[9] However, such a promise, although unauthorized and illegal, can not relieve the bank of the obligation to return the money so received to the party to whom it rightly belongs.[10]

Admissibility.—Agency for a corporation may be proved, and authority to act for it implied, just as in the case of a natural person.[11]

that he had the authority he exercised in the matter. Campbell *v.* Manufacturers' Nat. Bank, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438.

4. Individual transaction must be proven ratified or authorized.—Campbell *v.* Manufacturer's Nat. Bank, 67 N. J. L. 301, 51 Atl. 497, 91 Am. St. Rep. 438; Bank *v.* American, etc., Trust Co., 143 N. Y. 559, 38 N. E. 713; Manhattan Life Ins. Co. *v.* Forty-Second, etc., R. Co., 139 N. Y. 146, 34 N. E. 776; Shaw *v.* Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Petrie *v.* Clark, 11 Serg. & R. 377, 14 Am. Dec. 636; Rochester, etc., Road Co. *v.* Paviour, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790; Huff. Ag. (2d Ed.), p. 110.

5. Collection of rents.—Knapp *v.* Saunders, 15 S. Dak. 464, 90 N. W. 137.

6. Sale of note by cashier.—Hawkins *v.* Fourth Nat. Bank, 150 Ind. 117, 49 N. E. 957; National State Bank *v.* Vigo County Nat. Bank, 141 Ind. [illegible], 40 N. E. 799, 50 Am. St. Rep. 330; Smith *v.* Wells Mfg. Co., 148 Ind. 351, 46 N. E. 1000; People's Bank *v.* National Bank, 101 U. S. 181, 25 L. Ed. 907.

7. Payment of debts with assets.—Peninsular Bank *v.* Hammer, 11 Mich. 207.

8. Acts within cashier's scope of duty.—Wing *v.* Commercial, etc., Bank, 103 Mich. 565, 61 N. W. 1009.

9. Acts prohibited by law.—Harrison *v.* Heard, 69 N. H. 190, 38 Atl. 788.

10. Effect of illegal promise.—Harrison *v.* Heard, 69 N. H. 190, 38 Atl. 788; L'Herbette *v.* Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. Rep. 354.

11. Admissibility to prove agency.—Metzger *v.* Southern Bank, 98 Miss. 108, 54 So. 241; Carey Halliday Lumber Co. *v.* Cain, 70 Miss. 678, 13 So. 239, and see Rivers *v.* Yazoo, etc. R. Co., 90 Miss. 196, 43 So. 471.

Authority of President.—The inference that authority to enter into a certain contract has been conferred on the president of a bank may be legitimately drawn from proof that he was in the habit of doing such acts or making contracts of the same character as the particular act or contract in question, and that these acts or contracts so done or made by him, though in relation to different subjects, involve the same general power.[12] The fact that the president of a bank has been authorized by the board of directors to transfer or assign notes belonging to the bank may be proven by showing the existence of such facts as constitute a public holding out that he had such authority, and may be legitimately inferred from the proof that he was in the habit of doing acts of the same general character, though applied to a different subject—as the assignment of bonds or judgments; but such authority can not be inferred from the evidence that he was in the habit of receiving deposits or payments of notes, or that he was actually authorized to receive generally deposits and payments made to the bank.[13] And it is also true that it could not be legitimately inferred from his habit

also, the following, amongst many other authorities: Birmingham Trust, etc., Co. *v.* Louisiana Nat. Bank, 99 Ala. 379, 13 So. 112, 20 L. R. A. 600; Second Nat. Bank *v.* Howe, 40 Minn. 390, 42 N. W. 200, 12 Am. St. Rep. 744; Merchants' Nat. Bank *v.* McAnulty (Tex. Civ. App.), 31 S. W. 1091.

Where certain directors of a bank gave a note for a loan from another bank, the note being indorsed by the bank by its president, and it was renewed by another note indorsed by the cashier, and in a suit on the note against the bank the defense was that the officers had no authority to make the indorsement, and that the loan was procured by them for their individual use, it was error not to admit evidence that the president of the borrowing bank told the cashier of the lender before the renewal was made that the loan was for the bank. First Nat. Bank *v.* Arnold, 156 Ind. 487, 60 N. E. 134.

Where, in an action by a bank for an indebtedness due to it, defendant relied on a settlement with his creditors, including the bank, and the payment to the bank of the amount due under the settlement, and that the bank was bound by the settlement by reason of the acts of the cashier having authority to manage the affairs of the bank, and by the bank's ratification of the acts of the cashier, or by estoppel, evidence that the action was brought shortly after the death of the mother of defendant, from whom he inherited an interest in her property, was admissible as bearing on the question of ratification or estoppel. Metzger *v.* Southern Bank, 98 Miss. 108, 54 So. 241.

In an action against a bank for money received through the instrumentality of its cashier, conversations between the cashier and plaintiff's officers during the negotiation of the transaction held admissible after the cashier's authority had been repudiated. Third Nat. Bank *v.* St. Charles Sav. Bank (Mo.), 149 S. W. 495.

The authority of an attorney in fact of a bank to receive lands in satisfaction of drafts held by the bank may be inferred from the acts and conduct of the parties, and need not be shown by resolution or by-law of a board of directors. Norton *v.* Bull, 43 Mo. 113.

The power of a bank officer to release a surety without payment can be conferred by direct action on the part of the board of directors of the bank, but may be inferred from evidence of a general course of dealing, or from proof that the officer or agent had been intrusted with the entire management of the business of the bank. Pierce City Nat. Bank *v.* Hughlett, 84 Mo. App. 268.

12. **Admissibility to show authority of president.**—First Nat. Bank *v.* Kimberlands, 16 W. Va. 555. See Farmers' Bank *v.* McKee, 2 Pa. 318; Mount Sterling, etc., Road Co. *v.* Looney (Ky.), 1 Metc. 550, 71 Am. Dec. 491.

13. Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

of receiving deposits in the bank or his receiving payment of its negotiable notes that the power to dispose of or transfer a negotiable note had been conferred on the president of a bank; for this would be the exercise of an entirely different sort of power, and one much more limited in its character. Thus the clerk of the cashier of a bank in his temporary absence may receive deposits or payments of notes, but can not dispose of or transfer the negotiable notes belonging to the bank.[14] In an action on a certificate of deposit signed by one alleged to be the president of the bank as "manager," a certificate to another than plaintiff, issued by the same person as manager, is admissible in evidence as tending to show the authority of such president to issue such certificate.[15]

Authority of Cashier.—Under an allegation that a guaranty sued on was executed by the defendant bank in the name of its cashier, and that such cashier was authorized by a general usage to bind the bank to similar contracts, the plaintiff may prove any competent authority to the cashier, and is not restricted to proof of usage.[16] On the question, whether the cashier of a bank has authority to issue a certificate of deposit, other acts of a similar kind, frequently done by him are admissible as evidence.[17]

Negotiation of Loan.—Where the cashier of a bank effects a loan, and it becomes material to ascertain whether it was made for his own account or for the use of the bank, evidence of the negotiation and circumstances may be given for that purpose, whatever may be the form of the securities given or received, when the latter are introduced only collaterally in the cause.[18]

Purchase of Property.—In an action against the bank for the price of property purchased a witness should not be permitted to testify that he signed the order sued on as chairman of the organization committee of the bank, without proof from the minutes of the creation of such a committee, or of powers conferred on it. Nor should such witness be permitted to testify that in making the purchase he considered he was purchasing something needed by the bank and covered with his understanding of authority.[19]

Authority of Assistant Teller.—The authority of an assistant teller of a bank to certify checks as "good" may not be shown by evidence of a

14. Smith *v.* Lawson, 18 W. Va. 212, 41 Am. Rep. 688. See Potter *v.* Merchants' Bank, 28 N. Y. 641.

15. **Power of president to issue certificate of deposit.**—Jumper *v.* Commercial Bank, 48 S. C. 430, 26 S. E. 725.

16. **Authority of cashier to execute guaranty.**—Seeber *v.* Commercial Nat. Bank, 77 Fed. 957.

17. **Acts of similar kind—Issuing certificates of deposits.**—Robinson *v.* Bealle, 20 Ga. 275.

In an action on certificates of deposit signed by the cashier of a bank, his semiannual statements, and evidence of the custom of the bank or of the cashier in issuing such deposits, were admissible to show his authority to do so. Abbott *v.* Jack, 136 Cal. 510, 69 Pac. 257.

18. **Negotiation of loan—Evidence as to character in which made.**—Bank *v.* Kennedy (U. S.), 17 Wall. 19, 21 L. Ed. 551.

19. **Purchase of property—Authority of chairman of purchasing committee.**—Cottondale State Bank *v.* Burroughs Adding Mach. Co., 61 Fla. 141, 54 So. 896.

general custom of banks to authorize such agents to pledge the credit of the bank by certifying checks.[20]

Weight and Sufficiency of Evidence.—Where the question in issue is the existence of an agency for a bank or the existence of an authority to act for the bank in a matter, the general rules as to the weight and sufficiency of evidence apply. The agency or authority to act must be established by a preponderance of the evidence. In the footnotes will be found cases on the question of authority of particular officers on the following subjects: of vice-president to employ an attorney,[21] of president to execute a bond,[22] of cashier to issue cashier's drafts to his own order in payment of his individual obligations,[23] of cashier in regard to conveyance and reconveyance of property,[24] of cashier to execute instruments on behalf of bank,[25] of cashier to cancel bond given to the bank to indemnify against discounts, etc.,[26] of cashier to bind bank by statements as to finan-

20. **Authority of assistant teller.**—Hill v. Nation Trust Co., 108 Pa. 1, 56 Am. Rep. 189.

21. **Authority of vice-president to employ attorney.**—In an action by attorneys to recover for personal services rendered a bank, in which the defense was that the vice-president, who employed the plaintiffs, both for himself individually and for the bank had no right to act for the bank, the evidence reviewed, and held insufficient to sustain a judgment entered on a verdict for the defendant directed by the court at the close of plaintiff's testimony. Russell v. Washington Sav. Bank, 23 App. D. C. 398.

22. **Authority of president to execute bond.**—A bond was executed under the seal of a bank by its president who made an affidavit stating that he was president, that the seal affixed was the corporate seal of the bank, and that the seal was affixed by order of the board of directors, and that he subscribed the same by their order. Held prima facie evidence of the authority of the president to execute the bond. Mutual Life Ins. Co. v. Yates County Nat. Bank, 35 App. Div. 218, 54 N. Y. S. 743.

23. **Authority of cashier to issue cashier's drafts.**—To warrant a finding that the cashier of a bank had implied authority to issue cashier's drafts to his own order in payment of his individual debts, such as will bind the bank and protect a creditor in accepting a draft so drawn for a sum so large as to be out of the usual line of conduct in the banking business, a settled course of business must be shown, by which he was permitted, with the acquiescence of the directors, to exercise such authority during a series of years or in numerous transactions; and evidence that he had drawn not exceeding nine drafts in all in payment of his own debts, only four of which were to his own order, and all of which were issued within the preceding six months, is insufficient. Gale v. Chase Nat. Bank, 43 C. C. A. 496, 104 Fed. 214.

24. **Conveyance of property—Cashier.**—Evidence, in a suit to compel reconveyance of property conveyed to a bank, held to show that the cashier who acted for it in the matter acted as its authorized representative in agreeing to reconvey within a year if grantor within that time succeeded in selling the property. Porter v. Farmers', etc., Sav. Bank, 143 Iowa 629, 120 N. W. 633.

25. **Execution of instrument by cashier.**—The execution of an instrument on behalf of a bank by its cashier is shown to have had the authority of the officers by evidence that the bank's attorney, one of the directors, was consulted and approved the instrument, that the cashier's acts in similar transactions were invariably acquiesced in and his own testimony that the act in question received the director's approval. Whitney v. Foster, 117 Mich. 643, 76 N. W. 111.

26. **Authority to cancel bond.**—In an action against the surety on a bond given to a bank to indemnify it against all discount, etc., of the paper of a certain corporation, the defense was that the bond had been surrendered and canceled, and another one taken, and plaintiff denied the authority of the cashier to surrender the bond. A

cial responsibility of third persons,[27] of cashier with reference to lessee of rooms in bank building,[28] of particular officers to assign notes,[29] of assistant cashier in reference to erection of bank building, building contracts, etc.,[30] of teller to accept and discount notes,[31] of particular agents to sign certificates of deposit.[32] The same general rules apply to the question of ratification of acts done by the bank's agents.[33] Where a presumption exists in favor of the acts and authority of an officer of a bank, such presumption must be overcome by negative testimony as in other cases.[34]

by-law of the bank gave the cashier general charge of the books, papers, and property, subject to the direction of the officers. The plaintiff's president testified that the cashier generally determined the rate of discount, etc., and looked after the securities, and a director testified that the cashier had general charge of the lending of money. Held, that the cashier had authority to cancel the bond. Judgment, 78 N. Y. S. 38, 75 App. Div. 393, affirmed. German-American Bank *v.* Schwinger, 178 N. Y. 569, 70 N. E. 1099.

27. Statements as to financial responsibility of third persons.—In an action against a bank to recover damages because of statements of its cashier to plaintiff on inquiry as to the responsibility of a customer of the bank, by which plaintiff was induced to sell goods to such customer on credit, when at the time he was financially irresponsible, evidence examined, and held not to show that defendant cashier was acting within the scope of his authority when he made the statements. Judgment 73 N. Y. S. 924, 68 App. Div. 458, reversed. Taylor *v.* Commercial Bank, 174 N. Y. 181, 66 N. E. 726, 62 L. R. A. 783, 95 Am. St. Rep. 564.

28. With reference to lessee of rooms in bank building.—Sufficiency of circumstances to show that the act of a bank cashier in causing the rooms of a tenant in the bank building to be barred up was the act of the bank. Continental Bank *v.* Lidwell, 3 Mo. App., appx., 591.

29. Authority to assign notes.—Evidence held to show that a vice-president and cashier had authority to assign a note. Stone *v.* Gray, 10 Cal. App. 609, 103 Pac. 155.

30. Authority of assistant cashier—Building contracts.—Merchants' Bank *v.* Acme Lumber, etc., Co., 160 Ala. 435, 49 So. 782.

31. Accepting and discounting notes—Teller.—Authority of a bank teller to accept and discount a note for a particular person is shown by the fact that the teller was accustomed to accept and discount notes for persons doing business with the bank, and had often, in the absence of the cashier, accepted and discounted other notes for such person, and that these transactions had been recognized and approved by the officers of the bank. Iowa Nat. Bank *v.* Sherman, 17 S. Dak. 396, 97 N. W. 12, 106 Am. St. Rep. 778, modified on rehearing, 19 S. Dak. 238, 103 N. W. 19, 117 Am. St. Rep. 941.

32. Signing certificates of deposit.—Cornwall *v.* McKinney, 12 S. Dak. 118, 80 N. W. 171.

33. Ratification of acts done.—Evidence held to show ratification by a bank and its directors of the acts of its cashier in making loans and allowing overdrafts in violation of its by-laws. Wynn *v.* Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

34. Overcoming presumption.—The presumption of the authority of the president of a bank to execute a bond to pay a debt which was a specific lien on property acquired by it, arising from the use of its seal and his affidavit to the bond, reciting his office, identifying the seal, and stating that it was affixed by order of the board of directors, and that they authorized him to subscribe the bond, is not overcome by negative testimony of a director, who acted as clerk of the board of directors, that he did not know of any resolution being passed in regard to the bond, and that he found no such resolution in the records of the board nor any record of the property being sold or conveyed to the bank though he knew the bank had an interest in it, especially where the bank had afterwards conveyed its interest in the property. Mutual Life Ins. Co. *v.* Yates County Nat. Bank, 45 App. Div. 218, 51 N. Y. S. 743.

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